

RICS PROFESSIONAL STANDARD



Surveyors acting as arbitrators in commercial property rent reviews

England and Wales

9th edition, April 2013

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RICS standards framework

RICS' standards setting is governed and overseen by the Standards and Regulation Board (SRB). The SRB's aims are to operate in the public interest, and to develop the technical and ethical competence of the profession and its ability to deliver ethical practice to high standards globally.

The [RICS Rules of Conduct](#) set high-level professional requirements for the global chartered surveying profession. These are supported by more detailed standards and information relating to professional conduct and technical competency.

The SRB focuses on the conduct and competence of RICS members, to set standards that are proportionate, in the public interest and based on risk. Its approach is to foster a supportive atmosphere that encourages a strong, diverse, inclusive, effective and sustainable surveying profession.

As well as developing its own standards, RICS works collaboratively with other bodies at a national and international level to develop documents relevant to professional practice, such as cross-sector guidance, codes and standards. The application of these collaborative documents by RICS members will be defined either within the document itself or in associated RICS-published documents.

Document definitions

Document type	Definition
RICS professional standards	<p>Set requirements or expectations for RICS members and regulated firms about how they provide services or the outcomes of their actions.</p> <p>RICS professional standards are principles-based and focused on outcomes and good practice. Any requirements included set a baseline expectation for competent delivery or ethical behaviour.</p> <p>They include practices and behaviours intended to protect clients and other stakeholders, as well as ensuring their reasonable expectations of ethics, integrity, technical competence and diligence are met. Members must comply with an RICS professional standard. They may include:</p> <ul style="list-style-type: none"> • mandatory requirements, which use the word 'must' and must be complied with, and/or • recommended best practice, which uses the word 'should'. It is recognised that there may be acceptable alternatives to best practice that achieve the same or a better outcome. <p>In regulatory or disciplinary proceedings, RICS will take into account relevant professional standards when deciding whether an RICS member or regulated firm acted appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS professional standards into account.</p>
RICS practice information	<p>Information to support the practice, knowledge and performance of RICS members and regulated firms, and the demand for professional services.</p> <p>Practice information includes definitions, processes, toolkits, checklists, insights, research and technical information or advice. It also includes documents that aim to provide common benchmarks or approaches across a sector to help build efficient and consistent practice.</p> <p>This information is not mandatory and does not set requirements for RICS members or make explicit recommendations.</p>

Foreword

I well remember when the first edition of this RICS document was drafted in 1981. It was written by the inspirational head of my chambers, Ronald Bernstein QC, and my friend and colleague Kirk Reynolds, assisted by experienced surveyor-arbitrators. The document represented an important aspect of a sustained drive by RICS to raise standards of arbitration and expert determination in the field of rent review.

In 1981, the number of rent review disputes was increasing exponentially. Then, as now, there were many surveyors who were highly experienced at rental valuation, but very few had any real experience of acting as arbitrators (or indeed as independent experts) in valuation disputes. So, with one or two exceptions, members of the chartered surveying profession were near the bottom of a very steep learning curve when it came to acting as an arbitrator. The need for education was urgent, and the document represented a vital force in helping many of those valuation practitioners move quickly up the curve.

Indeed, both practitioners and those who use their services would, I am sure agree that the professional standard, together with the associated initiatives taken at that time by RICS, caused a sea change in standards of surveyors' experience, knowledge, competence and fairness in these important, quasi-judicial functions.

The drive to raise standards was by no means a temporary aim: successive editions of the documents have maintained and reinforced the achievements of the first edition. This latest, the ninth, continues what has become an established tradition of ever improving good practice. RICS rightly recognises that there is a continuing need to update advice and guidance, partly to ensure that surveyor-arbitrators are aware of new judicial decisions or new legislation, and partly to help them meet new challenges and devise ways to deal with them effectively and fairly. The relative girth of this edition, compared to the comparatively svelte nature of the first edition, reflects the increasingly complex nature of the evolving subject matter.

I unhesitatingly commend this latest edition of the professional standard. It builds on its predecessors and gives fully up-to-date guidance, invaluable to practitioners entrusted with the role of an arbitrator on a rent review dispute. The present edition explains in a clear, logical, and concise format: the statutory framework and the procedural legal requirements; what constitutes good practice, and how to deal with many of the problems that may arise. The professional standard starts with the inception of the dispute, and after dealing with the preliminary steps, discusses the award itself and the issues that arise after the award has been made. Every sensible arbitrator appointed to determine a reviewed rent would be well advised to have this document close to hand at all times.

It is excellent that Kirk Reynolds, now a very long-standing QC in this field, is still associated with this important work. It is also a pleasure to see another prominent QC in this field, namely Guy Fetherstonhaugh QC, as another contributor. Above all, however, the work derives its authority from the participation of the surveyor members of the professional standard committee – Martin Butterworth FRICS, Geoffrey Dale FRICS, Andrew Guest FRICS and Tony Guthrie FRICS – with their years of practical experience, ably led by Geoffrey Wright FRICS.

Lord Neuberger

March 2013

1 Introduction

1.1 Scope and application of this professional standard

This professional standard is designed primarily to assist those who are appointed to act as arbitrator, either by the President of RICS, or directly by the parties to a dispute. It is also intended to assist the parties themselves and those acting for them by making them aware of the procedures likely to be followed. This professional standard is reproduced, with commentary, in the *Handbook of Rent Review*.

This professional standard is based on the law and practice relating to arbitrations in England, Wales and Northern Ireland, which are governed by the *Arbitration Act 1996*. Arbitration in Scotland has evolved by a different route, and has its own Arbitration Act. RICS in Scotland has issued its own document for *Surveyors Acting as Arbitrators in Commercial Property Rent Reviews in Scotland*, and those involved in arbitrations to which Scottish law applies should refer to that document.

The majority of appointments made by the President of RICS are in landlord and tenant matters, notably rent review. Accordingly, this professional standard has been specifically prepared for rent review arbitrations. Some of the procedures included in the note, and the principles of natural justice, apply to all arbitrations. As regards agricultural holdings, however, it should be borne in mind that while the 1996 Act is to apply (with modifications) to arbitrations arising under the *Agricultural Tenancies Act 1995*, the *Wildlife and Countryside Act 1981*, and other contractual agreements of the parties,

the *Agricultural Holdings Act 1986* (s. 84 and Sch. 11) will continue to apply to arbitrations arising from tenancy agreements subject to the provisions of that Act. Likewise, milk quota apportionment disputes are to be settled in accordance with the *Dairy Produce Quota Regulations*. Separate RICS standards are available for surveyors acting as arbitrators and independent experts for all agricultural property disputes, whether under the Act or other agreements (see *Bibliography*). It should also be noted that a separate document for construction industry arbitrations is available (see *Bibliography*).

1.2 Standing of this document

This is a professional standard. It is not intended to be regarded as a treatise on the law and practice of arbitration generally, and is not intended to replace the exercise of the arbitrator's discretion with a rigid prescriptive approach to every conceivable problem that might emerge during the course of an arbitration.

1.3 Reasons for compliance with this professional standard

Members should note that ordinarily, when an allegation of professional negligence is made against a surveyor, the court is likely to take account of the contents of any relevant document published by RICS in deciding whether or not the surveyor has acted with reasonable competence. Although, like any other arbitrators, surveyor arbitrators are immune from suit, RICS members should nevertheless seek to conform to the practices recommended in this professional standard, for three reasons.

First, whether or not immunity applies, the procedures set out in this professional standard have been drafted to reflect best practice, and any member will wish to consider these procedures as at least the starting point.

Secondly, in relation to any allegation of negligence relating to a period before or after appointment, where immunity may not apply, members should have at least a partial defence to an allegation of negligence by virtue of having followed these practices.

Thirdly, members will wish to avoid the prospect of dissatisfied parties applying to court seeking either to challenge their awards under ss. 68 and 69 of the Act; or for further reasons to be provided; or for any other form of relief. While adherence to the guidance set out in this document will not avoid the risk of such applications entirely, it should minimise their occurrence and impact.

However, surveyor arbitrators have the responsibility of deciding when it is appropriate to follow the guidance. If it is followed in an appropriate case, the surveyor will not be exonerated merely because the recommendations were found in an RICS standard. On the other hand, it does not follow that a member will be adjudged negligent if the practices recommended in the professional standard have not been followed. It is for each individual surveyor to decide on the appropriate procedure to follow in any professional task.

Where surveyors depart from the practice recommended in the professional standard, they should do so only for good reason. In the event of litigation, the court may require them to explain why they decided not to adopt the recommended practice.

1.4 Interpretation

The following terms are used in this professional standard with the following meanings:

Act: the *Arbitration Act 1996*; references to 'sections' or, as appropriate, the abbreviated 's.' are to sections of the 1996 Act.

Conditional fee: this term refers to any arrangement where remuneration – however fixed or calculated – is to be made conditional upon the outcome of proceedings or upon the nature of evidence given. Other labels in common use are 'incentive-fee', 'speculative fee', 'success-fee', 'success-related fee', 'performance fee', 'no-win, no-fee' and 'contingency fee'.

Court: the High Court or a county court, subject to any order made under s. 105 of the 1996 Act which allocates proceedings under that Act to one or the other, or specifying proceedings which may be commenced or taken only in one or the other.

CPR: the Civil Procedure Rules. This is the set of rules governing the procedure of the Senior Courts and county courts in England and Wales. They can be downloaded from the [Justice website](#). These rules are supplemented by Practice Directions, Pre-Action Protocols and Court Guides. The objectives of the CPR are to make access to justice cheaper, quicker and fairer.

Direction: a requirement set down by a tribunal; see Section 13.

Disclosure: the production of documents in accordance with applicable rules and/or directions of a tribunal.

DRS: the RICS Dispute Resolution Service.

Evidence: this may be evidence of fact (whether direct or hearsay – see below) or expert (opinion) evidence. The weight to be attached to evidence by a tribunal will depend on various factors, the importance of which may vary from case to case.

Expert witness: a witness called by a tribunal to give expert opinion evidence by virtue of experience, knowledge and expertise of a particular area beyond that expected of a layperson. The overriding duty of the expert witness is to provide independent, impartial and unbiased evidence to the tribunal – covering all relevant matters, whether or not they favour the client – to assist the tribunal in reaching its determination. See further Section 9.

Hearsay evidence: evidence by way of the oral statements of a person other than the witness who is testifying and/or by way of statements in documents, offered to prove the truth of what is stated. In arbitral proceedings, subject to any agreement between the parties or prior direction given by the arbitrator, hearsay is usually treated as being admissible.

Privilege: a rule that protects a document from disclosure, either because it was written without prejudice, or because it is covered by legal professional privilege (see Section 17).

Representation(s): an oral or written statement that may, depending on the circumstances and context, be used to refer to a statement of case (i.e. a document setting out the case that is to be proved); an assertion of fact(s); expert opinion evidence; or an advocacy submission. Because of its lack of precision, this generic term is best avoided in the course of actual arbitrations, although it is used for convenience in this professional standard.

Statement of case: document setting out each party's arguments in relation to the arbitration, such as particulars (or points) of claim, defence and reply.

Submission(s): the presentation by way of advocacy of a matter in dispute to the judgment of a tribunal. The term is occasionally used loosely in the surveying community to refer to evidence of fact or expert opinion evidence presented, or to a mix of such expert opinion evidence and advocacy; such usage is misplaced, and should be avoided.

Surveyor-advocate: a surveyor who presents to the tribunal a client's properly arguable case on the evidence and facts available. The advocacy role is markedly different from the role of an expert witness or a negotiator (see Section 9).

Tribunal: the way the Act refers to the arbitral tribunal (as opposed to 'the arbitrator', for the reason that many of the arbitrations with which the Act is concerned will involve a panel of two or three arbitrators).

'Without prejudice': a rule that generally prevents any reference to written or oral statements made in a genuine attempt to settle an existing dispute. There are a number of established exceptions to the rule, explained in 17.5.

Witness of fact: a person who, usually on oath or affirmation, gives evidence before a tribunal on a question of fact.

1.5 Comparison of arbitration with determination by independent expert

Although the duties and suggested procedures for arbitrators and independent experts are similar in some respects, they are markedly different in others. To emphasise that difference, the RICS has chosen to issue separate guidance in respect of each. This professional standard therefore deals with arbitration alone. The main differences between arbitrators and independent experts as regards commercial rent reviews are set out in the table in Appendix A of this professional standard.

1.6 Further reading

While this note will provide adequate guidance for surveyors acting as arbitrators in the great majority of cases, it should be stressed that, in some cases, the surveyor arbitrator will need to have a wider and deeper understanding of the law and procedure than it has been considered appropriate to provide in these pages.

Any arbitrator wishing to enhance their knowledge of arbitration procedure and practice is recommended to attend one of the courses conducted from time to time by RICS, ARBRIX, the Chartered Institute of Arbitrators, or the College of Estate Management. The standard legal textbooks on the subject are the *Handbook of Rent Review* (Reynolds and Fetherstonhaugh); *Russell on Arbitration*; Mustill and Boyd's *Commercial Arbitration*; and Bernstein's *Handbook of Arbitration and Dispute Resolution Practice*, which includes a section 'Rent Review and Property Valuation Arbitration' by Geoffrey Dale (for full listings see *Bibliography*). An arbitrator should have access to a library containing the standard legal textbooks, and access to the numerous papers published by [ARBRIX](#).

2 The nature of arbitration

2.1 Introduction

Arbitration procedure is adversarial, with each party presenting evidence to support their differing views. An arbitrator should act fairly and impartially between the parties; using their general knowledge of the subject matter, and skill and expertise as an expert tribunal, to understand and weigh the available evidence in reaching the 'right' result, based on the submissions and evidence upon which the parties have placed reliance.

In the first instance, the parties have the right to agree all procedural and evidential matters regarding the conduct of their arbitration. In the absence of such agreement, the arbitrator should make any direction they consider appropriate reflecting their duties under s. 33 of the 1996 Act. The arbitrator is not obliged to ascertain the facts and the law relating to any case, but may choose to do so if they wish and if the parties have not agreed otherwise. In such a case, however, the arbitrator should tell the parties what is proposed, as 18.5 explains.

2.2 The principles of arbitration

Section 1 of the Act gives the following summary of the fundamental principles that apply throughout the Act:

- 'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense
- the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest ('party autonomy')
- the court should generally not intervene.'

If the parties do not agree on how they are to resolve their dispute, the arbitrator has wide powers to decide the procedures that are to apply – see Section 3.

3 Powers and duties of the arbitrator

3.1 Sources of the arbitrator's powers and duties

There are a number of different sources to which the arbitrator should pay close attention in order to understand the exact extent of their powers and duties in any one case, after they have been duly appointed:

- the terms of the arbitration agreement
- the Act
- the provisions of any special legislation applying to the particular subject matter
- other matters agreed between the parties
- the principles of natural justice.

It is important that the arbitrator is careful not to infringe any express provisions of the Act or of the other sources set out above (unless in conflict with the Act); it can result in an award being set aside or remitted (see 27.5).

3.2 Source (a): the terms of the arbitration agreement

Parties who include in their agreement a clause for settling by arbitration any dispute within the scope of that clause are thereby referring those disputes to private determination rather than to a court of law. Since in most cases the arbitrator derives authority from the contract between the parties they can also agree, as a matter of contract, the principles and procedure that shall apply in any dispute which may arise, provided that these do not conflict with the Act or any other Act.

The first rule for the arbitrator is therefore to look at the arbitration agreement (in this context, typically the rent review clause in the lease or the arbitration clause of a contract) and other sources of their authority to see what is provided. Should the arbitrator fail to conduct the proceedings in accordance with the procedure agreed by the parties, s. 68(2)(c) of the Act provides for a party to apply to the court challenging any award made.

3.3 Source (b): the Act

In many circumstances, the lease will simply stipulate that the parties' dispute should be dealt with in accordance with the Arbitration Acts (and where it refers to the Arbitration Acts 1950/1979, this is to be construed as a reference to the 1996 Act). In such circumstances, the arbitrator may nevertheless invite the parties' agreement on how they wish their dispute

to be conducted (see 3.5). Failing that, the arbitrator will use their discretion as to how to proceed (see 3.6).

However, there are some matters regulated by the Act that are mandatory, over which neither the parties nor the arbitrator has final control, and where recourse may be had to the courts. These mandatory matters are listed in Sch. 1 to the Act, and include matters of law and some matters of procedure such as extending time, enforcing decisions and attendance and dealing with challenges. Those provisions in summary are as follows:

- ss. 9-11 – stay of legal proceedings
- s. 12 – power of court to extend agreed time limits
- s. 13 – application of Limitation Acts
- s. 24 – power of court to remove arbitrator
- s. 26 – effect of death of arbitrator
- s. 28 – liability of parties for fees and expenses of arbitrators
- s. 29 – immunity of arbitrator
- s. 31 – objection to substantive jurisdiction of tribunal
- s. 32 – determination of preliminary point of jurisdiction
- s. 33 – general duty of tribunal
- s. 37 – items to be treated as expenses of arbitrators
- s. 40 – general duty of parties
- s. 43 – securing the attendance of witnesses
- s. 56 – power to withhold award in case of non-payment
- s. 60 – effectiveness of agreement for payment of costs in any event
- s. 66 – enforcement of award
- s. 67 – challenging the award for jurisdiction
- s. 68 – challenging the award for serious irregularity
- s. 69 – challenging the award for error of law
- s. 70-71 – supplementary provisions; effect of order of court so far as relating to s. 67 to 69
- s. 72 – saving for rights of person who takes no part in proceedings
- s. 73 – loss of right to object
- s. 74 – immunity of arbitral institutions, etc.
- s. 75 – charge to secure payment of solicitors' costs.

3.4 Source (c): special legislation applying to the particular subject matter

It is unlikely that special legislation will be relevant in cases to which this professional standard applies. Although many rent review clauses incorporate by reference parts of s. 34 of the *Landlord and Tenant Act 1954*, this regulates the valuation formula, rather than the way in which the arbitration should be conducted.

3.4 Source (d): other matters agreed between the parties

Given that one of the guiding principles to the Act is that of party autonomy (see 2.2), the parties are free to agree how their dispute is to be determined, subject to the mandatory procedures laid down by the Act. Thus, it is open to them to override the mechanism laid down in the lease, and agree a different procedure for the determination of their dispute which the arbitrator must then respect.

3.5 Source (e): the principles of natural justice

Any matters arising in the arbitration that are not provided for expressly or implicitly in the parties' arbitration agreement or the Act are matters for the arbitrator's discretion. This must be exercised judicially, and in accordance with the rules of natural justice, as reflected in s. 33 of the *Arbitration Act 1996*. The fundamental principles spelt out by s. 33 are that:

- 'the arbitrator must act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and
- the arbitrator must adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense and providing a fair means of resolution of the issues.'

Above all, it is the duty of an arbitrator, as it is of a judge, to hear both sides to the dispute (except when proceeding where one party defaults, see 10.5) and to decide it according to the evidence and the law.

In general, if there is nothing in the Act or in the arbitration agreement to indicate the contrary, the arbitrator should proceed in whichever way seems to be the fairest, consistent with the responsibility, outlined in s. 33, to adopt procedures suitable to the case, avoiding unnecessary delay or expense. Although it is the arbitrator's duty to proceed without delay, this is subject to the agreed wishes of the parties with regard to the conduct of the arbitration. The arbitrator should never be the cause of avoidable delay, but equally should not give the appearance of driving the arbitration forward to suit their own, rather than the parties' convenience.

3.6 The arbitrator may not delegate without the parties' consent

The arbitrator acts in a personal capacity and may not, without the consent of the parties, delegate any duties, powers or responsibilities. But where problems outside the range of the arbitrator's expertise and understanding arise (e.g. where a valuation surveyor is required to take into account issues of structural engineering, or highly specialised valuation issues as to part of a property), unless the parties agree otherwise, they have the power under s. 37 of the Act to appoint experts, legal advisers or assessors to assist in reaching a decision. The arbitrator must give the parties a reasonable opportunity to comment on any information, opinion or advice offered by any such person. As to legal advice generally, see 13.1.

4 Steps prior to appointment as arbitrator

4.1 The application for the appointment of an arbitrator

An arbitrator may be appointed either privately or via an appointing body, typically the President of RICS. An application to the President for the appointment of an arbitrator should be in writing and preferably made on the form obtainable on application to the DRS or from the [RICS website](#). The application will not be processed until the appropriate non-refundable fee has been received by DRS.

4.2 Matters for the arbitrator to check on invitation

When a surveyor is invited to accept an appointment to determine a dispute, there are a number of matters they should check before acceptance. In the case of an

appointment by the President of RICS, some of the matters are listed in the letter or form sent out by the DRS (see 4.3). The full list of matters to be checked may be summarised as follows:

- a** Does the appointing body have authority to appoint? See 4.4.
- b** Is the surveyor to act as arbitrator or as independent expert, or in some other capacity (such as mediator)? This is discussed in 6.6.
- c** Will the surveyor have jurisdiction to act? See 6.2.
- d** Is there to be more than one arbitrator? This is considered in paragraph 4.5.
- e** Does the surveyor meet the criteria for the task? See 6.7.
- f** Is the surveyor fit to take the appointment? See 4.6.
- g** Are there any conflicts of interest that would prevent them accepting the appointment?

This important topic is dealt with in section 5 of this professional standard.

If the surveyor is not sent the copy of the lease (or other document containing the arbitration agreement) at this stage (which will commonly be the case), then it may not be possible to be certain about some of these matters (and in particular (b) and (c)). In such circumstances, the surveyor should ask for a copy of the lease as soon as they have been appointed – see 6.4.

4.3 Invitation for appointment by the President of RICS

In the case of an application for appointment by the President of RICS, the person considered receives a letter or email from the DRS asking for confirmation about a range of matters concerning their suitability for appointment.

The questions from the DRS on the current letter or email response form are as follows:

- i Does the subject matter fall within the sphere of your own professional practice, not merely that of your firm?
- ii Can you undertake the task without delay or unnecessary expense?
- iii Do you have appropriate professional indemnity cover?
- iv Have you made appropriate enquiries, and are you satisfied you have no current involvements that would give rise to a real or perceived conflict of interest?
- v Have you made appropriate enquiries, and are you satisfied there are no involvements within the past five years that give rise to a real or perceived conflict of interest?
- vi Can you confirm that you are not currently acting as an arbitrator or independent expert in another matter that would conflict with this appointment?
- vii Do you comply with any special requirements (if stated) that may be listed in the case details?

The specific wording of this letter/form may be changed over time; however, in the case of an invitation by letter from the president, the questions will broadly follow this format. In the case of a private appointment, it is good practice for the arbitrator to consider the same matters, even if they are not asked directly.

It is to be emphasised that the response should be treated not as a formulaic exercise in ticking boxes, but rather as a good opportunity for the prospective appointee to carefully reflect on their own appropriateness for the task. For example, the five-year period with which question (v) deals should be taken as a guide rather than an absolute standard: there may well be matters falling outside that period that should be considered.

In particular, it is undesirable to answer the final question on the letter/form seeking confirmation of compliance with 'special requirements', with a simple 'yes', there should be a full compliance statement in the box at the bottom of the form; for example, 'I confirm that I have 10 years' experience in retail valuation in the Watford area'.

4.4 The authority of the appointing body

In the case of an invitation for appointment by the President of RICS, the arbitrator should have no concerns regarding the authority of the appointing body (although it will still of course be necessary to confirm the terms of the arbitration agreement). In the case of a private appointment, by contrast, the arbitrator should check that the parties' agreement

is in writing, and whether it contains any specific terms. If a copy of the agreement has not been provided, the arbitrator would be prudent to ask for a copy before proceeding further, and certainly before acceptance of the invitation.

Because there is no requirement for parties to provide a copy of the lease or other relevant document conferring on the President power to make the appointment, the arbitrator should be careful, even in the case of a Presidential appointment, to ask for a copy of the lease at the earliest opportunity following appointment, in order to check that they satisfy the appointment criteria (see 6.6). The same obviously applies to a private appointment.

4.5 Where there is more than one arbitrator

In virtually all rent review cases the reference will be to a single arbitrator, and this will be assumed if there is no agreement or direction as to the number of arbitrators. Where the arbitration agreement provides for more than one arbitrator, then the procedures set out in ss. 15, 16 and 17 of the Act should be followed. These also deal with the appointment of an umpire or a chairman: if this is contemplated, then it will be sensible to appoint them immediately to avoid the extra costs of repetition of parts of the procedure.

4.6 Suitability for appointment

Arbitrators are vested with powers that are in some ways greater than those of a high court judge, because of the very limited rights of appeal by the parties. It is essential, therefore, that the arbitrator has a good knowledge of the Act, in order to justify the entitlement to these powers. Before accepting any such appointments, arbitrators should ensure that they have a sufficient knowledge of the practice, procedures and law of arbitration, as well as the subject matter of the dispute so that they are able to assess the relevance and quality of the evidence presented to them, by which they arrive at their decision and award.

Over and above these criteria, however, arbitrators should ensure that they have the personal qualities to be an effective arbitrator. These include the ability to be authoritative but not officious; expeditious but not zealous; user-friendly but not familiar; attentive to detail but not pedantic; decisive but not impetuous. Some arbitrators may feel that they are better able to deal with smaller, less confrontational disputes, whereas others will thrive on controlling substantial clashes. It is important that arbitrators feel that they will be comfortable dealing with the nature of the dispute referred to them before accepting the appointment.

Lastly, the arbitrator should not accept the appointment if they consider that they may not be able to deal with the arbitration within a reasonable time frame.

4.7 Professional indemnity cover

Under s. 29 of the Act, an arbitrator is not liable for anything done or omitted to be done in the purported discharge of their functions as arbitrator unless the act or omission is

shown to have been in bad faith. It may therefore be questioned why the DRS asks on its appointment form whether the prospective appointee has appropriate professional indemnity cover. The question is academic, since the appointee is overwhelmingly likely to be a practising professional who will maintain cover as a matter of course.

5 Involvements and conflicts of interest

5.1 RICS' Conflicts of interest

As the summary of the contents of the letter from DRS in 4.3 shows, every effort is made by the President to select a person suitable for appointment, while avoiding any potential conflict of interest.

Given the importance of this subject, RICS has produced a dedicated document on conflicts and involvements for surveyors acting as arbitrators or independent experts. The following paragraphs summarise the guidance set out in that note. Reference should be made as necessary to its detailed provisions.

5.2 The overriding principle regarding conflicts of interest

The overriding principle is that every arbitrator should be, and be seen to be, impartial at the time of accepting an appointment and must remain so during the entire proceeding until the final decision has been delivered or the proceedings have otherwise finally terminated. Accordingly, an arbitrator must decline to accept an appointment or, if the reference has already been commenced, bring to the attention of the parties the circumstances, if they have any doubts as to their ability to be impartial.

This overriding principle does not however mean that an arbitrator cannot accept any appointment where there has been an involvement with one of the parties, as 5.3 explains.

5.3 Conflicts distinguished from involvements

An involvement is simply any relationship between the arbitrator and one of the parties, or the property, while a conflict of interest is an involvement that raises justifiable doubts concerning the fair resolution of the dispute.

Justifiable doubts necessarily exist as to the arbitrator's impartiality if they have a significant financial or personal interest in the dispute. Doubts are also justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator might be influenced by factors other than the merits of the case in reaching a decision.

5.4 Mere involvement not a disqualification

It follows from the distinction drawn in 5.3 that the mere fact that a prospective appointee has a relationship with one of the parties or the property is not an automatic ground for disqualification. Indeed, such a relationship may be seen instead to demonstrate market knowledge, and therefore to be a part of the rationale for their selection as the arbitrator in the first place. This is all the more so where the rent review clause requires that the arbitrator be sufficiently qualified and have experience in dealing with the market sector within which the property falls.

Accordingly, the mere fact that an involvement may exist is not reason enough for the prospective appointee to disqualify themselves or even for the existence of the involvement to be disclosed: the prospective appointee must apply the overriding principle (see 5.2) and consider whether:

- the involvement is so trivial that it need not even be disclosed or
- there is sufficient doubt for the involvement to be disclosed, but not for disqualification (but in which case the prospective appointee should give the DRS full details, and say why they consider that there is no conflict) or
- the involvement is such as to give rise to justifiable doubts as to their impartiality, in which case it will be a conflict of interest, with the result that the invitation must be declined.

5.5 Impartiality distinguished from independence

Although independence is often grouped together with impartiality, with the two concepts sometimes being used interchangeably, there is a critical difference between them. The parties rightly expect their arbitrator to understand the subject matter of the dispute, and often choose to have a dispute resolved by a surveyor rather than a court because they are looking for technical knowledge and experience to assist in the proper evaluation of their dispute.

Surveyor arbitrators take evidence from the parties and are in a better position to assess the weight to be given to that evidence if they are experienced in the type of property (or type of dispute) in question.

This experience with the market will take the form of a number of involvements that may in some cases be said to amount to a lack of independence. Provided, however, that the arbitrator does not allow their judgment to become affected by the lack of independence – provided that they remain impartial – there is no need for the arbitrator to be disqualified. Better an arbitrator who is acquainted with the subject matter of the dispute, even if dependent in some way, than an independent arbitrator who has no relevant knowledge or experience. Thus, the arbitrator must be impartial but need not be independent (unless the dispute resolution clause expressly requires this).

Accordingly, while parties are usually concerned to ensure that their arbitrator is independent, they are not entitled to insist on this unless their contract so provides. This is because such concerns may sometimes lead to attempts to exclude from consideration a large number of prospective appointees, on the grounds that they have, or in the past have had, some connection, no matter how remote, with one of the parties; and in some specialist fields it could be found that every specialist is requested to be disregarded.

5.6 The role of the President and the DRS

The role of the President of RICS in appointing an arbitrator is, on the face of it, a straightforward one. They are concerned to select a member with the appropriate expertise who is not precluded from taking the appointment due to a lack of impartiality. Ideally, therefore, the President should be entirely free to exercise their discretion as regards both the requirement of expertise and that of impartiality.

However, the DRS, to whom this task is in practice delegated, has little information available to decide for itself whether a conflict of interest might exist. Instead, it relies upon prospective appointees to carry out their own conflict checks. The prospective appointee is specifically asked to disclose any involvement, in particular any involvement they or their firm has (or has had in the relevant past) with the property, a nearby property or a party to the dispute. If such an involvement exists, the prospective appointee is asked to state whether this involvement is believed to constitute a conflict of interest, or to give reasons why the involvement does not amount to a conflict.

The final decision as to whether such an involvement may, or may not, give rise to the possibility or appearance of bias, or will in any way affect the potential appointment, is a matter for the President, not the prospective appointee. Under no circumstances should the prospective appointee make any contact with the parties or their representatives at this stage.

5.7 Investigations for the prospective appointee to carry out

The prospective appointee should make reasonable enquiries to discover any potential conflict of interest, as well as any facts or circumstances that may cause their impartiality to be questioned. That is not because the prospective appointee is liable for a conflict about which they know nothing – for of course they are not. Rather, if and when the facts amounting to a conflict emerge, the prospective appointee will rightly be criticised for the failure to have made the enquiries that would have allowed the parties to make alternative arrangements at an earlier, less costly, stage.

The checks should include:

- current and historic relationships between the prospective appointee and the subject matter of the dispute

- current and historic relationships between the prospective appointee and the parties to the dispute
- more remote relationships, such as those involving the prospective appointee's employer or partners, or organisations associated with the parties
- other involvements that may influence or be influenced by the prospective appointee's decision.

A potential appointee must, therefore, have an appropriate system for undertaking involvement checks within their firm that is reliable and efficient. The nature of this system will depend on the size and type of the practice.

Although the DRS sets a five-year time limit for the scope of the investigation, this should not be treated as absolute: prospective appointees are expected to exercise discretion and caution with matters immediately outside the strict limit, e.g. an involvement with the building on the previous review is likely to be more than five years ago, but should nevertheless be disclosed.

It is also important to have a system to prevent conflicts arising subsequently by partners or other members of staff accepting instructions from parties, or in connection with nearby properties, that might give the appearance of creating bias.

5.8 Disclosure of an involvement

Disclosure of an involvement to the President does not mean that the surveyor will not be appointed. On receipt of details of any involvement, the President will have regard to the overriding principle set out in 5.2. It is inconceivable that the President would knowingly appoint a person with a real pecuniary or other interest in the outcome of the dispute. A very remote or indirect pecuniary interest would not, however, disqualify an appointee. The President would not appoint someone whose appointment would raise a real possibility of bias in the eyes of a reasonably minded person. The test is not what the party to the dispute or their representative believes, or what in fact would happen or has happened. Once they have made themselves aware of all the relevant facts, the President must consider whether a reasonably minded person could perceive a real possibility of bias if the member in question were to be appointed.

The President may take the view based on the information supplied by the prospective appointee that the member concerned could not be seen to be impartial. In such circumstances, the President will seek another prospective appointee.

Alternatively, the President may take the view that the matters disclosed are remote and should not raise a real possibility of bias in the eyes of a reasonably minded person. In this situation the appointment is made without disclosure to the parties.

In a further alternative, the President may pass on the prospective appointee's disclosure to the parties or their representatives, inviting comments within a specified period of time. At

that stage the President will consider and give due weight to any objections but will not be bound by them, and the final decision as to the appointment will be theirs alone.

5.9 Effect of failure to disclose an involvement

Where a surveyor willfully fails to disclose an involvement, or accepts an appointment and subsequently purports to resign on the basis that instructions accepted after appointment give rise to a conflict, the President may conclude that the surveyor is not suitable for future appointments.

5.10 Disclosure of an involvement after appointment

Once appointed, in the interest of openness, the arbitrator may consider it appropriate again to disclose any involvements to the parties; particularly any involvements with the parties themselves. However, the arbitrator should not allow a party to use this information in an attempt to persuade them to resign.

By this stage, assuming all the facts were presented, the President will have been satisfied that the arbitrator is suitable. Only the parties by agreement, the arbitrator or the courts can decide otherwise. The arbitrator should ask the parties to declare immediately if they consider any such involvement gives rise to a conflict. The arbitrator should also request the parties and their representatives to share the responsibility of notifying them if they believe a conflict has arisen at any subsequent stage.

Of course, if the arbitrator becomes aware after their appointment of an involvement that may amount to a conflict, then that is something that should be disclosed immediately to the parties, without regard to the fact that the arbitration may by then have reached an advanced stage (see 5.2). The President has no further role to play at this stage, and should not therefore be consulted.

Section 7 sets out the steps that the arbitrator should take in the event that a subsequent involvement comes to light.

6 Action on appointment

6.1 Date of appointment

It may be important for an arbitrator to know how and when an appointment legally takes effect. Three situations should be distinguished.

Where the President is to make the appointment, it will probably take effect when the President signs the appointment letter. This creates a tripartite agreement between the parties and the arbitrator. Neither the President nor RICS are party to the contract.

If the parties themselves make the appointment, it takes effect either where the agreed appointee has told them they would be prepared to be appointed, on the date of the appointment by the parties; or where there is no prior contact with the agreed appointee, on the date of the arbitrator's letter of acceptance to the parties.

If the court itself makes the appointment, it takes effect when the court makes its order.

Other matters relating to the appointment of the arbitrator are covered by ss. 16 to 18 of the Act.

6.2 Objections to the arbitrator's appointment: on grounds of jurisdiction

If an objection to the appointment is to be made on the ground that the arbitrator lacks substantive jurisdiction (i.e. as to (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; or (c) as to the matters that have been submitted to arbitration in accordance with the arbitration agreement), it should be made promptly after the arbitrator's appointment. In particular, s. 31(d) of the Act requires such an objection to be made not later than the time that party takes the first step in the proceedings to contest the merits of any matter in relation to which they challenge the arbitrator's jurisdiction.

If such an objection is raised, the arbitrator should rule on it pursuant to s. 30 of the Act, unless the parties agree that it should be settled by the court. If the matter appears complicated (and particularly if either party is legally represented in relation to the challenge), the arbitrator should consider taking legal advice.

The arbitrator's ruling may be challenged by either party under s. 67 of the Act, but the arbitrator may continue the reference notwithstanding that an application to the court is pending.

Whether the arbitrator would be wise to continue the reference in any given case will depend upon a balance of considerations, such as the gravity and difficulty of the point raised; the

urgency of the arbitration; the speed with which the point might be determined by the court; and the likely effect on costs of proceeding in advance of the determination of the point. Of course, if both parties have agreed that the matter is to be determined by the court, there is no question of the arbitrator proceeding further with the reference.

6.3 Objections to the arbitrator's appointment: on other grounds

Section 24 of the Act provides that a party to an arbitration may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:

- that circumstances exist that give rise to justifiable doubt as to their impartiality
- that they do not possess the qualifications required by the arbitration agreement
- that they are physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to their capacity to do so
- that they have refused or failed:
 - properly to conduct the proceedings or
 - to use all reasonable despatch in conducting the proceedings or making an award
- and that substantial injustice has been or will be caused to the applicant.

The arbitrator may continue with the arbitration and make an award while an application to the court under s. 24 is pending. As with applications under s. 31, whether this would be a prudent course for the arbitrator to adopt will depend on a number of factors (see 6.2). If the court removes the arbitrator, it may make such order as it thinks fit in respect of their entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

6.4 Initial contact with the parties

Once appointed, the arbitrator should write to the parties:

- notifying them of their appointment
- requesting a complete copy of the lease (with properly coloured plans), together with any deeds of variation, licences or other documents material to the appointment
- asking if more time is required for negotiation before taking substantive action
- requesting confirmation that they are authorised to represent the landlord/tenant
- requiring all correspondence with the arbitrator (including attached documents) to be copied to the other side
- forbidding the supply of privileged correspondence
- setting out their proposed fees and charges (see 6.9).

6.5 Checking the appointment documents

Once the lease or other appointment documents have been received, the arbitrator should study the appropriate sections in detail so that they are clear as to the precise nature of the dispute and any special provisions that might apply. It is normally not necessary (and will result in unnecessary costs) to read the entire lease at this stage. It is important, however, to check for mandatory time limits and that the arbitrator has been properly appointed in the correct capacity.

At this stage, it might become clear to the arbitrator either that their appointment is not as arbitrator (see 6.5); they do not meet the appointment criteria (see 6.6); or that the lease lays down a timetable with which compliance will be difficult if not impossible, e.g. that the arbitrator must take a particular step within so many days of the review date, being a date that has already passed. Such problems should be rare, because ordinarily the relevant parts of the lease will be extracted or summarised on the application form by the applicant. Nevertheless, it is incumbent upon the arbitrator to carry out their own careful checks as soon as the lease is received.

If those checks reveal that there is a problem, then the arbitrator should bring it to the attention of the parties. If the matter is serious enough, the arbitrator should consider resignation if a resolution cannot be agreed with the parties. One further option that the arbitrator may consider would be to take legal advice at the parties' expense.

6.6 Arbitrator or independent expert?

Some leases and agreements may be unclear or ambiguous as to whether the appointment is in the capacity of arbitrator or independent expert.

Where a lease or agreement, with reference to the appointment of a surveyor, mentions 'arbitrator' or 'arbitration' or 'the Arbitration Acts', even though it may also make reference to a 'valuer', 'independent expert', 'expert' or other such term, it is generally treated as calling for the appointment of an arbitrator, unless it is clear that the parties intend otherwise.

An appointed surveyor should resolve any ambiguity concerning the capacity in which they are appointed before proceeding with the reference.

If there is any doubt as to the correct interpretation of the lease or other document giving rise to the arbitrator's appointment, the parties may agree which interpretation is correct. However, there is a danger that third parties (such as the original lessee, or a surety) might be able subsequently to dispute that agreed interpretation. For detailed consideration of this topic, see the *Handbook of Rent Review* and the standard textbooks on arbitration.

6.7 Criteria for appointment

Whether the request for appointment has emanated from the president or privately, the arbitrator should check the terms of the arbitration clause, so that they are clear as to the precise nature of the dispute and any special provisions that might apply to the appointment.

In this respect, it is not uncommon to find that the arbitration clause requires either that the arbitrator should have particular experience (e.g. expert in retail warehousing in Brighton); be qualified in a particular way (e.g. of not less than 15 years seniority in valuing commercial property or a director in an international practice); or take particular steps in relation to the appointment, such as arrange insurance to a certain level of cover. If the arbitrator is unable to meet such criteria, they should make this known to all parties immediately. Failure to do so may result in a later objection by one of the parties under s. 24 of the Act (see 6.2.2). It is not necessary to alert the DRS, since, as noted in 5.10, the DRS has no further role following appointment.

6.8 Non-receipt of the appointment documents

It will occasionally happen that the parties will fail to supply a copy of the lease or other appointment document to the arbitrator. The arbitrator cannot proceed in the absence of this document. In such circumstances, the arbitrator should remind the parties of their duty to do all things necessary for the proper and expeditious conduct of the arbitration (s. 40), and give a written warning that if the lease is not supplied within a specified reasonable period it will be necessary to resign from the appointment.

6.9 Establishing the arbitrator's fees and charges

Unless the arbitrator has pre-agreed the fee with the parties (or more usually the basis on which it will be calculated), the amount to be charged is at the arbitrator's discretion, subject to the right of either party to apply to the court for its determination. Unless the fees were agreed at the time the appointment was accepted (which cannot apply in a Presidential appointment) the arbitrator should state in writing to the parties in the initial letter following appointment the amount of any fees and charges or the basis on which they are to be calculated. The parties' written agreement to the arbitrator's fees and charges is desirable but cannot be required.

The following points (which are examined in greater detail in Section 24) should be noted in relation to the arbitrator's fee proposal:

- the arbitrator should always propose a fair figure or basis
- the arbitrator is entitled to proper remuneration for the work they have done, and it may be appropriate to provide, in common with the almost universal practice (in fields other than rent review), for the arbitrator either to require each party to deposit its share of the arbitrator's estimate of the costs of each stage of the arbitration, or to render interim invoices to be settled at periodic intervals on account of their costs

- it may also be appropriate to build in a mechanism for rate increases if the arbitration is unduly protracted or delayed
- the circumstances may also justify the arbitrator requesting the payment of a commitment fee to cover both the abortive costs and the loss of business likely to result if the arbitration is either postponed because the parties are not ready, or does not proceed to an award
- a charge merely for accepting the Presidential appointment is not appropriate.

Some parties have payment systems that require a payee to be on a register of 'approved' suppliers. They may seek to impose requirements for the arbitrator to be entered on the register. Such requirements are not appropriate for an arbitrator as they may impinge on their perceived independence, and they should not comply with them.

The parties should be made aware that the shorter and clearer their representations, the less will be the time required to peruse and understand them, with possible savings on costs.

7 Subsequent inability to act

7.1 Problems after the appointment has been made

Once the President has made an appointment, their jurisdiction in the matter is at an end unless the lease itself (or, in a relatively few cases, statute) provides to the contrary. If, therefore, after the appointment of the arbitrator, a party raises a matter alleged to make it wrong for them to continue with the arbitration (in practice, a real pecuniary or other interest in the outcome of the dispute, or other matters giving rise to a real possibility of bias), the arbitrator would be expected to:

- a obtain full details of the objection in writing
- b notify the other party in writing and invite comments from them
- c make such further enquiries as might be necessary in order to establish, for example, how long the party raising the matter has known about the alleged conflict (which may be relevant to the question whether the right to object has been waived)
- d apply the overriding principle (see 5.2) to decide whether there is a conflict of interest that would require the appointment to be terminated
- e if the answer is yes, seek the agreement of the parties to an orderly resignation and replacement by the President of RICS, unless both parties agree in writing that they should continue (and the arbitrator feels that they can do so) or
- f if the answer is no, continue.

If, following an offer to resign, one party accepts and the other party declines, an arbitrator has the power to resign unilaterally. This power is implicit in s. 25 of the Act (see 7.3).

7.2 Disclosure of an involvement by the arbitrator after the appointment has been made

If the arbitrator should discover a matter that might affect their ability to come to a decision, or would raise a real possibility of bias in the eyes of a reasonably minded person, they would be expected immediately to disclose it to the parties and then proceed as in (d) or (e) in 7.1. Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the proceedings are at the beginning or at a later stage.

It is to be emphasised that the mere fact of disclosure should not indicate to the parties that the arbitrator considers either that a conflict of interest exists, or conversely that they believe that there is no such conflict. Those are matters that the arbitrator can only finally decide having weighed up the parties' reactions to the disclosure.

7.3 Resignation of the arbitrator

The Act does not provide expressly that an arbitrator may resign but it seems implicit from s. 25 that they may do so if there is reasonable cause. Circumstances in which this may be reasonable are illness or incapacity; if 'without prejudice' correspondence is shown to them; or if a conflict of interest is exposed.

An arbitrator who resigns unreasonably may be found liable to the parties for the consequences. It is therefore prudent that an arbitrator considering resignation should first consult the parties in writing and, if possible, gain their acceptance that resignation would be reasonable in all the circumstances, with agreement also as to payment of fees and expenses.

7.4 Replacement of the arbitrator

The procedure for replacement of an arbitrator who resigns, or who is incapacitated in some way, is as follows:

- a** the parties can agree on the replacement arbitrator
- b** the parties may apply to the President of RICS to appoint a replacement arbitrator (for which RICS does not normally charge a fee)
- c** either party may apply to the court to appoint a replacement under ss. 18 and 27(3) of the Act.

8 Case management

8.1 Introduction

The term 'case management' is one that was used for the first time in the CPR, to describe the means by which the overriding objective of enabling the court to deal with cases justly was to be achieved (including: (a) ensuring that the parties are on an even footing; (b) saving expense; (c) dealing with the case in ways that are proportionate; (d) ensuring that the case is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources – see CPR 1.1). It is appropriate to apply the same concept to arbitration, while recognising the differences that exist between arbitration and litigation.

Arbitration differs from litigation, not least in that it is funded privately, with no pressure on the tribunal's resources; and the concept of party autonomy takes precedence. Moreover, the overriding objective, as far as arbitration is concerned, is spelt out in s. 33 of the Act ('General duty of the tribunal') in these terms, which differ from those set out in CPR 1.1 in some respects:

'(1) The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting their case and dealing with that of their opponent, and adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.'

It is therefore to be emphasised that the arbitrator is there for the parties, not the other way around. This section is concerned with the ways in which the arbitrator should comply with the general duty set out in s. 1.

8.2 Dealing with the parties

In some cases, the arbitrator will be in the fortunate position of dealing with parties that are represented by surveyors, who comply readily with their directions. In other cases, the arbitrator will have to deal with parties that are unrepresented, or uncooperative, or whose identities change during the proceedings.

Guidance concerning these matters is set out in section 10.

When the parties are represented by surveyors, the arbitrator will need to ascertain whether the surveyors are acting as expert witnesses or as advocates, or in the dual role. This is examined in section 9.

8.3 Preliminary meeting or other contact

Although the arbitrator will already have written a preliminary letter to the parties (see 6.4), many case management matters such as whether there is to be an oral hearing, the timetable for exchange of documents, evidential matters, and many other aspects of the conduct of the arbitration, should be dealt with as soon as the parties or the arbitrator decide that the arbitration proceedings should proceed, in order to allow the parties (and the arbitrator) to plan ahead.

Such preliminary matters are often most effectively and expeditiously dealt with by some form of preliminary contact rather than by correspondence, which may become protracted. In the first instance it is for the parties to decide whether this preliminary contact should be at a meeting, or be conducted by way of conference call or email; failing agreement it is for the arbitrator to decide. In doing so, they must balance such considerations as the possible savings in costs, the convenience of the parties, and the size and complexity of the arbitration.

Preliminary contact is considered in more detail in section 11 of this professional standard.

8.4 Directions

At the end of the preliminary meeting, and perhaps from time to time during the course of the arbitration as further decisions are needed, the arbitrator will need to record certain matters of timing and procedure that have been agreed or decided relating to the conduct of the arbitration. The best way of doing this is to issue a list of instructions to the parties, usually referred to as 'Directions'.

Arbitrators will usually wish to build up their own standard sets of directions, to serve as an aide- memoire. However, the use of such precedents should not obscure the need to approach each situation afresh, in order for the arbitrator to be able to gauge what is best for the particular parties in that particular arbitration. Moreover, the arbitrator should of course be aware that the parties have power under s. 34 to agree any procedural matter, and that if they do so, this will bind the arbitrator.

The directions that may be considered suitable for an arbitration conducted in writing only are considered in 14.5, while the further directions appropriate to an oral hearing are considered in 15.3.

8.5 The possibility of compromise

An arbitrator is not a mediator and it is not their role proactively to promote negotiations and compromise. However, the arbitrator should, at all times, encourage the parties to achieve their own settlement. It is recommended that at the outset, the arbitrator enquire of the parties whether there is any possibility of their reaching a negotiated settlement and, if so, whether they wish them to defer the arbitration. Either in the initial letter, or at the preliminary meeting if any, the parties should be reminded that they are at liberty to settle

between themselves at any time prior to the award, but in this event will be liable for the arbitrator's fees and disbursements to date (see 24.1).

8.6 Identification of the issues

Although the arbitrator will seek to use their preliminary contact with the parties to attempt to define the issues in the arbitration, it may be some time before the issues emerge to their full extent. It will be important for the arbitrator to keep a close eye on this, to ensure both that the issues are properly identified and that the parties' resources are properly targeted from the earliest possible opportunity.

If there are likely to be complex legal or technical issues, then the arbitrator will need to put measures in place to deal with these. This topic is considered in detail in section 13.

8.7 Agreeing the facts

The arbitrator should require the parties to agree as many of the facts as possible, with the aim of ensuring that the arbitration is concerned only with matters that are genuinely in dispute, with consequent economies in time and cost. This is dealt with further in section 12.

8.8 'Documents only' arbitrations compared to oral hearings

The matter that is likely to have the greatest impact on case management is the decision whether the issues should be debated during the course of an oral hearing, or whether the arbitration should consist merely of exchanges of written evidence and argument.

Each way of proceeding has merit:

- a** An oral hearing is likely to be a more efficient way of judging credibility and of teasing out the evidence through the use of cross-examination. The arbitrator may also consider with the parties the usefulness of so-called 'hot-tubbing': chairing a discussion between the parties' experts on the evidence and issues, with a view to narrowing the range of issues in dispute.
- b** By contrast, the use of written representations may be cheaper and quicker.

The arbitrator should therefore ascertain whether the parties wish them to proceed by considering documents alone, or by holding a hearing, pointing out that if there is no agreement between the parties on the matter then they will decide the procedure to be followed (see s. 34(2)(h) of the Act) having first listened to each side's arguments justifying the procedure they propose should be followed.

The overriding duty of the arbitrator is to act fairly and impartially and to adopt procedures suitable to the circumstances of the particular case. In view of the nature of the matters likely to concern surveyors, and their particular skill in the writing of reports, the written representation procedure is often more appropriate to a rent review dispute, but this is a

matter for the parties (if they can agree) to decide and for the arbitrator (if they cannot) to determine based on the circumstances of each individual case.

Even if the written representation procedure is decided on, the arbitrator may consider it necessary or desirable to have a hearing (perhaps limited to one particular aspect of the dispute only) if matters of fact or evidence contained in the written representations require clarification, or if the difference between the parties' respective figures is so great as to require explanation. The prospect of an opinion expressed in writing being subjected to cross-examination under oath at a hearing may act as a deterrent to the inclusion of irresponsibly high (or low) figures, obfuscation or spurious arguments. The parties may, of course, agree not to have a hearing, but this would be unusual in these circumstances.

Once the choice has been made between written and oral proceedings, the procedure thereafter will vary according to which has been chosen. Section 14 of this professional standard deals with procedure by written representations and Section 15 with procedure by way of hearing.

Later sections deal with evidence, the award, and fees and costs, all of which are common to both procedures.

8.9 Dealing with the evidence

Whether the arbitration is to proceed by way of a hearing or written representations, the arbitrator's fundamental task will usually be to marshal and evaluate the evidence before them (excluding as necessary that which is inadmissible), using their skill and experience as a chartered surveyor. The arbitrator will thus need to have a good grasp of the principles of evidence, including disclosure, admissibility, relevance and weight. These important matters are dealt with in section 16.

9 Expert witnesses and advocates

9.1 Introduction

Surveyors acting in rent review arbitrations commonly assume the roles either of expert witness or advocate, or sometimes both (but not at the same time). It is critical to the proper outcome of such an arbitration (a) that the arbitrator should be able to discern which role is being adopted at any one time (because very different rules apply to each); and (b) that the arbitrator should be able to depend upon the truthfulness of the expert evidence being adduced (because in a market where there are no comparable transactions, there may be no other satisfactory evidence).

RICS has for some years now produced professional standards for surveyors acting in either role, and the arbitrator will need to be familiar with the content of each, both in order to clarify what they are entitled to expect from the parties' representatives, where they are surveyors, and in order to identify and correct transgressions at an early stage.

This section summarises the principal duties in each document.

9.2 The surveyor acting as expert witness

Where the surveyor acts in the arbitration in the role of expert witness, their overriding duty is to the arbitrator (see 2.1 of the corresponding document). This duty, which overrides the contractual duty to the surveyor's client, is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour the client. This duty applies irrespective of whether or not the evidence is given on oath or affirmation. The document emphasises that special care must be taken to ensure that the expert evidence is not biased towards those who are responsible for instructing or paying the surveyor. Opinions should not be exaggerated or seek to obscure alternative views or other schools of thought, but should instead recognise and, where appropriate, address them. The surveyor is required to state in their written evidence that they have complied with the document.

In particular, arbitrators must ensure that surveyors give the whole truth. They should be required to disclose all relevant comparables and all relevant details of those comparables, whether such details assist their clients' case or not. They should be warned that failure to do so may discredit the remainder of their evidence in the eyes of the arbitrator and may be taken into account by the arbitrator when considering their award as to costs. It could also amount to professional misconduct and, in some circumstances, perjury.

It is critical that arbitrators recognise that opinion evidence, even unsupported by any other material, is nevertheless evidence, and should be considered and assessed. However, in order for the arbitrator to be able to have faith in such evidence, they have to have confidence in the impartiality and competence of the expert witnesses acting for the parties in the arbitration. If an arbitrator has grounds for suspecting that that is not the case, it is incumbent upon them to make that matter clear, as 9.6 suggests.

9.3 The surveyor acting as advocate

A surveyor acting as advocate is bound to act in the best interests of their client, and is absolutely entitled to be partial. Although a duty is owed to the arbitrator to act properly and fairly, and the arbitrator should not be misled, these duties fall some way short of the overriding duty that the expert witness owes to the arbitrator. The advocate should not offer any opinion, because opinions are only relevant and admissible when the surveyor is acting as expert witness.

9.4 The surveyor in the dual role

Recognising that it will often be expedient for a surveyor representing a client to wish to assume a comprehensive role, both giving evidence and making submissions, RICS has long allowed surveyors to take on both roles in the same arbitration. Although this practice is pragmatic and clearly has the potential to save costs, it tests the professional integrity of surveyors, who may sometimes struggle to comply with the different duties and standards the two roles demand.

Accordingly, both RICS' *Surveyors acting as expert witnesses* and the *Surveyors acting as advocates* provide that where a surveyor is acting in such a dual role, they should clearly distinguish between those two fundamentally different roles at all times, whether in oral hearings or in written presentations.

9.4 Dealing with unprofessional behaviour

While rare, an arbitrator may be faced with a situation where a surveyor would appear to have failed to comply with a relevant standard, in particular those relating to surveyors acting as expert witnesses and advocates. Examples include exaggeration or economy with the truth in relation to expert evidence, and abusive conduct in relation to advocacy (whether written or oral). Sanctions on surveyors for breaches of professional standards include disciplinary action, culminating possibly in a public reprimand, fine and/or expulsion from RICS, depending on the severity of the breach. Although all surveyors have a duty to report breaches of professional standards by other surveyors to RICS, the arbitrator must be mindful of two matters. The first relates to the arbitrator's function, which is to determine the matters in dispute in accordance with the arbitration agreement, rather than to exercise a disciplinary role. The arbitrator should therefore resist applications to rule upon whether there has been a breach of the professional standards.

The second is the arbitrator's duty of confidentiality. As a result of this duty, the arbitrator will not be obliged to report apparent breaches of professional standards to RICS unless the matter falls within an exception to the duty of confidentiality.

The arbitrator may find it helpful to warn the parties' representatives in their directions at the outset both of the need to comply with the professional standards, and of the steps that are to be followed in the event of any apprehended breach.

Those steps may include, in order of severity:

- use of the arbitrator's discretionary power to take the initiative to ascertain the facts and the law unless the parties agree otherwise (s. 34(2)(g)). In taking the initiative, the arbitrator should however be careful not to be seen to be advancing the case for one party, in order to avoid any suggestion of partiality giving rise to an application for their removal under s. 24 of the Act
- a reference to the offending conduct in the award, which the client will then be able to read
- the report of the breach to RICS. Given the confidential nature of arbitration, however, the arbitrator should make it clear that any such report will take effect as an agreed exemption from confidentiality.

10 The parties

10.1 Establishing the identities of the parties

It is essential that the arbitrator should record the names of the parties correctly. A preliminary meeting with the parties' representatives (if held – see Section 11), or directions, will provide an opportunity for this. Remember that the application will have been made by one side to the dispute and it is conceivable that they will not have been in possession of the full facts.

The following situations should be treated with care.

- One of the parties might be a company that has changed its name following a takeover or amalgamation. Here the new name should be given, perhaps with the company number if available (although it would do no harm to refer to the old name as well – e.g. 'Bigcoplc (formerly Bigco (UK) Ltd)').
- One of the parties might be a partnership, or carrying out business under a trade name. Suppose, for example, that the tenant's letters are headed 'Joe Bloggs Builders'. This might either be a trading name for, say, J Bloggs Ltd, or a partnership consisting of Joe Bloggs and Fred Bloggs. In the former example, the tenant's name in the heading would be 'Joe Bloggs Ltd trading as Joe Bloggs Builders'; in the latter case, it would be 'Joe Bloggs and Fred Bloggs trading as Joe Bloggs Builders'.
- The parties might not be the same as the parties shown on the lease – for example, the freehold might have changed hands or the lease might have been assigned. Care should be taken to show the current name. The reason for the change can then be explained in the introduction to the award.
- The parties might change their identities during the course of the arbitration, for example, through assignment. In such an event, the arbitrator should ensure both that the new party is aware of its obligations in relation to the arbitration and that provision is made for the recovery of costs from the outgoing party.

10.2 Deciding who shall be claimant

It is important that the arbitrator knows at an early date which party is the claimant and which party is the respondent, because certain parts of the Act affect the claimant only – see in particular s. 38(3) (security for claimant's costs) and s. 41(6) (dismissal of claim).

In rent review disputes, the identity of the claimant and the respondent is sometimes not as clear as in other forms of arbitration, because both landlord and tenant may be keen to establish the amount of the market rent – one to show that it has risen, and the other the converse. In such circumstances, if the parties are unable to agree who shall be claimant, the

arbitrator should simply designate one (most obviously the party who made the application to DRS) in their initial directions.

10.3 Unrepresented parties

Special care will have to be taken by the arbitrator where one or both of the parties is unrepresented by a surveyor and has no relevant valuation expertise. The problem becomes more acute when one of the parties has professional assistance and the other does not. The arbitrator's task pursuant to their duty under s. 33(1)(b) of the Act, is to 'adopt procedures suitable to the circumstances of the particular case ... so as to provide a fair means for the resolution of the matters falling to be determined', and it will not be fair if the arbitrator treats the unrepresented party as if they were on equal terms with the represented party.

This does not, however, mean that the arbitrator should descend into the arena in a bid to ensure equality of arms. Instead, without being partisan, the arbitrator should make sure that procedural matters are dealt with fairly; that the evidence is properly tested; and that allowances are made for any deficiencies in the presentation of the unrepresented party's case. They should not, however, seek to draw the unrepresented party's attention to evidence that has not been submitted and that may assist the case.

10.4 Liquidators/receivers and guarantors

Although the usual parties to an arbitration are the landlord and the tenant, there may be circumstances in which others are entitled to act on their behalf, or, more rarely, to intervene in the arbitration.

A properly appointed liquidator, receiver or administrator for either party may take over the relevant role. Financial difficulties of a party (including expected insolvency) are not grounds for delay providing the other party is aware of the circumstances and wishes to proceed. The arbitrator may also consider whether it would be appropriate to require security for the costs of the arbitration (s. 38(3)). The arbitrator should, however, be careful to act impartially, and should not suggest such a course except in exceptional circumstances.

An assignor or guarantor will not be a party to the arbitration unless the rent review clause or arbitration clause so provides (which would be very rare). They could, however, be called by either party as a witness. They cannot attend or present their own case unless both parties agree, or one party, consents to them having the conduct of that party's case in the arbitration. In such a case the arbitrator should be satisfied that the assignor or guarantor is properly authorised by the relevant party.

11 Preliminary 'meeting'

11.1 Format of the 'meeting'

The point has already been made (see paragraph 8.3) that it will be important for there to be early contact between the parties and the arbitrator to deal with a number of case management issues. This early contact may take the form of a meeting, but the parties may prefer, perhaps for reasons of convenience and cost, to have the matter dealt with by way of correspondence or by email. If so, a protocol needs to be observed to ensure that each party is copied in on all communications. This is dealt with in paragraphs 11.6 to 11.8.

The expression 'preliminary meeting' is used for convenience in this section to refer to this preliminary contact, whether it be by way of conventional meeting or some other form of communication such as telephone or video conference call, or email.

11.2 Party autonomy

One of the main principles of the Act is party autonomy. In other words, it should in the first instance be for the parties to decide how their arbitration should be conducted ('to agree any matter' in the language of s. 34(1)), subject only to the mandatory provisions of the Act.

In particular, the arbitrator cannot override the procedural agreement of the parties.

The arbitrator should reflect this principle of party autonomy in the execution of their duties in s. 33 of the Act.

11.3 Agenda for the preliminary meeting

It is often helpful to the parties if, when convening the preliminary meeting, the arbitrator sends them some draft directions. This may help to shape an early agreement; and it will in any event draw the attention of the parties to the points that have to be considered, with the result that they may be able to agree all or most of the directions necessary to prepare for the arbitration, and perhaps avoid the need for a meeting altogether.

The draft directions for the conduct of the arbitration will also provide a suitable opportunity for the arbitrator to remind the surveyors that they will expect compliance with the relevant duties laid down in the professional standards (see Section 9 above).

The matters that the arbitrator may wish to consider for the agenda will include those set out in 11.5.

11.4 Representation at the preliminary meeting

If either party intends to be represented at the hearing by a solicitor or counsel, it is highly desirable that the solicitor is present at the preliminary meeting and (if it has been decided to instruct counsel) that they discuss with counsel before the meeting the nature of the directions desired.

As a matter of courtesy and, more importantly, to avoid the costs and delay that would be caused by adjournments, a party who intends to be represented at the preliminary meeting by a solicitor or counsel should notify the opposing party a sufficient time in advance to enable the opposing party, if so minded, also to instruct a solicitor or counsel. The arbitrator should also be informed.

To avoid misunderstandings it may be appropriate to make a formal direction requiring notification of who will be attending the preliminary meeting, and their status, to be given to the arbitrator and the opposing party a reasonable time before the meeting. The arbitrator may also point out to the parties that those appearing should have the authority to agree any relevant matter so as to avoid delay.

11.5 Matters for discussion at the preliminary meeting

Section 34 of the Act deals with procedural and evidential matters. This is the starting point for deciding what matters to address at the preliminary meeting. The arbitrator's approach to the list of matters to be discussed should be informed by a consideration of what steps need to be taken that can best combine speed in obtaining an award with the need to give each party a reasonable opportunity to prepare their case.

There follows a list of topics that may be discussed at the meeting. It is to be emphasised that this is not an exhaustive checklist of matters for the arbitrator to raise with the parties, but merely a reminder for the arbitrator of matters that in some cases should, but in others may, be raised. Some of the matters (for example, disclosure and interest) are for the parties to raise themselves rather than for the arbitrator to mention.

- Who is to be the claimant and who the respondent? See 10.1.
- What documents are agreed to be relevant and who will supply them to the arbitrator?
- What facts concerning the subject property, and what comparables, are agreed, and who will supply a statement and full details accordingly? This is dealt with in section 12.
- What procedure do the parties wish to adopt? In particular, does either of them, at this stage, wish to ask for a hearing? This, together with the other matters to be considered in relation to a hearing, is dealt with in 8.8.
- Is the representative attending the meeting on behalf of a party the person who will be representing them thereafter, or is it intended to instruct someone else to act as advocate, e.g. a solicitor or barrister? If so, has the representative discussed the procedure with the designated advocate? Are any designated representatives authorised to receive communications from the arbitrator?

- Is any question of law likely to arise? If so, which of the procedures mentioned in 13.1 are most appropriate? Do the parties wish to remove the arbitrator's power to appoint a legal adviser? If not, do the parties wish to agree upon the legal adviser to be consulted, and what are the arrangements for the payment of the fees and expenses of the adviser for which the arbitrator is liable as expenses of the arbitration?
- Are statements of case necessary, or will the issues be sufficiently defined by lodging expert reports/adversarial submissions and (in due course) points of reply/counter submissions?
- What form should the parties' evidence and submissions take? How should they be exchanged; and how should copies be delivered to the arbitrator? See the communications protocol in paragraphs 11.6 to 11.8.
- Does either party wish to apply for disclosure, and if so is the disclosure likely to be restricted to a specified document or class of documents, or will it extend to everything that is relevant? See section 17.
- Should all the issues be dealt with together, or should they be split in some way?
- What rules of evidence are to apply to the arbitration? See section 16. In particular, are arbitrator's awards and independent expert determinations to be admitted?
- Have the parties agreed on responsibility for costs after the dispute has arisen? If not, do the parties wish the arbitrator to issue an award dealing with all matters in issue including the allocation of costs (i.e. who pays), with the determination of the recoverable costs (i.e. the amount payable by one party to the other consequent on the allocation) reserved if not agreed? Or do they wish the arbitrator to issue an award final as to all matters except costs, and to give them an opportunity to make representations on costs before deciding how to deal with them? Do the parties wish to know what if any policy the arbitrator has regarding 'near misses' (see 25.10)?
- Should interest be awarded? See section 26.
- Have the parties agreed to dispense with reasons as otherwise required by the Act? See Section 22.

11.6 Communications protocol

Whatever means of communication is adopted between the arbitrator and the parties to the arbitration, the arbitrator should make it clear from the earliest stage that, save in emergency, all communications with the arbitrator should be in writing and that a copy should be sent direct to the other party with confirmation that a copy has in fact been sent and by the same means.

The immediacy of email, and the ease with which emails can be copied to other parties, render it unlikely that there will be an emergency that requires communication by another means (such as telephone). In the rare event that this is necessary, the arbitrator should ensure that the party speaks to the arbitrator's secretary rather than the arbitrator; and that the party making the telephone call should make an attendance note of the conversation

and forward the note to the other party and to the arbitrator as soon as possible after the conversation takes place, together with an explanation of the need for the call.

There are many other aspects of communication between the parties and the arbitrator which should be covered by an appropriate direction. Paragraph 11.7 deals with a suggested email protocol, while paragraph 11.8 provides guidance for a protocol covering communication by other means.

11.7 Communications protocol – email

Communication by email is now common in arbitrations, and is to be encouraged not merely for its speed and inexpensiveness, but also for the ease with which it can be demonstrated that all relevant parties have been copied in on messages. As with any other form of communication, however, certain rules should be laid down, to ensure that the procedure remains fair. The preliminary meeting will provide a suitable opportunity for the arbitrator to lay down such rules.

The arbitrator should first check whether the parties are content to communicate by email. If not, then an alternative means of communication should be selected that will achieve the same objective of ensuring that all parties receive the same documents at the same time (see 11.8).

Where email is agreed as the primary means of communication, then the following rules should be considered:

- an acceptable type of virus-checking software must be used
- each party and the arbitrator should supply one email address for the purposes of communications
- all communications sent to the arbitrator should be copied to the other side
- communications sent to the other side should not be copied to the arbitrator unless it is necessary for them to see them
- all communications to and from the arbitrator should be acknowledged to establish safe receipt
- during periods of absence, out-of-office assistants should be used
- the time of service of the documents sent electronically shall be deemed to be the time of receipt by the arbitrator
- a typed name (or electronic signature) in an email will be regarded as the authenticating signature of the named sender
- email chains should not be sent to the arbitrator, to avoid inadvertent inclusion of without prejudice material
- where documents are attached to emails, (i) they should not exceed a certain size (to be agreed by reference to each party's receiving capacity); (ii) documents that are too large for attachment should be sent separately in hard copy; (iii) the documents should be in

an agreed format that all recipients can open and read; and (iv) any further drafts of such documents should be clearly marked as such (e.g. 'Mk 2') to assist with identification

- where documents are supplied as images, the file should be clearly identified with the format used and should always be subject to detailed agreement of procedures between the parties prior to transmission
- the arbitrator should state in their directions that a specified period, say five working days, is to elapse before they will examine the documents, during which either party may object to the admissibility of any evidence. This gives each side the opportunity of checking the opposite side's documents to ensure that they do not disclose 'without prejudice' negotiations.

11.8 Communications protocol – service of notices and documents by means other than email

In the absence of an agreed email communications protocol (see 11.7), any notice or document may be served on a person by any effective means. A notice or document addressed, pre-paid and delivered by post to the addressee's last known principal address, or to their registered or principal office, is treated as effectively served (s. 76 of the Act). If this is not reasonably practical, the court procedure is available, as set out in s. 77 of the Act.

The arbitrator should lay down rules regarding documents that are served in this manner. The alternative ways of lodging documents that are in common use are either to provide two copies to the arbitrator, who then sends one copy to the opposing party, or for the parties to exchange documents such as representations direct and then send a second copy to the arbitrator at a slightly later date. An alternative to the second method is that representations are exchanged in the arbitrator's office.

Whichever method is chosen, the arbitrator should state in the directions that a specified period, e.g. five working days, is to elapse before the documents will be examined, during which either party may object to the admissibility of any evidence. This gives each side the opportunity of checking the opposite side's documents to ensure that they do not disclose without prejudice negotiations. The arbitrator may require duplicate representations to be marked: the original as 'original' and the copy 'confirmed a true copy' and signed to that effect. This is to ensure that the responsibility for producing identical documents is in the hands of their author.

11.9 Request to defer proceedings

If both parties request the arbitrator, in writing, not to take any action, then they should defer to their wishes, but may remind them of their duty under s. 40 to do all things necessary for the proper and expeditious conduct of the proceedings. The arbitrator should inform the parties that they will proceed on the application of either party at any time. The arbitrator's duties under s. 33, or indeed the parties' duty under s. 40 (see 20.2), however, should not be neglected. Parties should be required to provide regular updates.

12 Agreeing the facts

12.1 Agreeing facts

The presentation of evidence is time consuming and therefore costly. Moreover, it may give rise to complex issues relating to the law of evidence. There are great advantages in persuading the parties at the preliminary meeting to agree facts, including the facts of comparables, to the greatest possible extent so that the arbitrator can concentrate on the presentation of the rival arguments and their evaluation.

To this end, the arbitrator should direct (if, rarely, the parties do not agree) that a statement of facts should be agreed at the earliest possible opportunity, together with a list of those matters of a factual nature that cannot be agreed (see 12.4), and the reasons for the disagreement.

12.2 The facts that are to be agreed

The facts that should be agreed will vary depending upon the complexity and type of dispute. In most common rent review scenarios, however, matters such as the appropriate basis of measurement, building description, user rights (including planning user) and comparable evidence (see 12.3) will normally be material, and there is no reason for not agreeing the facts relating to them.

The agreement should be recorded in writing.

12.3 Comparable evidence

The agreement by the parties of a list of comparable evidence is an important part of the arbitration. The purpose of agreeing such a list is twofold. First, it helps to narrow the room for contention in the arbitration (and hence helps to save costs). Secondly, it removes the potential for one party to ambush the other with late evidence that the other will find difficult to rebut in the time available.

The arbitrator should direct that the evidence should be presented in a uniform manner and presented as a single schedule. They should emphasise to the parties that their agreement to the inclusion by the other side of a piece of evidence in the list will not be taken as an admission that the evidence is relevant.

The following headings should be considered as a convenient way of structuring the list of comparable evidence:

- a** the address of the property
- b** the identities of the parties and any agents

- c** a brief description of the property (including its age and construction, floor areas, and any amenities and ancillary services)
- d** the nature of the comparable evidence, e.g. an open market letting; a rent review; the failure of a property to let
- e** the figure which has been agreed or determined (or not, as the case may be)
- f** in the case of a new letting, the dates when the terms were agreed and when contracts were exchanged
- g** the amount of any rent-free period granted, any capital contributions made or any other incentive
- h** in the case of a rent review or lease renewal, the date of the lease, the term commencement date and the length of term
- i** relevant details of terms and conditions in the lease documents which might affect rental value
- j** any relevant matter not recorded elsewhere (e.g. in side letters, related transactions) which affects value.

12.4 Matters that cannot be agreed

There will of course be some matters that cannot be agreed, although these will tend to be views that are dependent upon the facts (such as the correct method of devaluation) rather than the facts themselves. The arbitrator should however impress upon the parties that any failure to agree should be despite the parties' attempts to narrow the range of their differences, and not because they have not made those attempts in the first place.

Where the facts cannot be agreed it will assist the arbitrator to be informed of the reason for the disagreement, and they should therefore include a direction to this effect. Having to justify a stance taken in relation to a fact that cannot be agreed will often give the parties the necessary impetus to reconsider their stance.

13 Dealing with points of law and other technical issues

13.1 Introduction

The arbitrator has the power to appoint legal advisers and other experts to report to them, or to appoint assessors to sit with them to assist on technical matters, unless the parties agree otherwise.

The arbitrator is required to disclose any legal advice obtained and allow the parties a reasonable opportunity to comment (see s. 37(1)(b) of the Act).

The fees and expenses of such persons appointed by the arbitrator are for the account of the arbitrator and will therefore need to be recovered from the parties as part of the costs of the arbitration. The following are matters that the arbitrator should consider in that regard:

- a** obtaining an estimate of what the costs are likely to be (including the drafting of instructions, the fee for the advice itself, and any discussion concerning it), and how long it will take for the advice to be obtained, and giving the parties the opportunity to comment
- b** informing the parties that the costs of taking the legal advice will form part of the costs of the arbitration for which they will both be liable in the first instance (that is to say, until liability for costs is finally determined) on a joint and several basis
- c** seeking an interim payment from the parties to cover the costs rather than waiting until the award is finalised.

13.2 Disputes involving issues of law

Although most rent review arbitrations involve only issues of valuation, some may raise one or more points of law, such as the interpretation of the rent review clause or the admissibility of evidence. When a point of law is raised, the arbitrator should require the party raising it to provide it in writing and to send a copy to the other party. The arbitrator should then seek to agree with the parties (and, in the absence of agreement, determine) the exact nature of the point of law (including the formulation of the issue) and how it can best be resolved.

The following are the main possibilities:

The arbitrator may decide the legal issue after considering submissions from both parties.

The decision could then either be given as a separate award on the preliminary point of law, or it could be incorporated into the substantive award on rent. The arbitrator should raise

with the parties the benefit that might be associated with making an alternative award, but should only then proceed to do so if the parties agree.

The parties may request the arbitrator to take legal advice on the issue (or the arbitrator may independently decide to do so) before making the award (see 13.5).

The point may be decided by the court as a preliminary point of law (see 13.6).

The parties may agree after the dispute has arisen that no reasons shall be given for the award, in which event this will exclude the court's jurisdiction, with the result that the parties will then be bound by the arbitrator's decision on the issue.

13.3 Disputes involving other technical issues

The same analysis as in 13.2 applies to any other facet of the arbitration that appears to require special expertise in its determination (e.g. the remaining life of M&E plant). Here, too, the arbitrator should follow one of the different ways of proceeding set out in 13.2.

13.4 Procedure in relation to legal or technical issues

If an arbitrator intends to decide a legal or technical issue, they should consider whether a different approach is required in relation to the issue, compared with the case management in relation to the arbitration as a whole (see section 8).

In particular, the arbitrator will wish to consider with the parties whether:

- a hearing will be required, or whether the issue will be determined on the basis of written reports/submissions alone
- statements of case will be required
- it would be appropriate to direct that facts should be agreed in relation to that issue
- disclosure is required in relation to that issue
- sequential exchange of evidence is appropriate
- sequential or simultaneous service of submissions is appropriate.

13.5 Using a legal or technical assessor

In straightforward cases, the arbitrator need do little more than set down the timetable for submissions and counter-submissions to be provided to the chosen assessor. Following receipt of the assessor's advice on the point at issue, the arbitrator must disclose it to the parties for their comments (see s. 37 of the Act). The arbitrator should consider any comments made by the parties (in conjunction as necessary with an assessor). If there is any modification to the advice as a result of that process, the arbitrator may find it necessary to revert to the parties. At the end of that process, the arbitrator must decide whether to accept the advice.

In the more complicated cases, the arbitrator and the assessor may need to meet to discuss a number of matters. The arbitrator may have a far greater understanding of the nature of the background problem, including a feel for the real difference between the parties, which will inform the thinking of the assessor. Such matters may include the following:

- The issue: has this been correctly defined by the parties, or does it not quite cover the point that is really at issue?
- The evidence: is there sufficient material available for the assessor to be able to decide the issue, or is further material (e.g. any agreement for lease; the planning status of the premises) needed?
- The submissions: do these reveal any deficiencies in the approach that has been taken that will require questions to be asked of the parties?
- The draft opinion: it will often be prudent for the assessor to supply their opinion in draft to the arbitrator, and for them then to meet to discuss the views before the final version is issued.

13.6 Referral to court

As an alternative to the preliminary point being decided by the arbitrator, it may be decided by the court under s. 45 of the Act. This is only possible if:

- the parties agree or
- the permission of the arbitrator has been given and the court is satisfied that determining the question will produce substantial savings in cost and that the application has been made without delay and
- no agreement has been made to dispense with reasons for the arbitrator's award.

Unless otherwise agreed by the parties, the arbitrator may continue the arbitration proceedings and make an award while an application to the court under s. 45 is pending. It would obviously be wrong to do so if the remainder of the arbitration depends upon the outcome in relation to the preliminary issue.

13.7 The raising of legal issues as a means to delay

The arbitrator should bear in mind when a point of law is raised that this may merely be an attempt to delay matters. There should be no hesitation, therefore, in being robust in considering whether there is any merit in the point and in deciding whether to determine the point themselves, to seek legal advice, or to grant permission for a party to have the matter decided by the court. The arbitrator will wish to bear in mind that if they do decide the point themselves, and the parties accept it, much time and expense will have been saved. If either party does not accept the decision, then their remedy is to seek leave to appeal the point under s. 69 of the Act.

14 'Documents only' arbitrations

14.1 Introduction

The arbitrator will have established during the course of the preliminary contact with the parties (see p11.5(d)) whether the parties wish to have their dispute determined by way of written representations or an oral hearing.

This section deals with the procedure that will govern an arbitration by written representations. Arbitrations by oral hearing are dealt with in Section 15.

14.2 Terminology

A 'documents only' arbitration (also referred to as one conducted by means of 'written representations') is, as the expression suggests, one that avoids the more expensive and inconvenient alternative of a hearing. The dispute between the parties is conducted on paper, without a hearing, through exchange of evidence and submissions. These documents are often referred to generically as 'representations' (and 'cross-representations' in the case of documents in rebuttal), but this term is unfortunate since it tends to blur the important distinction between expert evidence, on the one hand, and submissions (or argument) on the other, to which entirely different rules of professional conduct apply (see Section 9).

It would be better practice to require surveyors to use more appropriate, dedicated terms to describe the relevant sections of the documents – e.g. 'Proof of Evidence', 'Opinion' or 'Report' for the section dealing with their evidence, and 'Submissions' or 'Argument' for the remainder.

Nevertheless, the term 'Representations' is so familiar as a generic concept that it is used for convenience in this section to indicate the different types of document that will be exchanged by the opposing sides.

14.3 Form of written representations

The most helpful written representation will be one that is organised in the following way:

- labelled, so that it is possible to tell from its cover the author, date, subject matter and party on whose instructions it is made
- paginated, with numbered paragraphs, for ease of reference and cross-reference
- concise, with no duplication of material that is found in the statement of agreed facts, and no lengthy recitation of lease terms

- appropriately divided, with separate sections dealing as necessary with opinion and argument.

The arbitrator should make these points at the preliminary meeting or in their directions, in order to ensure, so far as possible, ease of use.

It is suggested that a copy of the representation is delivered electronically in pdf format. It is sometimes helpful to have specific parts, e.g. schedules of evidence, reproduced in a form that the arbitrator can edit or add comments to, as this saves cost and time.

14.4 Content of written representations

In addition to the points made in 14.3, the arbitrator should also make it clear that they will require the content to comply with the following further rules:

- it should be moderate in tone, avoiding pejorative and hyperbolic criticism of the other side
- it should not contain inadmissible material such as reference to 'without prejudice' negotiations (see paragraphs 17.5 and 17.6)
- in the case of expert evidence, it should comply with RICS' *Surveyors acting as expert witnesses* (see 9.2)
- in the case of advocacy, it should comply with RICS' *Surveyors acting as advocates* (see 9.3).

In these days of both metric and imperial measurement, it is also advisable to direct that one standard should be used to achieve consistency between the parties.

14.5 Directions

Section 34(1) empowers the arbitrator to decide all 'procedural and evidential matters' (listed in s. 34(2)), subject to the right of the parties to agree any matter. Accordingly, the arbitrator should establish at the earliest possible stage what procedural matters have been the subject of agreement between the parties. Subject to any such agreement, the arbitrator must exercise their power under s. 34, having regard to their duty under s. 33. The arbitrator should enlist the parties' cooperation in reaching agreement on directions, reminding them, where necessary, of their duty under s. 40 to do all things necessary for the proper and expeditious conduct of the proceedings.

Whether or not a preliminary meeting is held, in preparing their directions the arbitrator should consider the applicability of the following matters:

- a any requirements of the arbitration agreement
- b the relevant communications protocol (see paragraphs 11.6 to 11.8)
- c the documents to be agreed and put before the arbitrator
- d the date for service of a statement of agreed facts (see Section 12)

- e** that, in advance of service of representations, any comparable transaction intended to be relied upon by a party shall be disclosed to the other party; the parties to agree the like details (as in 12.3) with respect to each comparable transaction. As to agreeing facts generally, see Section 12 that any 'without prejudice' negotiations or offers or other privileged material, whether oral or contained in correspondence, shall not be referred to in the representations
- f** where either party wishes to raise any point of law (e.g. as to the meaning of the rent review clause) affecting the dispute, how the point is to be resolved. As to disputes involving issues of law, see Section 13
- g** the timetable and mechanism for service upon the arbitrator and each party of their representations and cross-representations
- h** what rules of evidence are to apply (see Section 16)
- i** whether awards and expert determinations will be admissible
- j** a reminder concerning the duties of surveyors acting as expert witnesses and/or as advocates (see Section 9)
- k** the arbitrator's requirements for inspecting the subject property and comparables (see Section 21)
- l** unless otherwise agreed the arbitrator's right to call for a hearing if at any time they consider it necessary (see 8.8)
- m** whether the parties wish to dispense with the requirement for reasons
- n** whether the award will be a final award dealing with all matters in issue, including the costs of the arbitration, or an award with the costs of the arbitration reserved if not agreed but otherwise final on the substantive issue(s) in the award (see Section 22)
- o** that the award will only be released upon payment of the arbitrator's fees and costs
- p** unless agreed otherwise, the right for the arbitrator to impose a cap on the costs (see 25.10)
- q** whether and if so which offers to settle will be regarded as 'near miss' offers (see 25.10)
- r** unless agreed otherwise, the right for the arbitrator to issue such further directions as they think necessary, together with liberty for the parties to apply for variations or further directions.

The amount of the arbitrator's fee and the basis for evaluating it is best set out in a separate letter to the parties and is not usually included in the directions (see 6.9).

14.6 Directions to be confirmed in writing

When the procedural matters outlined above have been decided (whether by agreement or by decision of the arbitrator) the arbitrator should confirm them in writing, and tell the parties that, unless they are informed to the contrary, the directions reflect the scope of matters agreed at the meeting.

14.7 Exchange procedure

The arbitrator must specify in their directions a suitable procedure for exchange of written representations (see 14.5(h)). This should ensure that all communications with the arbitrator are also copied to the other party, in accordance with the chosen communications protocol (see paragraphs 11.6 to 11.8). This will apply to written representations as much as to any other document.

14.8 Allowing time for objections

As paragraph 11.8 also explains, whichever method of communication is chosen, the arbitrator should state in their directions that a specified period, say five working days, is to elapse they will examine the parties' written representations and cross-representations, during which either party may object to the admissibility of any evidence.

This gives each side the opportunity of checking the opposite side's documents to ensure that they do not disclose 'without prejudice' negotiations, or other inadmissible material.

14.9 Cross-representations/ replies

This second stage of the exchange of documents between the parties is ordinarily limited to comments upon the initial written representations. For that reason, these documents are commonly referred to as 'cross-representations' or 'counter-representations', although they may also be called 'counter-submissions' (where they deal with advocacy) or 'points of reply' (where they deal with evidence).

The arbitrator may need to make it clear that cross-representations should not contain representations or evidence other than in rebuttal of the points made in the opposing party's initial representations. In order to emphasise this matter the arbitrator may find it useful to provide a specific direction dealing with the admissibility of late evidence and the opportunity of the other party to comment on it.

14.10 Further written representations

It is important that the arbitrator make it clear (subject of course to the parties' right to agree otherwise) that there should be a limit to the opportunity to file documents in rebuttal.

Nevertheless, parties sometimes deliberately use the opportunity afforded by cross-representations to ambush their opponents by including fresh material. In such

circumstances, the arbitrator should be prepared to indulge the party taken by surprise by allowing an opportunity for further written representations, should that be requested.

In other cases, an unforeseen approach taken by the opposing party's representations may leave little alternative but for the party to adduce fresh evidence in response in its cross-representations. Here too the arbitrator may consider it appropriate to allow further written representations to deal with that fresh evidence.

These practices are clearly inappropriate, since they tend to prolong the arbitration and increase cost. The arbitrator should therefore seek to control them by directing that:

- a** the cross-representations are to be used for points of rebuttal only
- b** if fresh evidence is adduced in cross-representations, an opportunity for further written representations may be afforded to the other party
- c** any increased costs incurred as a result of the breach of the directions may be awarded against the transgressing party.

15 Arbitration by oral hearing

15.1 The right to a hearing

There is no automatic right to a hearing under the Act (see s. 34(2)(h)). The following situations may be distinguished:

- if both parties agree that there should not be a hearing, the arbitrator has no power to overrule them, and a hearing cannot take place
- if both parties agree that there should be a hearing, again the arbitrator has no power to overrule them, and a hearing must take place
- if the parties cannot agree, then the matter is to be decided by the arbitrator, using their discretion as to whether a hearing would be a better way of resolving the issues, in the light of the parties' arguments.

The question whether a hearing would be appropriate (as to which, see 8.8) should be kept under review. It may appear inappropriate for there to be a hearing in the initial stages of the arbitration, but that view may change as the arbitration progresses, the parties' evidence unfolds, and their representations are developed. In particular, if preliminary issues have been decided, and the main arbitration is then set to continue, it may be appropriate to hold a short meeting to tie up any loose ends at that stage.

If the parties agree there should be a hearing, or if the parties disagree and the arbitrator decides that there should be one, the following additional matters set out in this section may need to be considered.

15.2 Privacy

An arbitration is a private tribunal, and the only persons entitled to attend are the parties themselves and those whose attendance is required in order to assist the parties in presenting their cases, whether as advocates or witnesses. Other persons, e.g. students or pupils, may only be present with the consent of both parties and the arbitrator. The arbitrator should bear this consideration in mind, and be prepared to make such directions as the circumstances merit in order to preserve privacy.

15.3 Directions for the hearing

Given that the arbitration is to take the form of a hearing, it is considered that it would be good practice for there to be a preliminary meeting, following which the arbitrator should issue directions (where possible, by agreement of the parties). Many of the matters suitable for such directions are equally applicable to an arbitration that proceeds by way of written representations (see the procedural steps discussed in section 14). The directions for the

hearing should therefore be bolted on to that structure, although careful thought should be given as to how the steps in the timetable are to be sequenced.

The arbitrator should establish at the earliest possible stage what procedural matters have been the subject of agreement between the parties. Subject to any such agreement, the arbitrator should exercise their power under s. 34(1) to decide all procedural and evidential matters, having regard to their duty under s. 33. The arbitrator should enlist the parties' cooperation in reaching agreement on directions, reminding them where necessary of their duty under s. 40 to do all things necessary for the proper and expeditious conduct of the proceedings.

The additional matters to consider in directions for an oral hearing, although not all the topics will need to be covered in less complex cases, are as follows:

- statements of case – see 15.4
- exchange of witness statements – see 15.5
- exchange of expert evidence – see 15.6
- directions regarding evidence – see section 16
- exchange of skeleton arguments and authorities – see 15.7
- arrangements for the hearing – see 15.8
- procedure at the hearing – see 15.9
- the desirability of having closing submissions in writing – see 15.14.

15.4 Statements of case

Whereas in a 'documents only' arbitration written representations will be a combination of factual evidence, expert opinion evidence and legal arguments, an oral hearing will require a more detailed and wide-ranging approach to the documents required. The service of 'statements of case' (i.e. the points of claim and replies) may be an appropriate way to identify and narrow the issues. If so, this would normally be undertaken by a solicitor or counsel.

The directions required regarding such statements might include the sequence and dates by which each party is to serve upon the arbitrator a copy of their statement and answers. The procedures and timetable should be designed to meet the requirements of the case. Typically the claimant should deliver points of claim by a specified date, then the respondent should deliver points of defence within a specified number of days thereafter, with possibly the claimant delivering points of reply to defence within a further specified period.

15.5 Witness statements

If the evidence of fact cannot all be agreed, there may need to be a direction for evidence to be given by way of witness statements, to cover the evidence that either party needs

formally to prove. Such a direction will ordinarily allow each party to provide witness statements by way of simultaneous exchange.

The arbitrator will need to devise a timetable for this that will allow a reasonable period of time for the parties first to attempt to agree the facts in question, while leaving enough time for the service of expert evidence and submissions that will ordinarily follow the provision of witness statements.

15.6 Expert evidence

In a more complex case, it will not be appropriate for the parties to combine their expert evidence and advocacy in one document, as is commonly the case with written representations. Instead, the arbitrator should consider with the parties the desirability of exchanging expert evidence separately, coupled with a direction that the experts meet in an endeavour to narrow the issues.

The arbitrator may also need to be prepared to deal with a request for the provision of evidence by multiple experts from different disciplines, and to consider how such evidence should be sequenced. The arbitrator may find it necessary to strike a balance between the need to allow each party a fair opportunity properly to present their case, on the one hand, and the avoidance of unnecessary delay and expense, on the other (see s. 33 of the Act).

15.7 Skeleton arguments and authorities

An oral hearing will only have been arranged in the first place because the dispute is contentious and raises points of particular difficulty. In those circumstances, the arbitrator may find it helpful to require the parties to provide them with skeleton arguments setting out a summary of the issues and their arguments in relation to them. Ideally, such skeleton arguments should be exchanged at least a few days before the hearing.

If the case involves points of law, and the parties propose to cite authority in support of the propositions they intend to advance, then the arbitrator should direct the parties to give sufficient notice (and preferably copies) of the authorities to the other side as well as to the arbitrator.

15.8 Arrangements for the hearing

The arbitrator will need to form a view at an early stage (to be reviewed periodically as necessary) how much time should be set aside for the hearing, both in order to assist the parties with their time management, and to allow for the necessary accommodation to be arranged.

The arbitrator will need to ensure that the parties are organising appropriate facilities for the hearing. These will include:

- the selection of a venue that will meet both parties' needs and preferences as far as possible
- the provision or hire of appropriate numbers of suitably sized rooms for the hearing itself, the parties and the arbitrator
- the provision of lunch and other refreshments
- adequate supplies of chairs and tables
- holy books and other materials for the taking of oaths and affirmations (see 15.11)
- provision for a stenographer (see 15.14)
- other facilities such as display boards, projectors and microphones.

15.9 Procedure at the hearing

The usual procedure at a hearing is set out below.

- The arbitrator opens the proceedings and announces the arrangements for the hearing. It will be helpful if arrangements (e.g. the order of appearance of the witnesses) have been discussed and agreed with the parties beforehand. It may well be beneficial for an administrative meeting with the parties to be held in good time before the hearing specifically for this purpose.
- The claimant or their representative opens and presents their case and, where appropriate, their reply to any counterclaim, probably by summarising their case upon each.
- The claimant calls their first witness and examines them upon the evidence given.
- The respondent cross-examines the witness.
- The claimant may re-examine the witness by asking further questions, but only on matters arising out of stages (c) and (d) above.
- The arbitrator questions if necessary (see 15.12).
- The arbitrator gives each party the opportunity to ask questions arising out of the witness's answers to the arbitrator's questions.
- Stages (c)–(g) are repeated for each subsequent witness.
- The respondent outlines their case if they wish.
- Stages (c)–(g) are repeated for this and for each subsequent witness called by the respondent.
- The arbitrator raises any matter within their knowledge, not hitherto raised, that they consider relevant, and invites submissions on it.
- The respondent makes their final submissions (although in a more complex matter, it will usually be appropriate for the arbitration to be adjourned to allow both parties to

prepare written submissions, following which a further hearing to allow oral submissions accompanying the written submissions, and arbitrator's questions may be appropriate).

- The claimant makes their final submissions.
- The arbitrator closes the hearing and makes arrangements to inspect.

Arbitrators will wish to bear in mind that, in the interest of saving time and costs during the hearing in furtherance of the aim set out in s. 33 of the Act, it may occasionally be appropriate to warn the parties that disproportionate and prolonged examination or cross-examination of witnesses will be guillotined. This is a device which is sometimes used in litigation, and there is no reason why it should not be equally effective in arbitration.

15.10 Compelling witnesses to attend

Either party may, by agreement between themselves, or with the permission of the arbitrator, use the same procedures to secure the attendance of a witness and/or production of documents as would normally be available in legal proceedings (see s. 43 of the Act).

This is subject to the qualifications that the witness is located in the UK and the arbitration is being conducted in England, Wales or Northern Ireland.

Where the attendance of a witness or production of documents is not agreed between the parties it is necessary for the party seeking to adduce the evidence in question to apply to the arbitrator for their consent under s. 43, before the court can be asked to issue a witness summons (see paragraph 7.1 of the CPR 62 Practice Direction). Such applications are frequently made to circumvent confidentiality agreements found in comparable transactions, and often accompany applications for specific disclosure (see 17.6).

When considering an application for permission to serve a witness summons to require a party to attend to produce documents, the arbitrator will wish to bear in mind a number of considerations:

- the relevance of the documents
- the availability of other material that is or may be in evidence
- any privilege that attaches to the documents (see paragraphs 17.4 to 17.6)
- any confidentiality that attaches to the documents (see paragraph 17.9)
- the costs that may be associated with the production of the documents and the attendance of the witness
- whether the documents are necessary for the fair resolution of the matter
- whether the application will cause unnecessary delay or expense (see s. 33 of the Act)
- whether the application is speculative, or soundly based
- whether the application is otherwise oppressive.

An arbitrator should have regard to the s. 33 duty to afford each party a reasonable opportunity of putting its case in deciding whether to grant their consent to the application.

It should be noted that if the arbitrator grants the application, the court will then issue the witness summons as a matter of routine (provided that the purpose of the summons is to require the witness to appear at the hearing rather than on any other occasion, and is made at least seven days before the hearing – see CPR 34.3(2)). The issuing court has jurisdiction to set aside the summons upon application by the witness in question, and will do so notwithstanding the arbitrator's original consent if it considers that the summons is oppressive, or otherwise not necessary or relevant for the purposes of the arbitration – see CPR 34.4(3).

15.11 Oath or affirmation

It is routine for evidence in civil proceedings to be taken on oath. Section 38(5) of the Act provides that unless otherwise agreed by the parties the arbitrator may also take evidence on oath or affirmation, and it will be good practice to ensure that this is done, in order to emphasise the importance of giving full and truthful evidence.

The administration of the oath depends upon the religious beliefs of the witness, and before the hearing the arbitrator should enquire what religious books will be required for the swearing of evidence. In the event of difficulty, the representative of the party calling the witness should be asked to ensure that appropriate arrangements are made in advance. The most frequent wording required is:

‘I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.’

If the witness has no religious belief, or if their religious beliefs prohibit the swearing of an oath in these circumstances, they are entitled to affirm. In such cases, the witness should say or repeat after the arbitrator:

‘I solemnly, sincerely and truly affirm and declare that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.’

The oath or affirmation is normally administered by the arbitrator but there is no reason why this duty should not be carried out by one of the legal advisers. This will allow the arbitrator greater freedom to observe the demeanour of the witness at this point.

15.12 Conduct by arbitrator of the hearing

When an advocate is making a submission, it is helpful, and can considerably shorten the time, if the arbitrator indicates, as each point is made, whether or not the point has been understood and whether or not they provisionally agree with it. But if the advocate has been ‘stopped’ on a point, by giving such an indication, the arbitrator should not find against the advocate on that point without giving an opportunity to make further submissions on it, if necessary at a further hearing.

The arbitrator should always seek clarification of a point they do not understand. On the other hand, they should be careful not to interrupt the submission to such an extent that the advocate is prevented from putting a coherent case.

15.13 Where a surveyor is both advocate and expert witness

A difficulty for the arbitrator may arise in a hearing where a party is represented by a surveyor acting both as witness and as advocate (see section 9). The arbitrator and the parties' surveyors should, at all times, seek to distinguish between the two roles and to establish in which capacity the surveyor is acting at any one time.

A surveyor will be acting as an advocate when opening the case, summing up, or when cross-examining the expert surveyor acting for the other party. S/he will be acting as an expert witness when giving evidence or expressing an opinion, and will be subject to cross-examination when doing so.

It may help both the surveyor and the arbitrator (and indeed the other party) if the surveyor occupies a different seat or position when giving evidence from when making submissions (or, if this is too disruptive, by standing when making submissions and sitting when giving evidence).

The problems encountered, and the duties to be observed, when a surveyor is acting as an advocate, are addressed in RICS' *Surveyors acting as advocates*.

15.14 Note of evidence and argument

The arbitrator should have a sufficiently full note of the evidence and arguments to enable them to make a reasoned award dealing with the substance of the case made by each party.

The arbitrator should either make detailed notes of evidence and arguments, or (with both parties' consent) arrange for a shorthand writer familiar with property terminology to record the proceedings. In very substantial matters it may be desirable to have a note taken by professional stenographers. Although this is an expensive course, the delay involved in slowing down the proceedings so that the arbitrator may take a note may be more expensive than the cost of employing stenographers.

Even when a complete transcript is being made, the arbitrator should still take sufficient notes to later reference any material points that need clarification during the hearing.

16 The rules of evidence

16.1 Introduction

In an attempt to ensure that evidence given to the court is relevant, truthful and given fairly, certain 'rules' have evolved, some of which (such as the *Civil Evidence Act 1995*) are statutory in origin, while others (such as the CPR) have been devised by the courts. Such rules govern the admissibility, relevance or weight of material submitted to the court, and the time, manner and form in which it is presented.

The position in arbitration is different. Under s. 34(1) of the Act, subject to the right of the parties to make their own agreement on these matters, it is for the arbitrator to decide whether to apply strict rules of evidence as to admissibility, relevance or weight of evidence. The arbitrator is therefore allowed considerable latitude in relation to the rules of evidence. The essential task for them is to require parties to prove their assertions (whether as to fact or opinion) without undue formality, unless of course the parties agree otherwise. It is then for the arbitrator to evaluate the evidence (see Section 18).

In practice, the rules with which the arbitrator must be familiar (in order to be able to understand whether to apply them or not) are as follows:

- the rules regarding hearsay evidence (see 16.3)
- the (so-called) strict rules of evidence (see 16.4)
- the rule concerning the burden of proof (see 16.5)
- the treatment of post-review date evidence (see 16.6)
- the rules concerning the admissibility of arbitrator's awards or independent experts' determinations (see 16.7)
- the rules regarding disclosure and privilege (see section 17).

16.2 The arbitrator's choice as to which rules of evidence should apply

Subject to the parties' right to agree which rules of evidence should apply, the arbitrator has a free hand as to which of the rules referred to in 16.1 should be selected. The principal options are, in descending order of strictness:

- a that all facts should be properly proved
- b that the so-called 'strict rules of evidence' derived from the *Civil Evidence Act 1995* should apply
- c that a specially tailored set of rules should apply or

d that there will be no rules of evidence.

Options (a) and (b) are often perceived as unduly technical in rent review arbitrations, and may prove difficult to apply in practice where parties' representatives are not legally qualified or experienced in such matters. If the rules adopted are too strict and rigid, unnecessary and undesirable barriers may be erected that prevent or significantly increase the difficulty and cost of a party presenting a piece of relevant evidence to the arbitrator. An example might be requiring 'strict proof' of a comparable from someone with direct personal knowledge of the transaction when the relevant facts of the transaction were common knowledge and agreed between the parties.

On the other hand, if the rules of evidence adopted are too lax, the value of the evidence itself may be diminished because the arbitrator cannot be sure of its reliability and probity. For example, if uncorroborated hearsay evidence of an important comparable transaction is accepted from one party, how can the arbitrator be sure that all relevant details, including possible inducements, have been revealed? The possibility of incomplete or misleading evidence (whether by innocent mistake or deliberate manipulation) is increased. Moreover, even if option (d) is chosen, this does not mean that privileged material should be admitted. The rules on privilege are based on the public policy that parties should be free to obtain advice and prepare for proceedings, and encouraged to settle their differences, without fear of prejudicing their position in a dispute.

In these circumstances, the arbitrator will often wish to direct (and the parties will often consent to) the third option – a practical and cheap solution tailored to the facts of their dispute. An example of this – the giving of evidence through the use of proformas – is discussed in 16.8.

It is however important for the arbitrator to keep an open mind regarding which of these approaches should be adopted. For example, if it is clear that the primary dispute is going to revolve around the exact factual circumstances of a particular comparable transaction, and these are hotly disputed, then it may be appropriate to direct that the facts should be strictly proved, even if this would be exceptional in other circumstances.

16.3 Hearsay evidence

Hearsay evidence is second-hand evidence, which is obviously less satisfactory than evidence given by someone with direct knowledge of the evidence in question. The *Civil Evidence Act* 1995 allows hearsay evidence to be given in civil litigation, with certain safeguards as to notice, and leaves it up to the tribunal how much weight should be accorded to the evidence.

In more detail, the *Civil Evidence Act* 1995 does three things.

- a** it allows hearsay evidence in civil proceedings in principle
- b** it requires a party that wishes to adduce hearsay evidence to serve notice on the other party, giving particulars of this evidence. Although a failure to comply with this requirement will not affect the admissibility of the evidence, it may, however, be

taken into account by the tribunal in the exercise of its powers in connection with the proceedings and costs

- c it sets out guidance as to the weight to be given to hearsay evidence. Generally, the tribunal is required to have regard to any circumstances from which any inference can be drawn as to the reliability of the hearsay evidence. Specifically, it is required to have regard as to whether:
 - i it was reasonable and practicable to produce the maker of the original statement
 - ii the statement was made contemporaneously with the occurrence or existence of the matter stated
 - iii the statement involves multiple hearsay
 - iv there was a motive as to concealment or misrepresentation
 - v the statement is edited or is the result of collaboration and
 - vi the circumstances in which the evidence is produced are such as to suggest an attempt to prevent proper evaluation of its weight.

This emphasis on weight rather than admissibility is a matter which should commend itself to arbitrators in particular, since they have the technical expertise with which to evaluate evidence. The 1995 Act provides a comprehensive framework which can be imported into arbitration with simplicity and clarity. A direction that 'the rules of evidence in this arbitration shall be governed by the *Civil Evidence Act 1995*' will suffice. Alternatively, a direction that 'the strict rules of evidence will apply' (see 16.4) will achieve the same objective, since this is taken as a reference to the rules under the 1995 Act.

16.4 The 'strict rules of evidence'

Section 34(2)(f) of the Act provides that, subject to the right of the parties to agree any procedural or evidential matter, it shall be for the arbitrator to decide: 'whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented'. The expression 'strict rules of evidence' is here intended as a reference to the rules of court governing the treatment of evidence in civil litigation, currently contained in the CPR.

The description of these rules as 'strict' suggests that a rigorous approach to the admissibility of evidence would be appropriate (as in 'strict proof'). This is, however, quite wrong: the approach to such matters in the CPR is far from strict (principally because of the impact of the *Civil Evidence Act 1995* in relation to civil litigation, which virtually abolished the rule against hearsay – see 16.3).

The parties and the arbitrator should therefore avoid engaging in discussions as whether or not 'the strict rules apply' (which may only serve to confuse). It may instead be preferable to consider precisely how information may be rendered admissible, and how it is to be treated.

It is open to an arbitrator in appropriate circumstances (unless the parties agree otherwise) to direct that the rules should be truly 'strict' – i.e. that facts should be strictly proved without any hearsay at all. This will be rare, but may be warranted where the arbitrator has reason to believe that the hearsay evidence will be tainted in some way.

16.5 The burden of proof

Whatever the strictness of the rules of evidence that are to be applied in the arbitration, it nevertheless remains the case that the burden of proof of an assertion lies upon the party making the assertion. If, for example, in relation to a rent review clause containing a standard form disregard of improvements, a tenant contends (a) that certain parts of the premises were improved by it and should therefore be disregarded, the burden of proving the fact of the improvement falls upon the tenant. If the landlord then asserts (b) that, even if the tenant carried out the works, they should not be disregarded because they were carried out pursuant to an obligation owed to the landlord, the burden of proving that assertion will then fall upon the landlord.

16.6 Evidence of transactions occurring after the review date

The task confronting the arbitrator is usually to value the rent as at a certain date – the review date. By the time the arbitrator comes to carry out that task, it may be some time after the review date, and many things may have happened which one party or the other may contend shed light upon the rental value at the review date.

There are no formulaic rules that apply to the question as to what events occurring after the review date may be taken into account. Instead, the question is simply one of causation. If an event in question was wholly unforeseeable at the review date, then it should not be taken into account. By contrast, if an event had its roots in the market at the review date, so that it may be said to be affecting the market at the review date, then it should obviously be treated as relevant to that extent. Post-rent review transactions may reflect either or both types of events.

The weight to be given to such evidence is a matter for the arbitrator to assess in the light of their experience and knowledge of the relevant market. The fewer events that have occurred, the greater the weight is likely to be, but the longer the period between the valuation date and the date of the transaction, the less weight the evidence is likely to carry with the arbitrator.

For a more detailed consideration of post- review date evidence, see Chapter 7 of the *Handbook of Rent Review*.

16.7 The admissibility of arbitration awards and independent expert determinations

Arbitrator's awards and independent expert's determinations (and, for that matter, the decision of a court as to the amount of the rent payable on a lease renewal under Part II of the *Landlord and Tenant Act 1954*) may be said to be inadmissible, because they are of insufficient relevance to the issue in the present arbitration.

In practice, parties often agree to allow such evidence to be put before the arbitrator. Where they do not, the arbitrator may have to decide for themselves to what extent the evidence is admissible, given the authorities on the subject, and given the wide discretion conferred by s. 34. The matter is best dealt with at the preliminary meeting and in the arbitrator's initial directions (see 11.5). If the point arises later, further directions and perhaps a short meeting may be necessary.

Where awards or expert determinations are agreed as being admissible, it is still for the arbitrator to decide the weight that will be given to that evidence.

16.8 'Late' evidence

It will sometimes be the case that a party will seek to adduce evidence after the date set out in the arbitrator's directions. Sometimes this will be because the evidence in question has only just come to the attention of the market; at other times it will be because of the incompetence or inadvertence of the party concerned; it may on occasion be part of a deliberate tactic, in a bid to take the other side by surprise.

The arbitrator's task is typically to determine the market rent in accordance with the evidence, and it would frustrate that purpose to refuse to admit such evidence, merely because it is late. The approach should be that if the evidence is relevant (as to which, see in particular 16.6), it should be admitted, regardless of the reason for its lateness. The arbitrator should then consider (a) the extent to which the other side should be given an opportunity to respond to the late evidence; and (b) whether the other side can and ought to be compensated for any additional costs which it may have had to incur as a result of the failure to adduce the evidence at an earlier stage.

16.9 The giving of evidence by proforma or schedule

The most appropriate course for the arbitrator to take in the usual rent review arbitration where there is a simple dispute as to value based upon a number of comparable transactions, will be to direct that the parties agree between them the facts of the comparable transactions relied on by each party. In this way, most of the potential difficulties arising from rules of evidence can be circumvented by the parties agreeing the facts relating to comparable transactions before the hearing or before exchange of written representations.

A frequently used format is for each party to provide the other with a list of comparables on which it intends to rely, together with the relevant details of them. This gives the opposing party an opportunity to validate the evidence, following which both parties will be in a position to agree a joint schedule of the details relating to both parties' comparables. An added advantage is that such a process prevents the use of tactical surprise evidence in the arbitration. Late evidence not included in the joint schedule should only be admitted at the arbitrator's discretion. If in exercising this discretion the arbitrator were to decide to admit the late evidence, they should ensure the opposing party has adequate opportunity to investigate and comment on the new evidence.

Evidential difficulties will only arise where the parties are unable to agree all the comparable evidence in this way. As 16.2 suggests, a practice that is frequently adopted is to allow in evidence details of comparable transactions if confirmed in writing and signed by someone with direct personal knowledge of the transaction. This procedure is not as reliable as it might appear, however, since surprisingly often letters and proformas signed by persons with supposed direct knowledge and not verified by the other party to the arbitration are incomplete, inaccurate, or misleading in some other way. The prevalent conception appears to be that this sort of 'confirmation' operates as 'strict proof'. This is incorrect and the arbitrator should make it clear to the parties that such relaxations in formality do not remove the need to ensure that the material in question has been thoroughly checked and is therefore of good evidential value.

Whether or not the parties are able to agree all the comparable evidence, they should deal specifically with the admissibility of awards and determinations relied upon (see 16.7).

17 Disclosure

17.1 Disclosure in litigation

Disclosure is an important feature of the English adversarial legal system. The particular features relevant to rent review arbitrations are discussed in 17.2. What follows here is a brief outline of the process as it applies in civil litigation. A fuller account can be found in CPR 31. Chapter 7 of the *Handbook of Rent Review* deals with disclosure in the context of rent review arbitrations.

Standard disclosure is the name given to the process where one party to litigation reveals (usually by providing a list) that a relevant document exists or existed. A document is relevant if the party disclosing it relies upon it to support their case, or if it materially undermines their case, or if it supports the other party's case. It is worth emphasising that fairness plays no part in this process: if a document falls within these categories it must be disclosed. Thus, the fact that a document may be confidential does not mean that it is exempt from disclosure – although it may be possible to redact confidential parts of a document if they do not fall within the categories that require disclosure.

Once a document has been 'disclosed' in this way, the other party to the litigation is then entitled to inspect it unless either it is no longer in the disclosing party's control, or there is a right to withhold inspection (e.g. where the document is privileged), or it would be disproportionate to allow inspection.

If one party considers that the other has not disclosed certain documents that it should have done, it may apply for 'specific' disclosure, identifying the documents in question, and setting out the reasons for disclosure.

17.2 Disclosure in arbitration

The arbitrator's power to order disclosure is conferred by s. 34(2)(d). This provides that (subject to the right of the parties to agree any procedural matter) it shall be for the arbitrator to decide 'whether and if so what documents or classes of documents should be disclosed between and produced by the parties and at what stage'.

As in the case of disclosure in litigation, the arbitrator can order either standard or specific disclosure. However, whereas in litigation standard disclosure is virtually automatic (as discussed in 17.1), it will not usually be appropriate to make such an order in a rent review arbitration. Instead, it is suggested that an order for specific disclosure (i.e. requiring a party to disclose specified documents or classes of documents) will usually be more appropriate, and then only if specifically requested by one or other of the parties. If a party requests disclosure the arbitrator should ask it to identify the document or documents they require

and its reasons for wanting it or them to be produced. The other party should then be given an opportunity to comment or object.

The two grounds on which applications for disclosure are most commonly resisted are lack of relevance and privilege (discussed in paragraphs 17.3 to 17.7). Even if a document is perceived to have some relevance, and is not privileged, the arbitrator should nevertheless consider rejecting an application for disclosure if the evidence is marginal, and the cost of the exercise would be disproportionate.

Any order for disclosure should specify first a date by which a list of documents must be made available and then a date by which the opposing party must be allowed to inspect and take copies.

17.3 Documents privileged from disclosure

A document is privileged if it falls within one of the recognised classes of privilege. The classes most relevant to rent review arbitrations are legal professional privilege (see 17.4) and without prejudice privilege (see 17.5 and 17.6). The arbitrator's recourse when apparently privileged material is disclosed is considered in paragraph 17.7. Confidentiality, which is a quite separate topic, is considered in 17.8.

No summary of these topics can do justice to what is a complex field that has prompted much litigation over recent years. If the arbitrator is in any doubt concerning the exact bounds of these classes of privilege, and their applicability to material of which disclosure is sought, they should consider taking legal advice.

17.4 Legal professional privilege

There are two types of material to which legal professional privilege applies:

- a** Legal advice communications: correspondence and other communications between a client and their solicitor that are generated for the purpose of giving or obtaining legal advice for the client are almost always privileged. By contrast, where a party instructs a surveyor to advise on the meaning of a rent review clause, that advice will not be privileged.
- b** Litigation/arbitration communications: if litigation or arbitration is in progress or is contemplated, then all discussions, communications, and other steps taken with the dominant purpose of assembling evidence for use by a legal adviser (whether solicitor or counsel) are privileged. For this purpose it does not matter between whom the communications took place. Thus, correspondence and other communications between a client and a third party (such as a surveyor) will be privileged from disclosure, provided that an arbitration is contemplated or pending, and the material was provided with the primary purpose of assisting in the preparation of a contemplated arbitration, but not otherwise. It is an open question whether the privilege will apply where the client is to be represented in the arbitration by a surveyor advocate rather than a lawyer.

Some examples may illustrate this categorisation.

- As a general rule, an expert's report provided for a client will be privileged, because it is likely to fall within category (b) above.
- A valuation made for a proposed acquisition of a property will probably not fall within either category (a) or (b) above (but see below), and will not therefore be privileged.
- Advice given by the client's solicitor commenting upon such a valuation will be privileged even if the report is not, because this advice will fall within category (a) above.
- Once an arbitration reference has started, all discussions and correspondence concerned with the accumulation of evidence for the case are privileged, no matter between whom the communications take place. Here, category (b) clearly applies, and category (a) may apply as well.

The arbitrator should appreciate that, while material that is privileged must not be disclosed, it does not follow that material not falling within those categories must be disclosed, for the material must also be relevant before any order for disclosure should be made.

It is the second example above that gives the most difficulty in practice. Where one of the parties has acquired its interest in the property shortly before the review, it will be common to expect that valuation advice may have been obtained as to the likely outcome of the review. If the valuation was commissioned by the client's solicitor for the purpose of giving advice on the acquisition, or if it is sufficiently proximate to the review (and may therefore be said to have been prepared with a view to a likely dispute), then the valuation may be privileged under category (a) or (b) respectively.

If it is neither of these things, then it will not be privileged – but that does not mean that it should have to be disclosed. The party seeking disclosure will often suspect that the valuation may support a different figure to that contended for by the party in the arbitration, and will wish to undermine the party's expert evidence by reference to that different figure. While the difference may well be embarrassing, it may not assist either party's case. The task for the arbitrator is to determine the dispute by reference to relevant evidence. A valuation by a different surveyor at a different time, may be quite irrelevant. Moreover, the arbitrator's task is to determine the rental value, and not what a third party thought that value might be. Accordingly, an order for disclosure of the valuation may have the quite unfair result of imposing unfair pressure upon that party to settle the arbitration, rather than face hostile cross-examination regarding the valuation.

Moreover, while the mere fact that a document is confidential or commercially sensitive does not of itself prevent it from being the subject of a direction for disclosure, the arbitrator should refuse disclosure if they consider that to direct disclosure would be oppressive, i.e. it would impose on the party concerned a disadvantage or detriment disproportionate to any assistance that it is likely to give to the arbitrator in arriving at a just decision. Mere unfairness is obviously insufficient. As part of this process, the arbitrator may be asked to look at the document in order to decide whether it is privileged or not. If the arbitrator does so, and decides that the document was in fact privileged, they will then have to consider

whether it would be fair for them to continue with the arbitration. This is considered further in 17.5.

17.5 Without prejudice privilege

Correspondence or discussions between the parties relating to an arbitration that is ongoing or definitely in prospect are privileged from production where the dominant purpose of the correspondence or discussions is an attempt to compromise the dispute. Such correspondence or discussions are said to have been 'without prejudice', whether or not they are labelled as such. Conversely, it cannot automatically be assumed that a letter marked 'without prejudice' is privileged; it will only be so if it is genuinely part of negotiations to compromise a dispute.

A letter not itself marked 'without prejudice', but which is part of continuing correspondence between the parties initially marked 'without prejudice', almost certainly would be privileged.

The without prejudice privilege may only be lifted with the consent of both parties; without the consent of both parties the without prejudice material therefore remains privileged at all times. It follows that it is not open to the sender of a without prejudice letter subsequently to waive the privilege unilaterally. A party wishing to remove the without prejudice privilege which would normally attach to a compromise offer must do so expressly and unequivocally at the time of making the offer.

It then becomes an open offer which may be referred to by either party at any time. An offer made without prejudice may be repeated as an open offer at any time, but the previous existence of the without prejudice offer must not be disclosed save with the consent of both parties.

17.6 Third party without prejudice material

The question sometimes arises whether privileged documents belonging to a third party or generated during the course of another dispute (whether litigation, arbitration or expert determination) may be referred to in evidence. The following situations may be distinguished.

- Documents that are covered by legal professional privilege retain that privilege, and should not be admitted in evidence.
- Without prejudice negotiations leading to a settlement between two parties in multi-party disputes remain privileged and inadmissible as between the parties in the rest of the dispute.
- Without prejudice negotiations leading to a settlement between two parties do not retain that privilege when used by a third party in a different dispute.
- Such negotiations will however remain privileged in any subsequent dispute concerned with the same subject matter.

- Without prejudice material produced for the purposes of a different dispute between one of the parties and a third party will not be privileged in a later arbitration (at least where the documents are not covered by any legal professional privilege).

Accordingly, a witness in an arbitration who had taken part as agent of a third party in without prejudice negotiations to settle a rent review on neighbouring premises can be required to give evidence of those negotiations in the arbitration, since neither of the parties to the arbitration had been involved in those negotiations.

17.7 Inadvertent or deliberate disclosure of privileged material

The arbitrator's recourse when a party has included privileged material in its representations will depend upon the circumstances, as follows:

- a If the arbitrator has made a direction that they will not look at representations immediately, in order to give time for objection (see 14.8) then the remedy will normally be for the other party to require the withdrawal of the material before the arbitrator has seen it.
- b If the offence is acknowledged and the arbitrator has not yet seen the material, then they should return the representation and direct that it should be resubmitted excluding the offending material.
- c Where apparently privileged material is nevertheless brought to the arbitrator's attention, then the arbitrator will have to decide what course to take. In the first place, they should invite the offending party to comment on the admissibility of the information, with opportunity for the opposing party to comment.
- d If the arbitrator decides that the material was indeed privileged, they should then decide whether it is of such import that it would be impossible to proceed with the arbitration, in which case they should resign.
Depending upon the circumstances and the value of that information, they could equally decide that it would be possible to dismiss it, and still be able to proceed fairly and judicially with the arbitration. The views of the non-offending party will be relevant, as will the principle that a party should not benefit from its own misconduct.
- e Where the submission of the privileged material to the arbitrator was deliberate, this constitutes unprofessional conduct. The arbitrator should consider reporting the incident to RICS, which will then consider whether disciplinary action is appropriate.

17.8 Confidentiality

A party to a rent review arbitration will often be reluctant to disclose a document on the ground that it is 'confidential'. This is not, however, a reason for refusal that the law recognises. Either the document is privileged from disclosure, or it is not. Where a document is confidential (in the sense that it was intended not to be disclosed), but does not fall within one of the categories of privilege explained in paragraphs 17.4 and 17.5, then it will be

disclosable and liable to inspection. It may, of course, be of little or no relevance, in which case it should not be disclosed for that reason.

Where, however, the document is one that belongs to a third party (such as trading figures, or an expert determination), then the position will be different. The law does recognise a public interest in upholding the confidential nature of such documents. If one party seeks disclosure, the arbitrator will have to consider how best to reconcile the interest in carrying out their task properly with the public interest in confidentiality. This matter is considered further in 17.10.

17.9 Witness summonses

Either party may, by agreement between themselves, or with the permission of the arbitrator, serve a witness summons to compel a reluctant third party to attend to produce documents that are considered to be relevant, but which are not otherwise available. The procedure and the factors the arbitrator should take into account are discussed in 15.10.

17.10 Enforcing a direction for disclosure

If, without showing sufficient cause, a party fails to comply with the arbitrator's order or direction for disclosure, the arbitrator may make a peremptory order to the same effect (see 20.5), with such time limits as they consider appropriate (s. 41(5)).

If the party still fails to comply, the arbitrator may exercise their powers under s. 41(7) to do any of the following:

- direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order
- draw such adverse inferences from the act of non-compliance as circumstances justify
- proceed to an award on the basis of such materials as have been properly provided or
- make such an order as they think fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

The threat of these powers will often be sufficient to ensure compliance and in many cases the exercise of these powers would be an appropriate penalty for non-compliance. If the matter is of sufficient importance, however (and assuming the parties have not agreed otherwise), the party seeking disclosure (with the consent of the arbitrator) or (much less likely) the arbitrator may apply to the court under s. 42(2) for an order directing the other party to comply with the peremptory order made by the arbitrator.

18 Evaluating the evidence

18.1 Introduction

As section 16 explains, the modern tendency in litigation is for most evidence, whether hearsay or otherwise, to be admitted, and then accorded such weight as the tribunal considers appropriate. This approach lends itself particularly well to arbitration, since the arbitrator, with their specialist expertise in the subject matter of the dispute, will be especially adept at evaluating the evidence.

This section deals with the arbitrator's approach to that task.

18.2 The arbitrator's powers concerning procedural and evidential matters

The arbitrator is given wide powers by s. 34 of the Act to decide procedural and evidential matters unless the parties otherwise agree.

Among others these powers include:

- s. 34(2)(f) – weighing the evidence – see 18.3
- s. 34(2)(g) – conducting their own enquiries – see 18.5.

The arbitrator should not refuse to hear evidence tendered by one party unless the other party objects to it, in which case they must rule as to its admissibility. If the reason put forward is technically sound, but of no real merit, the arbitrator may order the party making the objection to pay the increased costs caused by the need to observe the technicalities.

It is frequently the case that a party obtains evidence late in the proceedings and either serves it on the other side (who then objects), or seeks to adduce it. In such cases, the arbitrator will have to rule whether the evidence should be admitted, and how it should then be dealt with. The arbitrator should in such circumstances, make every effort to balance two conflicting principles: the principle that the rent that is determined should be based upon the best possible evidence that the parties can adduce; and the principle that the arbitration should be conducted fairly, and without unnecessary delay or expense.

18.3 Weighing the evidence

One of the main reasons for the parties choosing to have their dispute determined by a chartered surveyor as an arbitrator is that they can be expected to have the appropriate expertise and experience to weigh the evidence properly. In some cases, both parties may put in inadequate submissions; for example, they may concentrate on the evidence of comparables which are out of date in relation to the review date, and put forward little or

no discussion of evidence of how the market has moved over the relevant period. In other cases, the evidence (and most usually the expert evidence) will conflict substantially.

In such cases, the arbitrator is entitled – and indeed bound – to use their skills to weigh up the evidence and decide what credibility to give it. The exercise of this power is however subject to a number of limitations:

- a** the arbitrator should not arrive at a figure as a result of this process that falls outside the bracket of the parties' contentions – see 18.7
- b** the arbitrator should not rely upon a piece of evidence which neither party has introduced without giving the parties an opportunity to be heard – see paragraphs 18.5 and 18.6
- c** the arbitrator should not select a method of valuation for which neither party has contended without giving the parties an opportunity to be heard – see 18.7.

The arbitrator may find it helpful in such circumstances to bring the representatives together in a meeting to consider the conflicts and tensions in the evidence.

18.4 Where there is little or no evidence

Depending upon the market at the review date, there may be very little transactional evidence to put before the arbitrator. However, the parties' experts may well have their own opinions as to the right rent in the absence of that evidence, and the arbitrator should have due regard to such evidence, despite the fact that it is unsupported by evidence of comparable lettings.

In assessing the weight to be attached to such an opinion, the arbitrator should take into account the ability, experience and objectivity of the expert who expresses it. The arbitrator may, indeed, prefer the opinion evidence of one valuer, even if unsupported by comparable evidence, where the valuer is shown to be a credible expert, with detailed knowledge and experience of the relevant market, to opposing opinion evidence apparently or allegedly supported by comparable transactions.

In certain circumstances, even reliable opinion evidence may be lacking. The arbitrator should try not to be put in the position where there is insufficient evidence to be able to reach a decision. If the submissions and evidence are inadequate in any way, the arbitrator should encourage the parties to supplement them. The arbitrator should indicate the nature of their concern about the evidence already submitted, and may convene a hearing for this purpose under the powers reserved in the directions (see 18.3).

Alternatively, the arbitrator could employ the powers under s. 34(2)(g), and carry out the requisite investigation themselves (see 18.5).

18.5 The arbitrator's own enquiries

The arbitrator's powers include deciding whether and to what extent they should take the initiative in ascertaining the facts and the law (s. 34(2)(g)). The arbitrator has to exercise this power with discretion, balancing the need to be aware of relevant evidence with the need to avoid unnecessary delays or expense. The arbitrator is not obliged to ascertain the facts and the law relating to any case, but may choose to do so if they wish and the parties have not agreed otherwise.

However, in the latter case it would be advisable for the arbitrator to tell the parties first (in accordance with the duty under s. 33(1)(b) to avoid unnecessary expense), in case they wish to provide that information themselves and possibly thereby save costs.

This initiative should be exercised very carefully, to avoid an aggrieved party alleging partiality by the arbitrator in advancing the case for the other party. Quite clearly it is not the function of the arbitrator, within the context of s. 34, to become a third expert in the arbitration.

Introduction of new evidence by the arbitrator should therefore be restricted to direct evidence rather than hearsay, to avoid the prospect of the arbitrator being subjected to cross-examination. Anecdotal evidence suggests, perhaps understandably, that arbitrators have not (as yet) taken up widely the opportunity to use their own initiative. Whether this is because arbitrators assume that the parties have put forward all the relevant evidence and submissions, or whether cost considerations outweigh the motive to acquire more helpful material, is not clear.

It should be borne in mind that the arbitrator is also under a duty in s. 33 to act fairly and impartially between the parties and to provide each party with a reasonable opportunity of putting their case and dealing with that of their opponent. The arbitrator would therefore be required to ensure that any information obtained is placed before the parties and they are given a reasonable period in which to make representations.

Arbitration case law under the previous *Arbitration Acts* included a number of instances where use of the arbitrator's own specific knowledge has been criticised by the courts.

Under the 1996 Act, however, such challenges are rarely successful. Observance of s. 33 and the rules of natural justice should enable the arbitrator to exercise their powers under s. 34(2)(g) of the Act without being guilty of 'serious irregularity'.

18.6 Use by the arbitrator of their own knowledge

Because the arbitrator has been selected on the grounds of special expertise and experience, it is likely that they will possess knowledge that may have been gleaned from involvement in the market, or, indeed, from other arbitrations or expert determinations. The distinction between the arbitrator's knowledge as opposed to professional expertise as an arbitrator and surveyor should be carefully observed. It is one thing for the arbitrator to perform an evaluative role by using general skills; it is quite another for them to deploy a

piece of evidence or valuation method drawn from their experience, which neither party has had an opportunity to deal with.

If there are specific facts within the arbitrator's own knowledge which cannot be shut out of their mind in making the award, these should be revealed to the parties and treated to the same scrutiny and procedures as agreed for the other evidence. An arbitrator's finding, based on their own specific knowledge, would not comply with the general duty of the tribunal of 'giving each party a reasonable opportunity of putting his case and dealing with that of his opponent', and, as such, could constitute a serious irregularity. Provided that the details of such specific knowledge are revealed to the parties, and they are given reasonable opportunity for comment, there is no reason for such details to be excluded if the arbitrator believes them to be of relevance.

Similar duties arise in the case of a difference of opinion as to valuation method. Accepting that the choice of the 'correct' valuation method is a 'fact' within s. 34(2)(g), it is clear that the identification and use of an alternative valuation method is derived from the arbitrator's own knowledge. The requirements of the Act indicate that the arbitrator's proposed use of an alternative method should be notified to the parties and that they should have the opportunity of making representations on that method.

18.7 The bracket of the parties' contentions

It is difficult to conceive of circumstances in which the arbitrator might be able to award more than the ultimate figure sought by the landlord or less than that submitted by the tenant. The arbitrator therefore should not award a figure outside the bracket of the parties' contentions.

19 Overlapping arbitrations

19.1 Introduction

Where the same or a substantially similar issue arises in a 'hierarchical' situation (e.g. between landlord and tenant and between tenant and sub-tenant), or in a 'parallel' situation (e.g. between a landlord and their tenants of a row of identical shops), and the applications for the appointment of an arbitrator are made to the President at or about the same time, the President may decide to appoint the same person as arbitrator in both or all cases (here referred to for convenience as 'overlapping arbitrations'), both in order to save costs, and to achieve consistency of result.

This section considers the problems that may arise with such appointments, and suggests the procedures the arbitrator should adopt to deal with them.

19.2 Overlapping arbitrations – the problems

There are four main problems that may confront an arbitrator appointed in overlapping arbitrations:

- a** the arbitrator has no power to consolidate the proceedings or arrange concurrent hearings unless the parties so agree (see s. 35). It may be found that no procedure for a combined hearing or combined representations can be devised which would be acceptable to all the parties
- b** each set of parties is entitled to insist upon privacy being observed in relation to their arbitration, with the result that the arbitrator will not be able to divulge any of the detail of arbitration A to the parties in arbitration B
- c** the parties to each arbitration are entitled to insist that the arbitration proceeds at a speed and cost which suits their own particular circumstances. The result may well be that the arbitrations will become out of step with each other, and that evidence or legal submissions in arbitration B that could have had a bearing upon the conduct or outcome of the delayed arbitration A will have to be left out of account
- d** if the parties insist upon their arbitrations being dealt with separately and privately, the arbitrator will have to consider whether they will be able to maintain impartiality. However, if they feel that the circumstances are such that they may not be able to proceed in accordance with the statutory duty to act fairly, the arbitrator may decide to resign one or more of the appointments, but whether there are any circumstances which might make them liable for the abortive costs incurred should be taken into consideration (s. 25). Paragraph 19.3 suggests some possible solutions to these problems.

19.3 Overlapping arbitrations – the solutions

To an extent, if the parties to each arbitration are not prepared to cooperate with each other, then there will be very little that the arbitrator will be able to do about it, beyond warning the parties of the unfortunate consequences of different decisions based upon different evidence. The best policy for the arbitrator will be to adopt a proactive approach right from the beginning, by warning the parties of the perils of independent behaviour, including the increased cost and delay and the potential for inconsistent decisions.

Accordingly, if the arbitrator has been appointed by the President in two or more such arbitrations, the arbitrator should consider in consultation with all the parties, whether a procedure for a combined hearing or combined representations could be devised which is acceptable to all of them. A suggested procedure is set out in paragraph 19.5.

19.4 Overlapping arbitrations – action on appointment

The following are the points to be noted whenever the arbitrator is appointed in two or more related cases:

- a** the arbitrator must follow any procedural requirements laid down in any of the leases, even if these vary from lease to lease
- b** as already noted, the arbitrator has no power to order combined hearings or submissions unless the parties consent
- c** the arbitrator must respect the parties' rights to have their arbitrations dealt with separately and privately
- d** the arbitrator should strive to obtain the parties' agreement to a procedure that will enable both arbitrations to run concurrently, even if they are not to be consolidated (see paragraph 19.5).

19.5 Overlapping arbitrations – cooperative procedure

Where the arbitrator has obtained the parties' agreement to a procedure that will enable both arbitrations to run concurrently, then:

- a** the arbitrator should ensure that the parties' agreement is recorded in writing
- b** the arbitrator should invite all the parties to a preliminary meeting, mindful however of the parties' right to require their own arbitration to be conducted privately, and without reference to any other
- c** at that meeting the arbitrator should explain the nature of a consolidated hearing with particular reference to the matters set out in paragraphs 19.1 and 19.2
- d** the arbitrator should seek to give directions for the conduct of the references bearing in mind the matters set out in paragraphs 19.1 and 19.2

- e despite the fact that the arbitrations may have been agreed to be dealt with concurrently or even consolidated, each must be given individual consideration, and separate awards must be issued in respect of each.

19.6 Overlapping arbitrations – uncooperative procedure

If the parties do not agree to consolidation or to hold concurrent hearings, then the arbitrations must be held separately, whether they are following the procedure for hearings or written representations.

In these circumstances, the arbitrator will have no alternative but to deal with each arbitration as an entirely separate undertaking. It is inevitable, however, that the approach taken in relation to one arbitration will be influenced by the evidence and submissions that may have been heard in the other. The arbitrator may raise matters which have arisen in a previous arbitration, or probe the evidence in the light of such knowledge. However, the award should not be based on a point not argued (or presented in representations) in the arbitration to which the award relates, without observing the rules of natural justice and giving the parties an opportunity of presenting written representations, or of being heard on those additional matters which the arbitrator believes are material.

Further, the fact that the arbitrations must be dealt with separately does not mean that the arbitrator can reopen an award already given and change the conclusion as further evidence becomes available. Each reference is dealt with individually and when the arbitrator has made an award their authority as an arbitrator has come to an end in that particular reference.

20 Proceeding where a party is in default

20.1 Introduction

Section 40 of the Act imposes a duty on the parties to do all that is necessary for the proper and expeditious conduct of the proceedings.

This includes 'complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal'.

Where one of the parties fail to comply with this duty, the arbitrator has power to apply a range of sanctions, which are summarised in 20.4 and analysed in the remainder of this section. These powers may be restricted or supplemented by agreement between the parties, although this would be unusual in a rent review context.

20.2 Examples of default

Breaches of the s. 40 duty will inevitably consist of a party's failure or refusal to take a required step in the arbitration in any respect. Typical cases might include:

- not attending the preliminary meeting
- failing to agree a statement of facts
- not supplying evidence
- failing to supply written representations or submissions
- failing to attend the hearing.

20.3 Where neither party wishes to cooperate

If neither party wishes the arbitrator to proceed with the arbitration, there is then, on the face of it, a conflict between s. 40 and party autonomy. On the one hand, it could be said that the arbitrator cannot simply condone an ongoing breach of s. 40. On the other hand, arbitration is a consensual dispute resolution method, and it would be contrary for the arbitrator to insist upon formal compliance when this would be contrary to the parties' wishes. It would therefore be impractical for the arbitrator to attempt to override the parties' joint agreement. Moreover, if the parties have agreed to limit the arbitrator's powers pursuant to s. 41(1), then the arbitrator is powerless to take any action in any event.

The arbitrator should content themselves with regular communications with the parties to remind them of the outstanding arbitration. In an extreme case, they should consider informing the parties that they will resign if there is no foreseeable progress.

20.4 The range of remedies in case of unilateral default

Section 41 of the Act gives the arbitrator a range of powers of increasing severity to use against the party in default, although the way in which those powers are set out is neither structured nor logical. In increasing order of severity, the arbitrator may:

- make a peremptory order for the party to comply with the obligation in question (s. 41(5))
- continue the proceedings in the absence of that party (s. 41(4))
- direct that the party failing to comply with a peremptory order may be penalised in some way (s. 41(7))
- invoke the assistance of the court (s. 42(1)) or
- make an award in the absence of the party (s. 41(4))
- where the claimant is in default, strike out the claim (s. 41(3) and (6)).

These remedies are considered in paragraphs 20.6 to 20.12.

20.5 Steps to take before proceeding in default

Section 41 is labelled 'Powers of the tribunal in case of party's default'. The powers in question are potentially draconian, as paragraph 20.4 shows. No arbitrator will wish to be put in the position of having to resort to the use of such powers. A prudent arbitrator will accordingly take such steps as are open to them to ensure that the arbitration is run in such a way as to avoid such resort.

- 1 The arbitrator may, on occasion, find it helpful to remind the parties of their general duty under s. 40 of the Act to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
- 2 If a case of possible default arises, before using their powers, the arbitrator should make sure that the party that is seemingly in default is actually in default. That will mean checking that the party:
 - received notice of the obligation in question (e.g. a direction to file written representations by a certain date) and
 - has no adequate excuse (i.e. no excuse at all, or a reason that the arbitrator considers unacceptable) for the failure to comply with that obligation. This is no more and no less than s. 41(4) itself requires.
- 3 The arbitrator should ensure that the parties' principals receive copies of correspondence in the event that the lack of cooperation appears to be attributable to an expert witness rather than the party itself.

- 4 The arbitrator should remind the uncooperative party of the arbitrator's duty to avoid unnecessary delay (s. 33) and the mandatory duty of the parties to cooperate with the arbitrator (s. 40).
- 5 The arbitrator should consider giving the party in default notice in accordance with the provisions of s. 76 of the Act that they intend to proceed with the arbitration on a specified date, and will do so even if that party does not comply with the direction. The arbitrator should take steps to ensure that evidence of service of such a notice is available. The most obvious example is pre-paid recorded delivery. If this is unsuitable for some reason, the arbitrator should keep a good record of how service was affected, and may even consider using a process server, from whom a witness statement should then be obtained.
- 6 The arbitrator should ensure both that notification of the date for any adjourned hearing event (or other timetabled step in the arbitration) is given to the party concerned and that they can, in fact, show that the defaulting party has had the notification.
- 7 If there is any doubt about notification or the existence of sufficient cause, it would be wise to adjourn the event (e.g. meeting, hearing, delivery of documents) to a later date. If a party 'shows sufficient cause' (i.e. provides a satisfactory explanation for defaulting), the arbitrator cannot proceed, since s. 41(4) is only applicable if sufficient cause is not shown.
- 8 These steps are particularly important if the party in default is not professionally represented.

20.6 Peremptory orders

A peremptory order is an order that is made once a party has already failed without sufficient reason to comply with a previous order of which it had notice. It has two purposes:

- a it gives the party in default in effect a second chance to comply
- b it also gives the arbitrator a range of extra remedies in the event that the order is not complied with (see 20.8).

Section 41(6) accords special treatment to peremptory orders to provide security for costs – see 20.9.

20.7 Whether to make a peremptory order

If the arbitrator is satisfied that a party is in default notwithstanding the taking of the steps suggested in paragraph 20.5, the next step for the arbitrator is to consider whether (a) to proceed in the absence of the party (in practice, therefore, without its attendance at an oral hearing, or without any or at any rate all of its written material if the arbitration is being conducted on the basis of written representations), or whether (b) to make a peremptory order. These appear to be genuine alternatives (see s. 41(4) and (5) of the Act).

Which of the alternatives is selected will depend upon the gravity of the default. For example, if the default lies in the failure to submit extra evidence, and the matter is urgent (and the other party is not prepared to wait the extra time it will take for a peremptory order to be administered), the arbitrator may take the view that it would more properly satisfy their duty under s. 33 were they to proceed with the arbitration in the absence of the party (see paragraph 20.11). By contrast, if the default is serious, and likely to make life especially difficult for the continued conduct of the arbitration, the arbitrator may wish instead to make a peremptory order, because that will increase their choice of further remedies in the event of continuing default. It will also give the party in default one last chance to comply. Peremptory orders are considered in detail in paragraphs 20.8 to 20.10.

20.8 Making a peremptory order

If, having weighed up the matters set out in paragraph 20.7, the arbitrator decides that it would be appropriate to make a peremptory order under s. 41(5) of the Act, they should consider the following.

First, the arbitrator should normally give a further warning to the party in default, indicating that the matter is serious and that they are considering exercising their right to make a peremptory order, with all that that entails.

Secondly, in the absence of any response, the arbitrator should then make the order. This should spell out clearly:

- a that the order is a peremptory order made pursuant to s. 41(5) of the Act
- b what direction the party in default has failed to comply with
- c the nature of the non-compliance
- d what the party in default is required to do in order now to comply
- e a reasonable time for the party in default now to comply
- f the penalties attached to further non-compliance – i.e. that if the uncooperative party fails to comply with that order then the arbitrator may exercise any of the powers conferred on them by s. 41(7) (see 20.9)
- g a warning regarding the arbitrator's ability to have peremptory orders enforced by the court under s. 42 (see form F3 in the Precedents section of the *Handbook of Rent Review*).

A suitable form of peremptory order is included as form F2 in the Precedents section of *The Handbook of Rent Review*.

20.9 Effect of failure to comply with a peremptory order

Where a party fails to comply with a peremptory order, the arbitrator has a range of options, set out in s. 41(7) and 42 of the Act. They may:

- a direct that the defaulting party shall not be entitled to rely on any allegation or material which was the subject matter of the order or
- b draw adverse inferences from the default or
- c proceed to an award on the basis of such materials as have been properly provided or
- d make an order as to costs in respect of non-compliance or
- e apply to the court for the peremptory order to be enforced under s. 42(2)(a).

The arbitrator will obviously have to select the appropriate further remedy with care. They may think it best to opt for a course that preserves the defaulting party's ability to make amends at a later stage, if that can be done in a way that will not be unjust to the complying party.

Enforcement of the arbitrator's peremptory order by the court under s. 42 may be done (unless both parties agree) upon application either by the arbitrator or by the other party (with the permission of the arbitrator). If satisfied that the party in default has failed to comply with the peremptory order within the time specified within the order, or otherwise within a reasonable time, the court may then order the defaulting party to comply with the arbitrator's peremptory order. The result of this will be that the whole battery of the court's enforcement powers may then be invoked (although it is fanciful to suppose that this is anything but academic in the case of a rent review arbitration).

20.10 Effect of failure to comply with a peremptory order as to security for costs: s. 41(6)

If the claimant fails to comply with a peremptory order for security for costs, the arbitrator has power to dismiss the claim, which effectively means that the claimant has lost the arbitration and the matter has finally been disposed of. For these purposes, 'claimant' includes 'counterclaimant', with the result that this power may be used against either party to the arbitration provided each is claiming some form of relief against the other.

20.11 Proceeding in default

The mandatory requirement for the arbitrator to comply with the general duty under s. 33 to act fairly and impartially and adopt suitable procedures applies throughout the arbitration whether or not the defaulting party is present. Unless otherwise agreed by the parties, the arbitrator is therefore not merely entitled, but will be bound to proceed in the absence of a defaulting party (having, as appropriate, worked through the safeguards set out in this section), and make an award on the basis of the evidence presented (s. 41(4)).

Before so doing, the arbitrator should give notice of the intention to proceed in default under s. 41(4). An appropriate form is set out as form F1 in the 'precedents' section of the *Handbook of Rent Review*. It is recommended that the arbitrator seeks to convene a meeting of both sides at the defaulting party's premises.

It is not the arbitrator's duty to represent the defaulting party, nor should the evidence and arguments submitted by the opponent be unquestioningly accepted. The arbitrator is appointed for their own experience and knowledge, and should there be any doubt as to the relevance or accuracy of any of the evidence presented by the attending party, those opinions should be advised to both parties so that the attending party can then respond.

Unless otherwise agreed by the parties, the arbitrator can take the initiative to ascertain the facts and the law (s. 34(2)(g)), which is particularly useful when proceeding in default.

As outlined in 18.5, the arbitrator is not entitled to consider their own evidence without first revealing that evidence to the parties and giving them sufficient opportunity to comment.

If the parties have agreed to written representations being the appropriate procedure, before proceeding to the award, the arbitrator should make available to the defaulting party for comment a copy of any representations they have received from the other party, and give it a suitable opportunity to respond.

When proceeding in default, the arbitrator would be well advised to ensure all communications are copied to both parties by pre-paid recorded delivery. The defaulting party remains entitled to the mandatory provisions of the Act and, as such, may agree to an award with or without reasons, dealing with costs, or interest, and does not lose any right they may have to challenge the award.

20.12 Dismissing the claim

The power in s. 41(3) of the Act to 'make an award dismissing the claim', rarely occurs in rent review arbitration because it is only applicable when the conditions in that subsection are satisfied - i.e. where the arbitrator is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing their claim, and that the delay gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or that it has caused, or is likely to cause, serious prejudice to the respondent.

An award 'dismissing the claim', in the context of s. 41(3), would not determine the merits of the claim (as distinct from an award, after using the s. 41(4) or (7) powers, which would determine the merits of the claim). This is why 'dismissing', under s. 41(3), is hardly ever done when the limitation period has not expired, since to do so would leave the claimant able to resurrect the claim, knowing that 'dismissing' has not finally decided the dispute on its merits.

21 Inspections

21.1 The requirement for inspections

As soon as the hearing or the written representations have been concluded, so that the relevant evidence and submissions are still fresh in mind, the arbitrator should make a detailed inspection of the subject property and the comparables submitted (or at least those considered relevant or important). Where the arbitration is being conducted with a hearing, the arbitrator will usually find it of advantage to make a brief preliminary inspection before the hearing.

Where a tenant of the subject property is uncooperative and refuses access, the arbitrator has a general power under s. 38(4)(a) of the Act to give directions for inspections, etc. which may then be enforced. By contrast, where a tenant of a comparable property, unrelated either by ownership or occupation, refuses access, the arbitrator is in the hands of the parties or their surveyors, because neither they nor the court has power to require access to the comparable property to be given.

21.2 Attendance at inspections

The arbitrator may often prefer and find it more convenient, with the agreement of the parties, to make inspections unaccompanied. Unless the arbitrator is inspecting unaccompanied by the parties, inspections should be conducted in the presence of both parties or their representatives unless either party indicates in advance that they have no wish to be present and no objection to the inspection taking place in the presence of the other party.

21.3 Dealing with oral evidence at inspections

The inspection is not an appropriate occasion for reopening the hearing, and it is unusual for the parties accompanying the arbitrator on the inspection to address any comments to them. However, if comments are made to the arbitrator, they must be limited to drawing their attention during the inspection to factual matters covered in their evidence. Conversely, the arbitrator may put relevant questions to the parties during the inspection of any property.

On those occasions when the arbitrator inspects the premises unaccompanied by the parties or their representatives, they should be careful not to engage in conversation with any third parties. Should the arbitrator come across any matter that might be relevant to the issues in the arbitration, they should treat the matter like any other piece of evidence (see 22.4).

21.4 Dealing with the evidence gained from inspections

The purpose of an inspection is to enable the arbitrator to form their own view of the evidence already submitted, rather than to gain fresh evidence. From time to time, however, the arbitrator will gain evidence that will either contradict or supplement the evidence in the arbitration. In such a case, natural justice requires that the matter be raised with the parties and that they are given the opportunity to comment, just like any other matter forming part of the arbitrator's own knowledge to which the parties are not privy (see 18.7).

22 The award

22.1 Introduction

The purpose of an award in a rent review dispute is to resolve all the issues in the dispute that have been referred to the arbitrator, and embody them in a valid and enforceable document.

In order to be valid and enforceable, the arbitrator's award must comply with a number of requirements drawn from the *Arbitration Act 1996*, the common law, and the agreement between the parties. This section reviews those requirements.

22.2 Types of award

A rent review dispute may have only one issue – to take the most obvious example, the amount of the rent of the premises. Alternatively, it may have several – for example whether the arbitrator has jurisdiction; whether the rent review clause provides for a headline rent; and what the rent should be.

In the latter case, the parties may want the arbitrator to decide all such issues together, and produce one award. Alternatively, it may be appropriate (particularly where the determination of one issue will affect the approach to another) for the arbitrator to deal with the issues sequentially, by making a series of awards. Section 47 of the 1996 Act gives the arbitrator the flexibility to do this, unless the parties agree otherwise. There is no universally accepted name for the series of preliminary awards that an arbitrator may make to deal with issues that they or the parties wish to deal with sequentially. The pre-1996 Act term 'Interim Award' is discouraged, and the term 'Partial Award' should also be avoided, for obvious reasons. The better practice is to call such awards 'Award No 1', 'Award No 2', and so on; or 'First Award', 'Second Award', etc.; or 'Award No 1 (Jurisdiction)', 'Award No 2 (Legal issue)', 'Award No 3 (Rent)', 'Award No 4 (Determination of Costs)', and so on.

22.3 Award as to costs

In a small documents-only rent review, it may be appropriate and cost-effective to deal with all issues (including costs) in one award, which will usually be entitled 'Final Award'.

Even in a straightforward case, however, it will generally be preferable to deal with the question of costs once the parties have had time to consider the arbitrator's decision on the substantive issues. In such a case, the arbitrator will commonly make an award that deals with everything save costs. They will usually then label the substantive award 'Final Award save as to Costs', followed by an award dealing with costs, which might be called 'Final Award on Costs'.

22.4 Agreed awards

If the parties compromise all or part of their dispute in the course of an arbitration, their agreement may either be that their dispute is resolved upon the agreed terms, or that they will agree before the arbitrator what award they should make. In either event, unless the parties agree otherwise, the arbitrator must terminate the proceedings as regards the part so agreed, and record the settlement in the form of an agreed award.

A revision of the rent in accordance with the rent review clause in a lease does not take effect as an amendment and does not therefore need to be recorded in a deed. Many leases, however, provide that a memorandum of any agreed reviewed rent is to be endorsed on the lease and the counterpart, in which case it is a matter for the parties and will not therefore involve the arbitrator.

Where, however, there is no such provision in the lease, the parties may prefer that the agreed review rent be incorporated in an agreed award, since an award is a legally binding document.

Such an award would avoid the (admittedly remote) possibility of future arguments between the parties and/or subsequent assignees, which might arise if the agreed review rent was only incorporated in an exchange of letters.

There are a number of matters the arbitrator should be careful to note in connection with an agreed award.

- a** The arbitrator should only proceed to make such an award if the parties agree in writing that they should.
- b** The arbitrator should check the agreement to ensure that it is clear and capable of performance.
- c** If the parties wish the arbitrator to draft the award, they should do so and supply the draft to the parties for their approval.
- d** If the parties have provided a draft award, the arbitrator should check it carefully, revise as necessary, and submit the revised draft to the parties for their agreement. The arbitrator may object to making the award (see s. 51 of the Act) if the draft award or the agreement leading to it is in an unacceptable form.
- e** The agreed award must state that it is an award of the arbitrator and that it thus has the same status and effect as any other award on the merits of the case.
- f** Save that it need not state reasons (s. 52(4)), an agreed award should be set out in the same form as any other, following the requirements of the parties or s. 52 as appropriate.
- g** If the agreed award does not deal with the payment of the costs of the arbitration then the authority of the arbitrator continues to run in relation to those costs.

- h** If the parties settle their dispute, but do not agree that there should be an agreed award, the arbitrator should terminate the substantive proceedings, since there will be nothing further to be decided.

22.5 The essentials of a valid award

The requirements for a valid award have a number of different sources: the parties' own agreement; the common law; and the *Arbitration Act* 1996. Those requirements, elaborated as necessary in the paragraphs that follow, are:

- a** The parties are free to agree the form of the award – see s. 52(1) of the Act. The agreement may include such basic matters as whether the award should be in writing; and whether it should contain reasons. An award will be defective if it does not comply with the parties' requirements – see s. 68(2)(h). It is good practice to ask the parties if they have any particular requirements in relation to the form of the award. If they do not, the arbitrator is bound by the common law and Arbitration Act requirements detailed below. Each of these requirements should however be read as if prefaced by the words 'unless the parties otherwise agree'.
- b** The award must not be delayed – see 22.7.
- c** The award must be in writing – see s. 52(3).
- d** The award must contain reasons – see s. 52(4). This is one of the most important requirements of a valid award and the one which causes the most difficulty in practice. The requirements to give reasons, and the way in which the reasons should be set out, are considered in 23.8.
- e** The award must be certain and unambiguous. The arbitrator must make it clear exactly how they have decided the dispute. If they fail to do so, the award may be challenged under s. 68(2)(f) of the Act.
- f** The award must be complete. If the award fails to determine all the disputes submitted for the decision of the arbitrator, it may be vulnerable to a challenge based on serious irregularity under s. 68(2)(d) of the Act.
- g** The award must not deal with matters that have not been referred to the arbitrator. If the award purports to determine matters beyond those submitted, the award will be bad for excess of jurisdiction, and liable to be set aside under s. 68(2)(b).
- h** The award must be final. The arbitrator will often be asked to determine a matter in the alternative – for example assuming (a) that the tenant's contention regarding the effect of the disregard of improvements is correct; and (b) that it is not. It will not be sufficient for the arbitrator just to express the rental values in terms of (a) and (b) – they must also go on and decide which of those alternatives is correct, without which the award will not be final.
- i** The award must state the seat of the arbitration – see 22.10.

- j The award must be signed by the arbitrator – see 22.9.
- k The award must state the date on which it is made – see 22.9.
- l The award must be enforceable. The award should be framed in such a way as to ensure that it can be enforced either by action on the award or by summary process under s. 66 of the Act. This requirement will rarely be of relevance in a rent review, since the usual outcome of the award will be to determine the open market rental value, rather than to specify a rent that the tenant is to pay.

22.6 The contents of the award

It is good practice to develop a template for use in setting out the award, to ensure that all the salient elements are covered in a logical, clear and complete way. Most well written awards follow a set pattern containing a number of different ingredients. These are examined in section 23.

22.7 Time for making the award

The arbitrator's general duty to avoid delay in the arbitration extends, of course, to the making of the award. Accordingly, if the arbitrator fails to proceed without using all reasonable despatch in making an award once the evidence and submissions are complete, they may be removed by the use of the mandatory powers available to the court under s. 24 of the Act. The arbitrator should therefore proceed with inspections and award as soon as the hearing or the written representations have been concluded.

Arbitrators will generally have many commitments in their working practices that will need attending to. However, an arbitrator should not accept an appointment if it is likely that such other professional commitments will unduly delay the making of an award. On a practical level, moreover, the longer the arbitrator waits before finalising the award, the more difficult the task, since their grasp of the detail will start to weaken.

There are a number of practical measures the arbitrator can adopt to ensure that the award is made as quickly as reasonably possible. First, the arbitrator should diarise sufficient time for considering and drafting the award. Secondly, they should use an award template that will assist with the layout and operate as a checklist for the contents. Thirdly, they should devise a system for ensuring that the evidence and submissions of each party are dealt with fairly, and that properly reasoned conclusions are arrived at in relation to all the issues.

The arbitrator should be able at the conclusion of any hearing or once representations are complete to indicate when the award will be ready to publish. If there are likely to be any delays in the process, the parties should be kept informed.

22.8 Date and delivery of the award

The parties are free to agree on the requirements as to the notification of the award to the parties. If there is no such agreement, then when the award is ready for issue the arbitrator should notify both parties that it is available to be taken up.

The award must state the date on which it is made – see s. 52(5) of the Act. This date is a matter of great consequence, because it triggers the 28-day period within which any errors may be raised for correction (see 22.11), and challenges may be made (see s. 70 of the Act). Under s. 54(1) of the Act, the date of the award is either the date the parties agree (rare in rent review); or the date the arbitrator decides to specify in default of such agreement; or, in the absence of such decision, the date the arbitrator actually signs the award in accordance with the requirement in s. 52(3).

It is, therefore, of critical importance for the arbitrator, once the award has been signed, to inform the parties both that the award is ready, and how it may be obtained. The arbitrator should not act in a way which may reduce the effective time available to the parties. Equally, the arbitrator is entitled to require full payment for fees (including costs and VAT) before the award is released to the parties (see s. 56 of the Act), and rent review arbitrators usually exercise this right (known as exercising a lien for fees). If the arbitrator does exercise a lien for fees, the award is made on the date it was signed, (unless some other date is specified), and not on the date the award is released to parties following payment of fees. For example, the arbitrator could inform the parties that the award will be available and signed within seven days, which will allow them to arrange for the payment of fees.

It is suggested that the arbitrator might delay publishing the award until receipt of final payment, rather than before informing the parties that it is available. For example, the parties might be told by the arbitrator ‘my award is prepared and will be published and released on receipt of payment of my fees, which are £x’. The arbitrator should also consider the impact of extended public holidays, and whether it is appropriate to publish an award immediately prior to them, particularly if it is unlikely to be taken up until after the holiday.

If one party pays the full amount of the arbitrator’s fee the award should nevertheless be issued to both parties at the same time. This is important because of the time-limits referred to above. If the party who has paid all or part of the fee in this way is not required by the terms of the award to bear such responsibility for the arbitrator’s fee, it may obtain appropriate reimbursement (see 25.3). The arbitrator should supply VAT invoices to the parties if and as requested. In the unlikely event that, having been advised that it is available, neither party takes up the award within a reasonable time, the arbitrator should issue the award to both parties. If necessary, the arbitrator should eventually sue both parties for recovery of their fees in accordance with the award, on the basis of joint and several liability.

22.9 The seat of the arbitration

Section 52(5) of the Act requires the ‘seat of the arbitration’ to be stated. This much misunderstood provision is intended as a reference to the civil jurisdiction according to

the laws of which the arbitration is to operate. The parties are free to designate this, but if they do not, the arbitrator is entitled to determine the seat having regard to the arbitration agreement and all the circumstances (see s. 3 of the Act).

Under s. 46 of the Act, the arbitrator is, unless both parties agree otherwise, to determine the matters in dispute in accordance with the law chosen by the parties as applicable. In practice, in a domestic rent review arbitration, neither the arbitrator nor the parties will designate the seat as anything other than England and Wales, or Northern Ireland (and not, for example, London, which does not have its own local law), or the applicable law as anything other than those obtaining in those jurisdictions. Once the seat is so designated, the award will be regarded as made there, regardless of where it was signed.

22.10 Correction of mistakes in the award

All tribunals make mistakes from time to time. Unless the parties have agreed otherwise, s. 57 of the Act allows the arbitrator, on their own initiative or on the application of a party to correct such mistakes within a specified timetable. This topic is discussed fully in section 27.

23 The contents of the award

23.1 Introduction

It is good practice to develop a template for use in setting out the award to ensure that all the salient elements are covered in a logical, clear and complete way. Most well written-awards follow a set pattern containing a number of different ingredients, as follows:

- heading
- title
- recitals
- background
- the review provisions
- issues
- reasons
- decision
- closing formalities.

23.2 Heading of the award

The heading serves as a ready indicator of the parties to the award, and establishes the fact that the *Arbitration Act* 1996 applies (as it usually will). There is no legal requirement for such details to be set out in this or any particular way, but this way of commencing the award is now so well-established that it may be best to follow the convention.

A typical example of a heading will be:

IN THE MATTER OF THE ARBITRATION ACT 1996 AND IN THE MATTER OF AN ARBITRATION BETWEEN:

BIGCO (UK) LTD Landlord

- and -

SMALLCO (EASTERN) LTD Tenant

It is essential to record the names of the parties correctly, and the preliminary meeting with the parties, or directions, will provide an opportunity for this (see 10.1).

Although the arbitrator must decide which of the parties shall be claimant (see 10.2), there is no standard convention concerning the titles to be given to the parties for the purposes of the arbitration. The use of the terms 'Claimant' or 'Applicant' and 'Respondent', as in civil

litigation, is often encountered. In the context of a rent review arbitration, although both parties are usually seeking to have the rent ascertained, the Act nevertheless requires that one party be designated claimant.

23.3 Title of the award

The next point to consider is what to call the award. The *Arbitration Act 1996* does not prescribe names for different types of award, and, with the obvious difference that the final award discharges the arbitrator's obligations to the parties, arbitrators should not think that different types of award have different characteristics that require special treatment. Nevertheless, it will be helpful to those considering the award if it is labelled clearly to indicate which stage of the arbitration it is dealing with. This topic is dealt with in 22.2.

23.4 Introduction to the award

The introduction is the part of the award that seeks to explain how the arbitration came about, how the arbitrator comes to have jurisdiction and the process by which the arbitrator gathered the information upon which the decision is based.

This part is often referred to as the 'Recitals', but this is a slightly obtuse legal term, and it is better to head this part of the award 'Introduction' or 'Preliminaries' instead. Further, old legal documents, and some awards, begin each paragraph of the Recitals with the word 'Whereas'. There is no need for this indeed it is positively discouraged – simple numbered paragraphs will suffice.

The relevant matters should then be set out in chronological order. There is no set requirement as to what should be included but consideration should be given to the following:

- a description of the lease, including the rent review provisions
- a reference to the arbitration clause in the lease
- a brief description of the dispute that has arisen
- the way in which the matter was referred to arbitration
- the way in which the arbitrator was appointed (by agreement of the parties, by an appointing body, by other arbitrators, by default, or by the court)
- the arbitrator's acceptance of their appointment, together with the date
- details of any written agreements by the parties that affect the arbitrator's powers or jurisdiction
- details of any correspondence that might have a bearing on the matters the arbitrator has to decide or the procedure to be adopted
- a description of any preliminary meeting held, with date, location and representatives attending

- a summary of any directions given (brief details only unless there is some important matter such as specific disclosure, jurisdiction, etc.)
- the date of receipt of any Statement of Agreed Facts
- the date of receipt of any written submissions/expert reports, counter- submissions/ replies or witness statements
- if the arbitration involved any hearings, details of venue, dates, and what happened, including:
 - who represented each party
 - which factual witnesses gave evidence for each party, and their position in the organisation they work for and
 - which experts gave evidence, their respective disciplines and on which party's behalf they appeared
- if an inspection of the subject matter of the dispute was carried out, when and where and who else was present at the inspection
- if an inspection of the comparables was carried out, when and where and who else was present at the inspection
- to what extent the arbitrator has taken the initiative in ascertaining the facts and the law.

23.5 Background to the award

This is the section of the award that sets out the background to the dispute. In a factually complex dispute, the arbitrator will use this section to summarise the events in chronological order leading up to the crystallisation of the dispute between the parties.

In a rent review arbitration, however, there will rarely be much to say beyond the fact that the landlord served a rent review trigger notice; the tenant served a counter-notice; the parties were unable to agree the amount of the open market rental value; and the dispute was then referred to arbitration.

23.6 Rent review provisions

This part of the award should set out or summarise the relevant provisions of the review clause and any other material parts of the lease or other legal documentation.

23.7 The issues

Having explained what the dispute is and how it came about, it is now time to identify the issues that the arbitrator must decide in order to make their award. Correctly identifying the issues is one of the most important tasks of an arbitrator.

Although in one sense there is only one issue in a rent review arbitration, namely, the amount of the rental value, in reality there are likely to be a number of separate issues which

will need to be decided along the way. These will or may include issues of fact (such as who paid for a particular improvement, or the date on which an allegedly comparable transaction was agreed or concluded); issues of law (for example, the meaning of the covenant to repair or the review clause); and issues of expert opinion (for example, the strength of demand on the valuation date or which comparable transactions are the most helpful). The arbitrator will need to resolve each of these and to give their reasons for doing so. Identifying the relevant issues is therefore an important first stage in the process of giving reasons. It is often helpful to set out the issues at an early stage in the award, and then to deal more fully with them one by one later on.

In most cases the arbitrator can quickly identify the core issues simply by reviewing the valuation conclusions advanced by each party; that ought to provide the framework of main issues to consider. There may well be peripheral or subsidiary issues but these should be readily identified by adopting this approach.

23.8 The reasons

The statutory duty to give reasons has two underlying purposes. The first is that it is a requirement of common fairness that the losing party should know why they have lost. The fact of losing may of itself produce a sense of injustice, which will be greatly increased if the losing party is left ignorant or unclear as to why their case has been rejected. Conversely, the giving of proper and intelligible reasons may go a long way toward preventing any feeling of injustice in the first place. This point needs to be continually borne in mind by arbitrators when considering the adequacy of their proposed reasons. A good test on every occasion is to say 'If I were the losing party, would I be left in no doubt as to why I have lost on this issue?' The second purpose behind the giving of reasons is for the benefit of the arbitrator. A duty to give reasons compels them to consider and articulate why they have decided the issues in the way they have. That process may itself uncover faulty reasoning or inconsistencies of approach. It is everyday professional experience that the solution to what seems an intractable problem can become much clearer in the course of explaining the apparent difficulty to someone else, or (perhaps more significantly) that a point which seemed absurdly straightforward at first glance becomes much more difficult when mentioned to a colleague. The practitioner may realise even as they explain the point that they have approached it from the wrong angle, or that their proposed solution cannot be justified. The process of drafting reasons can perform a similar function for the arbitrator.

The arbitrator does not have to provide a conclusion on every facet of the parties' cases, provided that, on reading the reasoned award, the parties or other interested person should be able to understand how and why the arbitrator has come to the conclusions that they have.

The arbitrator should not be defensive in the way they expresses themselves, but should seek to satisfy the requirement for reasons by revealing what they really thought. Arbitrators should take care, however, to express themselves in a professional and temperate manner. They should not express personal sentiments or sympathy for a losing party in fear of

conveying partiality. In the event of an appeal under sections 67, 68 or 69 of the Act, the court may order the arbitrator to give reasons, or provide more detail for the purpose of considering that appeal.

The following pointers may help the arbitrator to shape an award that will enable the parties to understand how and why they came to their decision, having weighed up the opposing arguments.

a Summarise the evidence

Where the resolution of the issues turns on the evidence, the arbitrator should begin by finding the necessary facts. Sometimes, this process will involve the arbitrator saying why they preferred the evidence of one witness to that of another. Alternatively, it may simply involve the arbitrator setting out what is common ground.

b Summarise the arguments

Once the facts have been found, the arbitrator should summarise the arguments put to them by each party. The arbitrator should ensure that they do not take up unnecessary space by simply repeating the parties' submissions. Where these are long and complex, the arbitrator should consider stating, as do many judges, that no summary would do justice to the careful arguments of the party in question, but that in essence their case was as follows (with a brief reference to the salient points).

c Arrive at a reasoned conclusion

The arbitrator must explain succinctly why, in the light of the evidence, they have reached their decision on each issue. This is, perhaps, the most difficult part of the award. It is often easy for the arbitrator to arrive at their decision, but less easy to articulate their reasons for doing so. Often they will simply find the analysis of one party's surveyor more convincing than that of the other. But they owe it to the parties to explain why they have done so as best as they are able. It may be helpful for the arbitrator to set down their decision on each of the separate issues, and then state the facts and reasons for that decision. In this way, the arbitrator will avoid writing a detective story, and should find it easier to set out the rationale more fluently. While the right course depends on the individual circumstances of each case, a number of general points can be made.

First, the arbitrator should take care to avoid an imbalance between, on the one hand, reciting the opposing arguments, and on the other, the reasons for the decision. Nothing is more frustrating for the parties than to be told in detail that which they already know, and not to be told that which they do not know and wish to know. Arbitrators should therefore aim for a proper balance between recitals and findings/reasons, with the latter taking up most of the award.

Secondly, what must be provided to the parties is the thinking process which led to the arbitrator's decision, i.e. the grounds or justification for deciding the relevant issues in the

way they did. In undertaking this exercise, care should be taken to distinguish between a genuine reason and something which looks like a reason but is not. Re-stating the conclusion in a different way (for example 'The premises would be unattractive to the market because no tenant would want them') does not explain why the conclusion was reached. Equally, not everything that begins with 'because' necessarily amounts to a reason, or at any rate, a sufficient reason (for example, 'Mr X FRICS took the view that the appropriate rate per foot for the mezzanine floor was £4.50 per square foot. I do not accept his view because I do not think that £4.50 is the correct figure'). What is important in each case is to identify and express so far as possible the real grounds on which the decision was reached, i.e. (taking the last example) that £4.50 is not consistent with the open market letting of the identical building next door, which shows a figure nearer £10 for the mezzanine floor. If Mr X has put forward arguments why that building is not a useful comparable, the arbitrator needs to address those arguments and explain why they are incorrect.

Thirdly, the degree of detail required will vary from case to case and from issue to issue. The arbitrator should steer a course between, on the one hand, being too brief and sketchy, and on the other, going into matters in greater detail than the parties reasonably need to understand the decision on the relevant issues. Precisely how the arbitrator resolves this will depend on all the circumstances. They do not need to provide a reasoned decision on every single point raised by the parties, particularly those that are not relevant to their overall decision on value. What they need to provide are the reasons why they have decided the relevant issues in the way they have, and provide enough to ensure that the parties understand how and why they have arrived at this decision.

Fourthly, reasons should be set out in clear and plain English, which avoids over-long sentences and (so far as realistically possible) the use of jargon. The arbitrator should bear in mind that the paying customers are frequently laymen without specialist property or valuation expertise. Consequently, they should aim to make the award as comprehensible as possible in the circumstances. In so doing, they should have no concern that the award will be any the less authoritative as a result of not using formal or technical language.

Fifthly, when the amount awarded is based on comparables, it is important for the award to show how the arbitrator's analysis of the comparables has informed their final view. It has not been uncommon in the past to find an award that concludes along the following lines: 'Those of the comparables which I regard as relevant produce a range of ITZA figures from £62.00 psf to £73.50 psf. In my opinion, the appropriate figure to adopt for the subject premises on the review date is £65.00 psf'. This is a leap of faith. As will be obvious, there is a missing link in the chain of reasoning leading to the final figure, namely, the reason for selecting that particular figure out of the range of possible figures. The losing party is left with no idea of why the figure was as it was. This is a great source of frustration. Consequently, the award should set out the reasons why the arbitrator ended up adopting the figure they did.

23.9 The decision

This important section will usually be headed 'AWARD'. It sets out the arbitrator's decision on the dispute presented. It is always essential that the arbitrator makes an unequivocal and final decision on the amount of the rent and such other issues as may be included in the arbitration agreement (e.g. costs). The wording of the findings and award and the directions as to costs should therefore be clear and unambiguous. Where, as previously mentioned in 13.1, the arbitrator makes alternative findings, it is necessary to say which of the alternatives has actually been awarded.

Typically, this will start with the arbitrator's determination of the rental value. The arbitrator will also need to consider whether any ancillary orders are required; for example, in relation to the payment of costs by one party to another.

The arbitrator may also need to make decisions on ancillary matters such as whether to award interest under s. 49 of the Act (see 26).

23.10 Closing formalities

Once the arbitrator has written the decision section and dealt with costs to the extent necessary to do so at that stage, they should set out the closing formalities.

If the arbitrator has not already done so in the preliminary parts of the award, they should state the seat of the arbitration at this point (see 22.10).

The arbitrator should then sign and date the award. There is no need to:

- a** state the place the award was made – this is treated by s. 53 of the Act as having been the seat of the arbitration
- b** refer to the award having been 'published' – it suffices to state when it is dated
- c** have the signature of the arbitrator witnessed.

Having written the award and checked it for accuracy, spelling and punctuation, it is always prudent to print it off and put it to one side for at least 24 hours and read it again before signing it off in order to eliminate errors that survived the initial proofreading.

24 Fees

24.1 Introduction

The parties' joint and several liabilities to an arbitrator extend only to 'such reasonable fees and expenses as are appropriate in the circumstances' (s. 64(1)). This drafting leaves open to question the following issues, which are analysed in this section.

- What may the arbitrator take into account in fixing their fee? (See 24.2).
- How should the arbitrator account for the fee? (See 24.3).
- How should the arbitrator deal with any expenses incurred? (See 24.4).
- Is it appropriate for the arbitrator to charge a fee merely for accepting the appointment? (See 24.5).
- Is it appropriate for the arbitrator to charge a waiting fee? (See 24.6).
- Is it appropriate for the arbitrator to charge fees on account? (See 24.7).
- May the arbitrator increase their rates? (See 24.8).
- What if the parties reach a settlement before the award is taken up? (See 24.9).
- Should the arbitrator approach fees for repetitive work differently? (See 24.10).
- How should the arbitrator deal with objections to their charges? (See 24.11).
- What happens to the arbitrator's ability to recover fees when they resign or are removed? (See 24.12).

24.2 The basis of charge

In fixing the fee, the arbitrator should have regard to the complexity and importance of the matter in dispute, the degree of responsibility, skill and specialised knowledge involved, the amount of time involved, the level of the representation and the amount or value in dispute. These are the criteria likely to be applied if the arbitrator's fees have to be determined by the court.

In some cases, it will be desirable for the arbitrator to fix the fee at the outset of the arbitration, especially when the amount at stake is small. However, in many cases it will be impossible for the arbitrator to name a precise fee at the outset; although, as previously stated in 6.6, they should give an indication as early as possible as to the basis they are going to adopt.

Where the amount or rental value of the subject property is small, a fee based on a normal hourly or daily rate of charging may be large in relation to the amount involved. In such cases it is common for the surveyor arbitrator to charge a lower fee as part of the service that

members of RICS traditionally give to the public. It is therefore suggested that in formulating their proposal the arbitrator should:

- a** start with the hourly or daily rate that they would charge for other professional work they undertake of average complexity
- b** adjust this rate, as they would in any case, having regard to the importance of the matters in dispute, the degree of responsibility, skill and specialised knowledge involved, whether the parties were represented (and therefore the extent to which the arbitrator was assisted), and the amount or value in dispute
- c** estimate the time reasonably likely to be spent dealing with the reference, reflecting whether or not a reasoned award is required
- d** look at the resultant figure and consider whether it is a fair amount to charge, having regard to the interests of the parties who have to pay it and to the interests of the profession in providing the rent review service to the public.

If the arbitration is possibly going to become protracted it may be wise for the arbitrator to reserve the right to vary their charging rate at some future date (see 24.8).

24.3 Expenses incurred by the arbitrator

The arbitrator's fees and disbursements will, on occasion, also include the cost of taking legal or other specialist advice, and these costs form part of the costs of the reference. It will be wise for the arbitrator to include these in their decision as to costs, which form part of the award.

Where such ancillary specialist costs seem likely to arise, the arbitrator would be prudent to obtain the parties' agreement to their payment at the outset, before they are incurred. This is therefore a matter that is best dealt with at the preliminary meeting (see 11.5).

24.4 Recording time spent

Where an arbitrator is charging on a time basis, they should from appointment onwards keep a full log of the time spent and disbursements so as to be able to justify their fees ultimately charged if either party challenges them. The arbitrator may find it convenient to adopt the increasingly common practice of logging time spent in units (usually of 6, 12 or 15 minutes as appropriate to local market practice). This is the basis upon which parties are normally charged fees by their lawyers (see 25.18).

24.5 Commitment or acceptance fees

While it is common in arbitrations in spheres other than rent review for the arbitrator to request a commitment fee, the right to such fees is not sanctioned by the Act, and it cannot be said that the arbitrator is entitled to them as an implied term of the arbitration. Indeed, RICS regards it as unacceptable for an arbitrator to charge a commitment or acceptance fee

merely for accepting their appointment. Often, however, the arbitrator will find that nothing substantive happens for long periods during the appointment, perhaps while the parties negotiate. The question whether it is appropriate for the arbitrator to charge waiting fees in such circumstances is considered in paragraph 24.6.

24.6 Waiting fees

There are many examples of lengthy delays post-appointment during which the parties will be negotiating. While this may be perfectly reasonable, it is not reasonable for the arbitrator to be conflicted from accepting other instructions due to such delays.

One way for the arbitrator to deal with this is to inform the parties at the outset that they will resign after a specified period of months if there has been no substantive progress. The arbitrator should then inform the parties a reasonable period before carrying out this action in order to give them a chance to consider the consequences of their inaction.

Another way, which is becoming increasingly common, is for the arbitrator to charge a fee (either on a one-off basis, or repeatedly periodically) if nothing has happened after a specified period of time. If the arbitrator wishes to preserve their right to collect such fees, then the matter should be raised at the outset of the arbitration (see 6.6).

If no such fees are agreed, and the arbitrator subsequently seeks to charge them, but one of the parties refuses, the arbitrator cannot refuse to proceed without payment, and cannot insist upon payment.

24.7 Fees on account

It is common in arbitrations in spheres other than rent review for the arbitrator to request payment of their fees in tranches in advance and on account of their work at various stages in the arbitration. Again, the right to such fees is not expressly sanctioned by the Act, and it cannot be said that the arbitrator is entitled to them as an implied term of the arbitration. Accordingly, if the arbitrator wishes to preserve their right to collect such fees, then they should raise the matter at the outset of the arbitration (see 6.6).

If no such fees are agreed, and the arbitrator subsequently seeks to charge them, but one of the parties refuses, the arbitrator cannot refuse to proceed without payment, and cannot insist upon payment.

This is a particularly important consideration where the arbitrator may be incurring substantial fees in advance, e.g. accommodation of an oral hearing or counsel's fees.

24.8 Increases in fee rates

It is not unknown for arbitrations to continue for substantial periods of time. If the arbitrator has stated at the outset what the charging rate is, they may come to regret having tied themselves to a rate that will become comparatively unremunerative over time. It would be

prudent instead for the arbitrator to inform the parties at the outset that they reserve the right to increase the charging rate periodically.

24.9 Fees where a negotiated settlement is reached before the award is taken up

While it is impossible to make specific recommendations (because the appropriate fee must depend on the circumstances of each individual case) the following, read in conjunction with 23.2, may provide some guidance.

24.10 Repetitive work

Where an arbitrator is appointed to determine a series of similar disputes (e.g. several units in a parade of shops, or as regards the same premises, between a head lessor, head lessee and under-lessee) or where the work is repetitive, a fee on the previously mentioned basis might be appropriate for a selected test unit, with reduced fees for the allied and subsequent arbitrations concerning the adjacent properties or under-let parts of the property.

Time of settlement	Appropriate fee
(a) After appointment and before (b) below.	Nominal charge, if any. A charge merely for accepting the appointment or for work carried out before the appointment (e.g. conflict searches) is not appropriate.
(b) After perusal of documents and/or preliminary meeting and issue of directions, but before proceedings in accordance with those directions are commenced.	Quantum meruit (usually based on time) plus disbursements. In default of agreement, the arbitrator has a residual jurisdiction to award costs (s. 51(5)). In the meantime, the arbitrator is entitled to reasonable fees (s. 28(1)) if the parties have not already agreed the amount or rate of them (s. 28(5)).
(c) After action in (b) together with submission of statement of agreed facts and delivery of pleadings, representations, and cross-representations, perusal by the arbitrator, preliminary inspection and general preparation for the hearing.	On a time basis or if not time-based, a fee of a quarter to a half of the full fee that would have been charged had the arbitration proceeded to its end.

Time of settlement	Appropriate fee
(d) After action in (b) and (c), and holding the hearing, or giving detailed consideration to the representations and counter-representations and detailed inspections of the subject property and comparables, but before preparation of the award.	On a time basis or if not time-based, a fee of say half to three-quarters of the full fee as above.
(e) After action in (b), (c) and (d) and completion of the award and notification to the parties that it is available to be taken up.	The full fee plus disbursements.

24.11 Objections to charges

If a party objects to the arbitrator's proposed fee basis, the arbitrator can inform the parties that they will proceed and that if either party still wishes to challenge the fees they can be subject to determination by the court.

The courts have held that it is improper for an arbitrator, after appointment, to make an agreement as to fees with one party if the other party objects. It is therefore suggested that the arbitrator should merely state the amount which (or the basis on which) they propose to charge. If one party objects, the arbitrator should reply that the objection is noted.

Any party may apply to the court for the determination of a reasonable arbitration fee, even after a fee has been paid to the arbitrator (see s. 28(2) and (3) of the Act).

It cannot be over-emphasised that Presidential appointments as arbitrators are regarded as important matters carrying a high degree of responsibility on the part of the member so appointed, whose ability to act with impartiality is of paramount importance. It is therefore unthinkable that an arbitrator would be prejudiced against a party because of any objection to the basis of charge proposed by the arbitrator.

24.12 Fee upon removal or resignation

On their resignation or removal, the arbitrator may be entitled to a reasonable fee to be agreed by the parties or determined by the court (see s. 24(4) and 25(3)(b) of the Act).

25 Costs

25.1 Introduction

The combined effect of ss. 61 and 63 of the Act is that, after making their award final on the substantive issue in the rent review arbitration, the arbitrator may then have to deal first with the allocation of costs (who pays) and then with the recoverability of costs (the amount to be paid consequent on the allocation). Accordingly, the decision as to how the costs of the arbitration shall be allocated between the parties is usually reserved to a further award after receiving submissions on costs.

The costs of a closely fought rent review arbitration may be formidable, and may in some cases eclipse the amount at issue. It will therefore be important for the arbitrator to understand the 'rules' relating to the allocation and recoverability of the costs of the arbitration, and the matters that should inform the way in which they exercise their discretion as to costs.

The rules, which are themselves little more than presumptions or guidelines, may be summarised as follows:

- the parties are free, once the dispute has arisen, to agree how costs should be allocated (see 25.3)
- if the parties do not so agree, the allocation of costs is a matter for the arbitrator (see 25.4)
- costs should follow the event (see 25.5)
- costs may be awarded on an issue-by-issue basis (see 25.6)
- although the arbitrator has a discretion as to costs, that discretion should be exercised judicially (see 25.7)
- the award on costs should be reasoned (see 25.8).

This section also deals with cost capping (see 25.9); the allocation of costs where there is no winner (see 25.10); the ways in which parties can protect themselves against costs awards by making appropriate offers to settle (see 25.11); the making of an award final on all matters except costs (see 25.12); and the ways in which disputed costs may be assessed (see 25.13).

Appendix B to this professional standard contains a flow chart setting out a suggested approach to the allocation of costs, applying the principles set out below.

25.2 Meaning of 'costs of the arbitration'

The expression 'costs of the arbitration' is defined in s. 59 of the Act to mean the arbitrator's fees and expenses, the fees and expenses of an RICS Presidential appointment and the legal

or other costs of the parties. The parties are free to agree that the costs should be dealt with in a particular way (see ss. 60 to 65 of the Act). Subject to that, if a party has won, in applying the principle that costs follow the event the arbitrator has a duty to deal in the award on the allocation of costs, with the costs incurred by a party in preparing and presenting their case, including the fees of expert witnesses, solicitors and counsel.

If neither party can be said to have won (see 25.9), then it is unlikely that any order for each party's costs should be made, although it would be appropriate for the arbitrator to order that each party should bear half the costs.

There is no clear authority on the circumstances in which a judge or arbitrator can award as part of the costs of the action or arbitration costs incurred before the commencement of the action or arbitration. There is, however, some authority in relation to the interpretation of the CPR that such costs incurred are allowable if they were made in contemplation of arbitration proceedings and were relevant to the dispute as ultimately constituted.

25.3 Reimbursement of costs

The award determining the allocation of costs may be different from the amount a party has paid to the arbitrator to take up the award on the substantive issue. If so, then the arbitrator will need to include a reimbursement direction in the award on the allocation of costs to the effect that if a party has paid more than the amount for which it is liable the other party shall reimburse such excess.

25.4 Agreements between the parties as to costs

Under s. 60 of the Act, any agreement entered into before a dispute has arisen to the effect that a party shall pay the whole or part of the costs of the arbitration is void. A dispute arises when one party makes a claim against the other which is ignored or denied by the other. Thus the provision often found in leases and other arbitration agreements, stipulating an equal division between the parties of the costs of any arbitration proceedings, is void.

There is nothing to prevent the parties reaffirming their acceptance of this provision after a dispute has arisen, and nothing to prevent them making their own agreement as to costs at any stage after their dispute giving rise to the reference to arbitration has arisen. This agreement will then be binding on them. In the absence of such agreement, the arbitrator has both the power and the duty to include in the award the decision as to how the costs of the arbitration are to be borne.

25.5 The arbitrator must make an award on costs if not agreed

In the absence of the parties' agreement on the allocation of costs and, if relevant, the amount of them, the arbitrator has a duty to determine them by an award, save that, by s. 63(4), the court may determine recoverable costs if the arbitrator declines to do so. If the parties have not agreed upon how the costs shall be allocated between them, and the

arbitrator fails to deal with the matter of costs in the final award, the award is defective for want of finality, and can be challenged by either party in court on that ground. In such an instance, if there were no other grounds for challenging the arbitrator's award, the court would probably remit the award to the arbitrator for amendment by including in the award their decision on the matter of costs.

Where the arbitrator has omitted to deal with costs, a more practical course is for either party to apply to the arbitrator to make an additional award so as to deal with the question of costs.

This application should be made within 28 days of the publication of the award, and the arbitrator should make the additional award within 56 days of the date of the original award. However, both the parties and the court have power to extend these time limits (see s. 57 of the Act).

An award allocating costs between the parties, and an award determining the amount of recoverable costs, are each separate events and there is no reason why a party should not make a 'Calderbank' offer to seek protection for the costs incurred in that event. Other circumstances which may be taken into account include: the conduct of the parties; the amount, if any, by which the bill of costs has been reduced; and whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

An award as to liability for costs may take a number of forms, depending upon how the arbitrator applies the principles set out below. Commonly used ones are:

- Party A shall pay Party B its costs of the arbitration
- Party A shall pay Party B (such and such a fraction or percentage) of its costs of the arbitration (see 25.6)
- Party A shall pay Party B its costs of Issues X, Y and Z only
- Party A shall pay Party B its costs of the arbitration up to (date) or (event).

25.6 The general principle: costs follow the event

It is the settled practice of the courts that in the absence of special circumstances costs should follow the event – that is to say that the successful litigant should receive their costs. This principle is repeated for arbitrations under s. 61(2) of the Act, except where the arbitrator considers it inappropriate in relation to the whole or part of the costs (see below).

Usually rent reviews have only a single 'event' (the quantum of rent) on which the award of costs should be based. Thus, if the arbitrator's award favours the figure put forward by one party (or is substantially the same), then, unless any of the criteria examined below apply, that party should have an order for costs made in its favour. Whether it is appropriate for the arbitrator to award a party its costs if its figure is closer to the award than that of the other party is examined in 25.11.

An arbitrator should in their award give clear reasons for any departure from these principles. The following are examples where they might consider being justified in so doing:

- a** the winning party lost on a discrete issue, in respect of which substantial costs were incurred – see 25.6
- b** a party has made an offer in the nature of a ‘Calderbank’ offer to settle the dispute (see 25.11)
- c** a party has behaved in an obstructive or uncooperative manner and has thereby increased the costs of the arbitration
- d** a party has produced an unnecessary volume of submissions or evidence having little or no bearing on the subject matter, or has unreasonably extended the work involved in the reference.

Reasons for departing from the principle that costs follow the event are derived mainly from decided cases, with which an arbitrator should be familiar in exercising their discretion acting judicially.

25.7 Costs on an issue-by-issue basis

Where an arbitration deals with several issues, the arbitrator may feel it appropriate to award costs on an issue-by-issue basis. It may at first sight appear obvious that such an approach is fair. If, for example, much time has been taken up in arguing about the extent of improvements which are to be disregarded, which the tenant effectively won, but the arbitrator then determines a figure that favours the landlord, the tenant may ask for the costs of the improvement issue, on the ground that the landlord has lost that issue. The response to this from the landlord might be that the overall dispute was as to the amount of rent, which the tenant has wholly lost, with the result that its victory on the improvements point has made no difference. On closer analysis, such arguments are not easy to resolve, and will depend in any given case on the arbitrator’s views of the parties’ stances.

Even if the case seems a suitable one for an issue-by-issue order, the arbitrator should remember that the award needs to be practicable in terms of quantification, and therefore the costs incurred on issues subject to different awards need to be separately identifiable. This may be very difficult to assess in practice. Taking the improvement scenario again, it may be very difficult to ascertain what costs were attributable to that issue. A more satisfactory, if broad brush, approach may be for the arbitrator simply to order that the successful landlord should only recover a given percentage of its costs.

25.8 The exercise of the arbitrator’s discretion as to costs

The arbitrator has a discretion as to costs, but this discretion must be exercised judicially.

That means it must be exercised according to the rules of reason and justice, not according to the private opinion of the arbitrator, nor from motives of, for example, benevolence, or

sympathy, or annoyance. There are many factors affecting the exercise of the discretion as to costs.

An arbitrator should be aware of the prospect of arguments for widening their discretion consequent upon recent cases and by analogy with [the CPR](#) (particularly Part 44.3). It is known that some respected practising arbitrators in disciplines other than property value disputes are applying the CPR principles. The CPR do not apply to arbitration, and unless and until the courts clearly decide to the contrary it is recommended that an arbitrator should not apply the CPR or refer them to the parties without the parties' reference to them in the first instance. An arbitrator may, however, find the principles contained in the CPR useful in exercising their discretion.

25.9 Awards of costs must be reasoned

If the arbitrator has to give their reasons for such an award (as would be expected unless the parties have agreed to dispense with reasons), it may be sufficient for them simply to state their finding of fact that one party has been substantially successful and that, in applying the principle that costs follow the event, the party shall have the costs (meaning that the other losing party shall pay that party's costs and the other costs of the arbitration).

If the arbitrator departs from this simple allocation of costs by, for example, awarding the winner only a proportion of the costs or awarding that each party bears its own costs, then they must provide a proper explanation.

25.10 Cost capping

Unless otherwise agreed the arbitrator may limit the recoverable costs (i.e. the amount a party may recover from the other) under s. 65. The power to limit costs may be implemented at any time and more than once, but by s. 65(2) it must be done before such costs are actually incurred.

The arbitrator may consider it appropriate to remind the parties of their power under s. 65 of the Act to 'cap' recoverable costs to a specified amount, particularly if one party is a layperson and the other is a large company. This is because an arbitrator has a duty to seek to ensure that parties understand the arbitral process under the 1996 Act.

25.11 The allocation of costs where there is no clear winner

In rent review or other valuation disputes where there is a clear winner, for example a party whose rental valuation has been accepted by the arbitrator, then that party should ordinarily receive its costs, as paragraph 25.6 explains.

This approach is not inflexible, since it counts as effective wins those figures which were 'close enough', or 'near misses'.

However, it is seldom the case that either party is wholly successful in that the arbitrator awards one party the figure contended for. In such a case, where neither party can be said in substance to have won, it may be proper for the arbitrator to award that there should be 'no order as to the costs of the arbitration save that the arbitrator's fees and expenses shall be borne equally by the parties'.

It is often argued, however, that where the figure contended for by one party is closer to the awarded rent than that of its opponent, then in the absence of other factors, the arbitrator should award a substantial proportion or even the whole of the costs of the arbitration to that party. However, the arbitrator should consider carefully before applying this approach.

Suppose, for example, that the landlord was contending for an annual rent of £130,000; the tenant for £50,000; and the arbitrator awards £100,000. Who has 'won'? The award may be closer to the landlord's figure, but it is difficult to justify the logic that the tenant should pay the landlord a proportion of the costs as a result. A more logical approach is to consider that in the absence of a preparedness to settle at or very close to a different figure for which either party was contending (which could only be established by a 'Calderbank' offer – (see 25.12)), the only proper order is no order for costs.

In the event that a party submits that an admissible close (but unsuccessful) figure should be taken into account, it is suggested that the arbitrator should make a finding of fact as to whether the difference between the figure in question and the award is a negligible or a non-negligible amount. If the difference is negligible, it could, at the arbitrator's discretion, have the same effect on the allocation of costs from the date that the figure should have been accepted as if it had been successful. In considering whether the difference is negligible or non-negligible, the arbitrator may take into account the costs incurred by the pursuit of the arbitration.

If the difference is non-negligible, the arbitrator has a choice: they may decide that there should be no order as to costs on the basis that neither party has truly won; or where a party has been significantly or substantially successful but not in the 'near miss' category, they may decide (more unusually) that a fractional award on the allocation of costs may be appropriate. There is no right or wrong answer and the arbitrator should do whatever they consider is appropriate in all the circumstances.

The arbitrator should be careful not to constrain the exercise of their discretion by deciding, in advance of the result (and, worse, by telling the parties) what they will regard as a win, or, conversely, a non-win. If, for example, the arbitrator was to announce at the preliminary meeting that a figure within two per cent of the award would be regarded as a 'near miss', then they would automatically have to rule out a figure within 5.5 per cent of the award. Such individual rules of thumb may concentrate the parties' minds on settlement, but they forfeit any measure of a discretionary approach to the question of costs. There is, however, nothing preventing the parties themselves agreeing the parameters within which a near miss will be considered a win.

The arbitrator may well wish, however, to give a broad indication to the parties on how far they are likely to exercise their discretion. Parties may well appreciate advance warning of

the arbitrator's approach, and will wish to take this into account in formulating their offers, and in considering offers from the other side.

25.12 Offers to settle

A party may seek to protect themselves against liability for costs by making an unconditional written offer to settle on specified terms, expressly reserving the right to refer such an offer to the arbitrator after an award has been made as to all issues other than costs. Such an offer is known as a 'Calderbank' offer. To be effective it should contain the following:

- a** an unconditional written offer, capable of acceptance by the offeree, to settle the rent review at a specified rental figure
- b** a reasonable proposal regarding the parties' costs incurred up to the date of the offer. In rent review disputes it is usually appropriate to propose that each party bears its own costs plus one-half of the arbitrator's fees
- c** a statement that it is made 'without prejudice save as to costs'. If the offer is simply made on a 'without prejudice' basis, where the right has not been expressly reserved to refer to it in connection with costs, then neither party may refer to it, without the consent of the other, because that would offend against the without prejudice rule (see 17.5). Where the offer has correctly been made 'without prejudice save as to costs', then it may only be referred to on the question of costs: it retains its privilege in all other respects (unless both parties agree that it should be waived)
- d** it should not be made 'subject to contract'. If it is, then the arbitrator should rule that the party making it cannot rely upon it, because that label renders the offer one which is conditional and is not capable of acceptance by the offeree.

Either or both parties may make such an offer. If the procedure is to be effective, the party making the offer, or both parties, should ask the arbitrator to make an award which will be final as to all matters except costs. It will be too late to produce a 'Calderbank' letter after publication of an award which deals with costs.

If the offer states a time within which it must be accepted the time allowed must be reasonable.

25.13 Effect of an offer to settle

If the landlord makes a 'Calderbank' offer, and the tenant does not accept it, and the arbitrator determines a rent equal to or higher than the landlord's offer, then in the absence of special circumstances the arbitrator should award that the tenant shall pay the landlord's costs and the arbitrator's fees incurred after the date when the offer ought reasonably to have been accepted (not the date of the letter). The converse applies where the tenant has made a 'Calderbank' offer which is equal to or higher than the figure awarded; namely, the tenant would have its costs, incurred after the date when the offer ought to have been accepted, paid by the landlord and the landlord would pay the arbitrator's fees.

The allocation of the costs of the arbitration prior to when the offer should have been accepted should 'follow the event' as explained earlier, although obviously for these purposes the existence of the 'Calderbank' offer is ignored. If the arbitrator for special reasons departs from the usual award, they should give a reason for this in the award.

The notional date for acceptance of the 'Calderbank' offer should take into account a reasonable time for the party receiving the offer to take advice and consider it. The period must be reasonable in all the circumstances: if the parties' decision-makers are fully informed, and meet to consider a compromise, then a reasonable period might be measured in hours rather than days or weeks. In other circumstances, a reasonable period for acceptance would not normally be less than ten days, and usually a period of 14 to 21 days is applied. In the event of a dispute on the period, the arbitrator will have to make a finding of fact in their award, after receiving representations.

If the rent determined is lower than the landlord's offer or higher than the tenant's offer, then unless the offer is very close to the award (see the 'near miss' discussion in 25.11), the decision on costs should be the same as it would have been had no offer been made. This is because a 'Calderbank' offer is not opinion evidence of an expert witness; it is a commercial offer to compromise a dispute which may have a hidden agenda for the offeror which will not be known by the arbitrator.

If a party makes a second 'Calderbank' offer, the arbitrator must consider each offer in relation to the date on which it should have been accepted and the costs up to that date.

Where an award results in a nil increase in an 'upwards only' rent review this would normally result in the landlord being liable for the tenant's costs on the grounds that the landlord had achieved nothing by pursuing the arbitration, notwithstanding the level of the tenant's submission. The tenant may seek to achieve reinforced protection by making a 'Calderbank' offer at a nominal increase in rent.

Some parties might seek to obtain the costs protection of a 'Calderbank' while using devices such as additional conditions, unreasonable time limits for acceptance and the like to minimise the chances of the opposing party accepting the 'Calderbank'. Arbitrators should be alert to such practices and be satisfied that a successful 'Calderbank' did indeed provide a genuine opportunity for acceptance and for the saving of subsequent costs.

'Calderbank' offers withdrawn completely after the date for acceptance (rather than left open subject to the payment of the offeror's costs from the date for acceptance) should be treated with particular caution.

25.14 Withdrawal of offers to settle

A question that often arises is whether any reference may be made on the question of costs to an offer to settle that was made but has been withdrawn. If the awarded figure would have been within the offered amount, the maker will wish to make something of the fact that it had been willing to settle at what will have been determined retrospectively to be a reasonable figure. By contrast, the other party will wish to point to the fact that the maker

obviously had better thoughts, and will contend that it is to be judged by reference to its later, and not its former, position.

As with all matters relating to costs, it is best to avoid making any hard and fast rules, and it will be interesting to see what, if any, reason is given for the change of mind of the offeror. As a matter of general principle, it is difficult to see how credit should be given for an earlier, more beneficial approach, which was not persisted with. The purpose of such offers is to give cost protection against the final result, rather than to indicate the reasonableness of the maker's attitude at any one time. The maker therefore withdraws such an offer at its peril.

25.15 Award final on all matters except costs

A party who has made a 'Calderbank' offer should request the arbitrator to issue their award as an award final on all matters save as to costs. After the issue of the award the party or parties may, if they cannot agree, request the arbitrator to issue an award allocating the costs of the arbitration, in the light of the 'Calderbank' offer or offers which are then submitted to the arbitrator.

In their award determining the allocation of costs, in addition to the amount specified in any 'Calderbank' offers, the arbitrator may have regard to other factors. For example, whether either party has won or lost a distinct issue in the proceedings which ought to be dealt with separately in relation to costs; or whether a party has been obstructive, such as refusing to comply with a notice to admit material facts which are later proved at the hearing, or by wasting time in the reference (see 25.5).

25.16 Assessment of costs – in principle

Generally, if the arbitrator is asked to deal with costs, they will be only asked to deal in the first instance with the allocation of the costs of the arbitration (i.e. who should pay whom), leaving the assessment of the actual amount of the costs until later. Indeed, the arbitrator should encourage the parties to agree the recoverable costs between themselves. It is best to deal with the parties' legal and other costs and the arbitrator's fees and expenses separately. In dealing with the allocation of costs, the arbitrator will need to state the basis upon which the amount of the costs is to be assessed and how, when and by whom that assessment is to be carried out.

If the parties are unable to agree on the assessment of the amount of the costs, then the arbitrator must do so (see s. 63(3)). They should consider providing for the determination of recoverable costs in one of the following ways:

- a** if no lawyer is involved, the arbitrator should determine costs as they are likely to be fully conversant with the costs of the surveyor experts employed by the parties. The usual basis of determination is set out in s. 63(5)
- b** if lawyers are involved, the arbitrator should give the parties a choice of:

- i determination by the arbitrator, either alone if they are sufficiently conversant with the principles, or with a costs assessor
 - ii determination by the court
 - iii assessment by the Costs Panel of the Chartered Institute of Arbitrators
- c if the arbitrator does not determine the costs, a party may apply to the court for its determination.

25.17 The basis of assessment of costs

Awards often contain a direction that 'costs are to be determined on the "standard basis"', or, for that matter, on the 'indemnity' basis.

Those terms are not defined in the Act, and are best avoided. It is better to make a direction for assessment referring to the default basis of assessment set out in s. 63(5) of the Act. This limits the recoverable costs to a reasonable amount which was reasonably incurred. Any doubts on what constitutes a 'reasonable amount' or as to whether an amount was 'reasonably incurred' should normally be resolved in favour of the party who is ordered to pay them.

The arbitrator may, however, take the view that in the exercise of their discretion it would be appropriate to resolve any doubt in favour of the receiving party (i.e. on what is referred to in litigation as 'the indemnity basis'). In particular, where one party has 'beaten its Calderbank', the arbitrator may wish to consider whether it would not be appropriate to order that the costs payable from the latest date upon which that offer should have been accepted should be paid on the indemnity basis. Even here, however, the arbitrator should never order the payment of costs that they consider to be unreasonable in amount or unreasonably incurred.

More guidance on these bases is set out in the notes to CPR 44.4. It should rarely be necessary, however, for the arbitrator to immerse themselves in such minutiae on what should be a common-sense question for the exercise of discretion.

25.18 How to assess costs

In some relatively small arbitrations a successful party's claim for recoverable costs may be as a lump sum. In larger cases the claim will be based on an itemised bill, setting out in sufficient detail: what was done and by whom, when it was done, how long it took and the rate per hour in respect of each person engaged in the matter. Time engaged is usually divided into units of 6, 12 or 15 minutes. In appropriate circumstances an arbitrator should not seek to carry out the determination in accordance with the court's requirements and procedures, as this may incur unnecessary delay and expense (contrary to s. 33 of the Act).

However, an awareness of usual, more formal, procedures is important if lawyers are involved, as they are likely to be familiar with and expect such procedures.

The arbitrator will normally allow the lower of the costs actually incurred by a party or the cost at which a party could reasonably have obtained the services required. The arbitrator may wish to see the relevant fee accounts and/ or letters of engagement relating to the actual costs incurred. A surveyor's recoverable costs claimed on a time basis should not be allowed if the actual remuneration was on some other basis. The arbitrator will also consider whether the costs incurred were reasonable, and would not without very good reason allow the expensive hourly rates and travelling expenses of City-based solicitors and surveyors in a small provincial arbitration where satisfactory representation could have been obtained less expensively locally.

It is the effective policy of costs assessors in litigation to award a successful party only 60–70 per cent of its costs on the standard basis, and approximately 80 per cent on the indemnity basis. There is no reason for arbitrators to follow this practice. In general terms, if the arbitrator is reasonably satisfied with the costs that they are told the winning party has incurred, they will have little desire or need to seek to

reduce their bill by concerning themselves with fine distinctions as to whether it was absolutely necessary to have spent one hour more here and there on crafting representations.

26 Interest and other supplementary awards

26.1 The power to award interest

The usual form of rent review clause refers to the arbitrator only the question of what the rent payable under the lease should be.

Section 49(5) of the Act expressly provides that 'references in this section to an amount awarded by the [arbitrator] include an amount payable in consequence of a declaratory award by the [arbitrator]'. A declaratory award is one that declares a result ('the market rental value is £X'), as opposed to a judgment, which typically records what sum is owed by one party to another.

Since the determination of the arbitrator in awarding a reviewed rent is declaratory in its nature, it is likely that the award would be treated by a court as an 'amount' awarded for the purposes of s. 49. This section permits the award of simple or compound interest on any difference in the rental liability resulting from the award.

Accordingly, where the rent review provisions of the lease do not provide otherwise, and the parties do not agree otherwise, then the arbitrator may decide in appropriate cases that the reviewed rent should bear interest. It will however be inappropriate for the arbitrator to raise the question of interest if neither party has sought to do so. In practice, it is very rare for the parties to do so, and the arbitrator should not feel tempted to do so in their stead, merely because the Act contains a mechanism allowing for interest. Where one of the parties claims interest, then it will be relevant for the arbitrator to ascertain whether the lease contains a provision allowing interest to be recovered in the event of a delayed review of the rent. If it does, then it is difficult to see why the arbitrator should add to the contractual provision by making an award. Conversely, if it does not, then the arbitrator may well consider that it would be inappropriate to make an award in circumstances where the parties' bargain has not provided for it. It is suggested that an award might only be considered where one party has been culpable of substantial delay which the other party had no opportunity to remedy.

The selection of the date from which interest should be payable will require careful consideration. In some cases, it may be apparent that the landlord has been instrumental in delaying the review process (perhaps in the hope of achieving a higher rent as market conditions improve). In such circumstances it might appear unjust to impose interest on the award backdated to the review date, because this would penalise the tenant. On the other hand, there is force in the contention that the landlord has been kept out of its money, which the tenant has had the use of in the interim. It will be for the arbitrator to balance these competing considerations when weighing up the exercise of their discretion.

26.2 Award of interest on costs

Unless the parties agree otherwise, the arbitrator also has power to award interest (simple or compound) on costs (see s. 49 of the Act). Once the allocation and quantification have been determined it may well be appropriate for the arbitrator to award interest on the amount owed by one party to the other, either from the date of the award on the allocation of costs, or from a future date (say, 21 days thence) by which the payment should reasonably be made.

26.3 Supplementary award for amount due

It is open to the parties, if they so agree, to enter into a supplementary reference to arbitration conferring upon the arbitrator, who has been appointed under the rent review clause, power to make an award for the payment by the tenant to the landlord of any arrears of rent that may be payable at the date when the primary rent review award is made. Such a supplementary award can be enforced under s. 66 in the same manner as a judgment or order of the court.

It is difficult, however, to see any circumstances in which the tenant would want to join with the landlord in conferring this power upon the arbitrator.

27 Events after the award

27.1 Closing the case

With the exception of the matters discussed in to 27.6, once the arbitrator has made the final award, they have completed their task; they are *functus officio*, to use the legal expression.

It follows from this that the arbitrator has no further jurisdiction in relation to the arbitration and, subject to the points made in this section, is not at liberty to entertain any requests by the parties for anything else (see 27.7).

27.2 Additional awards

There are four sets of circumstances in which, notwithstanding the making of the 'Final Award', the arbitrator can nevertheless be prevailed upon to make a further award:

- Where both parties agree, the arbitrator can be asked to make any additional award (see s. 57(1) of the Act). This power could conceivably be used to require the arbitrator to remake the award if the parties perceive it to be deficient, but they must both agree to this.
- Where the arbitrator has failed to make an award that they should have made, s. 57(3) of the Act gives the parties the means of compelling the arbitrator to make a further award. This can be used to procure an award on costs or interest or in respect of any other claim that was before the arbitrator but not dealt with in the award.
- The arbitrator may be asked to make an award for the payment by the tenant to the landlord of any arrears of rent that may be payable at the date when the primary rent review award is made (see 25.3).
- Where a successful challenge is made to the award, the arbitrator can be required to reconsider the award in the light of the court's order (see 27.10).

27.3 Correction of awards by agreement

Where it appears to the parties that the award contains an error of any kind, the arbitrator is required to entertain an agreed application by them to correct the award (see s. 57(1)). The error can be of any kind, large or small, and no matter how fundamental. It is, however, essential that the parties agree. If they do not, then the arbitrator's power to correct the award is very constrained, as 27.4 explains.

The fact that the parties may have agreed that the award contains an error that must be corrected does not mean that the arbitrator is bound to accede to the application by the parties. The view may be taken that the parties themselves are mistaken, and that the award

needs no correction. Before making a decision, however, the arbitrator would be prudent to hear the parties.

27.4 Correction of awards other than by agreement

Where the parties are not in agreement, then s. 57 of the Act only allows the arbitrator, apart from the additional award power already discussed (see 27.2), either on their own initiative or on the application of a party, to:

- a correct a clerical mistake or error in the award arising from accidental slip or omission
- b clarify or remove any ambiguity in the award.

It is important to appreciate the limitations of this s. 57 power so far as 'changing' the award. It entitles the arbitrator to correct an accidental clerical mistake (for example, wrong addition) or (where the award is ambiguous) to clarify what was meant. But it does not entitle them to change their award in any other respect, even if they have a subsequent change of mind or one party wishes to adduce further evidence on some issue. Once the arbitrator has made the award, their jurisdiction is at an end, and any further recourse is a matter for the court.

Any such occurrences may be embarrassing for the arbitrator but they should not allow such feelings to affect their conduct of the matter. If an award contains an error or a deficiency, the situation should be remedied as expeditiously and with as little fuss as possible.

27.5 Examples of matters suitable for correction other than by agreement

Examples of the types of accidental clerical error that are suitable for correction under s. 57 (and which have been encountered in practice) include:

- changing the name of a witness from Hobbes to Hoblet halfway through the award
- putting the evidence of an expert into the wrong side of the scales and therefore causing the wrong party to win
- the incorrect placing of a figure in a ladder of calculations thus giving an incorrect result
- getting the name of a party wrong from the front page right through to the back sheet
- typographical errors in figures.

There is no set form of document for correcting an error. A simple form of award that sets out the nature of the error and the step taken to remedy it (usually appending the corrected award) should suffice. An arbitrator should not take either of these actions without first giving the parties a reasonable opportunity to make representations.

27.6 Timetable for correction of awards other than by agreement

Section 57 of the Act sets out the following timetable for the operation of the power to correct awards other than by agreement:

- any application for the exercise of the s. 57 power must be made within 28 days of the award, or such longer period as the parties agree
- once the matter has been raised with the arbitrator, they must give the other party a reasonable opportunity to make representations
- any correction of the award must then be made within 28 days of the date the application was received by the arbitrator (in the absence of a contrary agreement by the parties)
- any additional award must be made within 56 days of the original award (save in the case of agreement to some other effect)
- where the matter has been raised by the arbitrator themselves, they must make any requisite correction within 28 days of the award (unless, again, there is agreement to some other effect).

These time limits may be extended by agreement between the parties, or by the court.

27.7 Requests for further reasons

Where the award appears to the parties to be insufficiently reasoned, they may agree to approach the arbitrator to ask for further reasons, in the shape of an additional award, which the arbitrator would be bound, in the absence of a good reason to the contrary, to supply pursuant to s. 57(1) of the Act (see 27.2).

Where the parties do not agree, then the arbitrator has no power to give additional reasons, and must decline any request to do so, no matter how compelling the case might be.

Section 70(4) of the Act gives the court the power to require the arbitrator to supply further or better reasoning if the court takes the view, in the course of a challenge to an award, that the award does not state the arbitrator's reasons in sufficient detail to enable the court properly to consider the challenge. The fact that the case may be an obvious one for the giving of further reasons does not give the arbitrator any jurisdiction, in the absence of a court order, to supply such reasons – but it may make the parties agree to make a joint request under s. 57(1), in order to save costs (see 27.2 and 27.3).

27.8 Legal challenges to the award

A party to an arbitration may (upon notice to the other party and to the arbitrator) apply to the court:

- under s. 67, for a ruling upon the substantive jurisdiction of the arbitrator (see s. 30)

- under s. 68, on the ground that there has been serious irregularity affecting the arbitration. Such an application may be made when substantial injustice has been done to the applicant due to the arbitrator acting unfairly; or exceeding their powers; or failing to conduct the proceedings in accordance with the procedure agreed by the parties; or failing to deal with all the issues put to them. Further, when there is uncertainty or ambiguity as to the effect of the award; or otherwise not acting according to law (which includes fraud); or failing to comply with the requirements as to the form of the award; or any irregularity in the conduct of the proceedings of the arbitration (e.g. using personal knowledge, investigations or expertise without disclosing it or them to the parties)
- under s. 69 (unless otherwise agreed by the parties) on a question of law arising out of the award. An appeal on a point of law may only be brought with the agreement of all the other parties or otherwise with the leave of the court and then only if the court is satisfied that the determination of the question will substantially affect the rights of one or more of the parties; or that the question is one which the arbitrator was asked to determine; or that on the basis of the findings of fact in the award the decision of the arbitrator is obviously wrong, or the question for the arbitrator is one of general public importance and there is serious doubt as to the arbitrator's decision.

A party can lose the right to object on any of the grounds set out above if it has not made that objection to the arbitrator as soon as it arises, and in any event an appeal against an award must be lodged within 28 days of the date of the award. Fundamental to the appeal process is a requirement under s. 70 that the challenger has first exhausted any available arbitration process of appeal or review and any available recourse by way of correction of the award or additional award.

27.9 Reaction to legal challenge to the award

It follows from the discussion above that the arbitrator has little role to play in any legal challenge to the award, unless:

- the parties jointly request assistance under s. 57 (which may be said to be inconceivable, given that the challenge is a hostile procedure)
- they are required by the court to provide reasons (see 27.7) or
- they wish to exercise the opportunity afforded to them by CPR62 either to apply to be joined as defendant, or to file representations, or to file a witness statement explaining some matter (which would generally be inadvisable).

In cases falling outside these limited circumstances, the arbitrator should resist the temptation to explain their reasons for making the award that they did. There is no reason for not replying courteously to the parties' correspondence, but the arbitrator should not provide any substantive replies unless both parties agree that they should do so.

27.10 Remission of award to the arbitrator

On an application challenging the substantive jurisdiction of the arbitrator under s. 67 of the Act, the court may confirm the award, vary the award, or set aside the award in whole or in part.

On an application by a party to challenge the award on the grounds of serious irregularity under s. 68, the court may remit the award to the arbitrator, in whole or in part, for further reconsideration; set the award aside in whole or in part; or declare the award to be of no effect, in whole or in part. However, the court will only use its power to set aside or declare an award to be of no effect if it is satisfied that it would be inappropriate to remit the matters in question to the arbitrator for reconsideration.

On an appeal on a question of law under s. 69, the court may confirm the award, vary the award, remit the award to the arbitrator in whole or in part for reconsideration in the light of the court's determination, or set aside the award in whole or in part (but only if it was satisfied that it would be inappropriate to remit the matters in question to the arbitrator for reconsideration).

Where the award is remitted to the arbitrator in whole or in part for reconsideration, the arbitrator shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission (or such longer or shorter period as the court may direct) – see s. 71 of the Act.

27.11 Order setting aside award

Where the arbitrator's award is set aside in its entirety, then the arbitrator will obviously have no jurisdiction to consider the matter further (in contrast to cases where the award is remitted to the arbitrator, considered in 27.10). The Act does not expressly provide for what, if anything, is to happen to the costs that have been incurred in relation to the set aside award, let alone in relation to the arbitrator's costs. In an egregious case, it might be possible for one of the parties to invoke the court's powers under s. 24(4) of the Act, although it seems likely that this procedure is available only where the arbitration has not yet been concluded.

27.12 Enforcement of the award

Section 66 of the Act provides that an award is enforceable, by leave of the court, in the same manner as a judgment or order of the court.

However, this provision does not apply to the normal rent review arbitration because in such an arbitration the arbitrator's powers extend only to determining the amount of the rent payable under the lease, and do not extend to ordering the payment by one party to the other of a sum of money.

Accordingly, once the award has been made, the remedy of the landlord whose tenant does not thereafter pay whatever sums of rent may be due is to proceed for the recovery of arrears of rent in the usual way. The provisions of s. 66 will, however, apply to costs when determined and quantified.

Appendix A – Comparison of arbitration with determination by independent expert

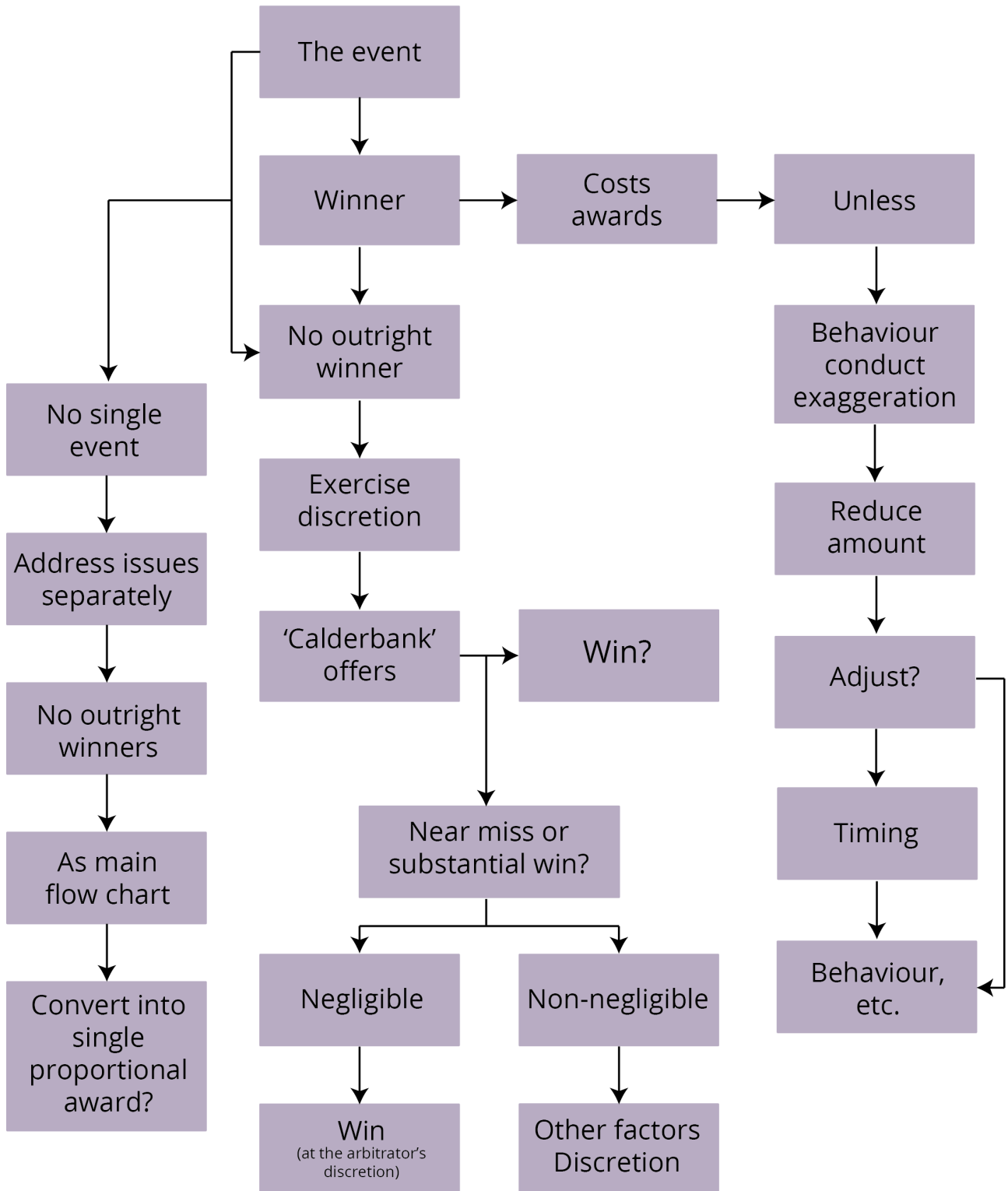
The main differences in the duties and suggested procedures for arbitrators and independent experts as regards commercial rent reviews may be summarised as follows:

Arbitrator	Independent expert
(a) The arbitrator acts (as does a judge) only on evidence and arguments submitted to them, but they are able to draw the parties' attention to matters of which they may not be aware. They are also able to take the initiative in ascertaining facts and the law (see 18.5). The award must lie between the extremes contended for by the parties. The arbitrator is, however, expected to use their expertise in assessing the relevance and quality of the evidence and arguments submitted.	(a) The independent expert has the duty of investigation to discover the facts, details of relevant comparable transactions and all other information relevant to their valuation (though they may receive information regarding these matters from the parties).
(b) The arbitrator cannot decide without receiving evidence from the parties, or from one of the parties when they are 'proceeding in default' by the other, except where proceeding on their own initiative (see 20.10).	(b) The independent expert bases their decision upon their own knowledge and investigations, but may be required by the instrument under which they are appointed to receive submissions from the parties.
(c) The procedure for arbitration is regulated by the Act.	(c) There is no legislation governing procedure for the independent expert and they have to, therefore, settle their own contract with the parties.
(d) A party to an arbitration can seek and (through the courts) compel disclosure of documents or the attendance of witnesses (see 17.8).	(d) The independent expert has no such powers.

Arbitrator	Independent expert
(e) An arbitrator may not delegate any duties, powers or responsibilities, although they can seek assistance (see section 13).	(e) The independent expert has a duty to use their own knowledge and experience in arriving at their own decision. However, during the course of the investigation the independent expert may seek routine administrative or other assistance from any other person. This is always provided that they are in a position to vouch for the accuracy with which such tasks are carried out.
(f) In an arbitration the arbitrator can award that one party shall pay all or part of the arbitrator's fees and all or part of the other party's costs. They can also assess the quantification of those fees and costs.	(f) An independent expert has no power to make any orders as to their fees, or as to the costs of a party, unless such a power is conferred upon them by the lease or by agreement between the parties.
(g) The arbitrator's fees can be determined by the court under the Act (see 24.6).	(g) There is no procedure for formal determination of an independent expert's fees.
(h) There is some (albeit limited) right of appeal against the award of an arbitrator on a point of law. An arbitrator's award may also be challenged in the courts on the basis that the arbitrator did not have jurisdiction or on the grounds of 'serious irregularity'. If a serious irregularity is shown, the court may (in whole or part) remit the award, set it aside or declare it to be of no effect.	(h) There is no right of appeal against the determination of an expert, although in some very limited circumstances the court may set it aside.
(i) Provided they have not acted in bad faith the arbitrator is not liable for negligence (see s. 29 of the Act).	(i) The independent expert is liable in damages for any losses sustained by a party through their negligence. This is so notwithstanding that the court will not interfere with a final and binding determination that they have made.

Appendix B – Costs flow chart

Note: the following flow chart is designed to guide arbitrators through the exercise of their discretion in relation to costs. It is not intended to replace the exercise of that discretion.



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