



# Surveyors acting as arbitrators in construction disputes

England, Wales and Northern Ireland

2nd edition, April 2017

Effective from 3 July 2017

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RICS professional standard, England, Wales and Northern  
Ireland

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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
<b>RICS professional standards</b>	<p><b>Set requirements or expectations for RICS members and regulated firms about how they provide services or the outcomes of their actions.</b></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"> <li>• mandatory requirements, which use the word ‘must’ and must be complied with, and/or</li> <li>• 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.</li> </ul> <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>
<b>RICS practice information</b>	<p><b>Information to support the practice, knowledge and performance of RICS members and regulated firms, and the demand for professional services.</b></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>

# 1 Introduction

## 1.1 Scope of this professional standard

This professional standard applies to RICS members appointed to act as arbitrator in a dispute relating to construction works. It should also be of assistance to parties involved in arbitration, and those acting for them, by making them aware of the procedures that may be followed.

It provides outline guidance and practical suggestions, but it is not, and should not be taken to be, a complete statement of the law and practice of arbitration. In the majority of cases, the arbitrator will need to have a wider and deeper understanding of the law and procedure of arbitration than provided in this professional standard.

The professional standard is based upon arbitration law and practice in England, Wales and Northern Ireland, where the *Arbitration Act 1996* (referred to in this document as 'the Act') applies. In this professional standard references to sections (sometimes abbreviated to 's.')

are references to sections of the Act. Readers should be aware that the law and practice in Scotland differs to that set out in this document.

Under the Act reference is frequently made to the 'tribunal'. This word is used to refer to 'the arbitrator or arbitrators' and is used because, in some arbitrations, there is more than one arbitrator. However, in the vast majority of construction arbitrations in the UK there will be a single arbitrator, and the appointment of a sole arbitrator is the default position under the Act, if the parties have not agreed otherwise (s.15(3)). Therefore, in this professional standard reference is made throughout to the 'arbitrator' rather than the 'tribunal'.

## 1.2 The fundamentals of arbitration

Arbitration is a private dispute resolution process that has been used by commercial parties for many centuries. In England the first *Arbitration Act* was passed into law in 1698.

The primary purpose of arbitration, historically and currently, is to provide commercial parties with the opportunity to have their disputes resolved by a selected third party (the arbitrator) without having to go to court.

The benefits of arbitration, as opposed to litigation, include the fact that the dispute remains a private and confidential matter, the procedure is flexible, the process should be faster and less expensive and the arbitrator will generally be someone with experience and expertise in the subject matter of the dispute.

In certain other respects, construction arbitration is similar to litigation. The arbitrator, like a judge, decides the rights and obligations of parties under the contract by hearing

submissions and taking into account the evidence provided. This may include evidence of witnesses of fact and expert witnesses.

In many arbitrations of construction disputes there will be a hearing at which witnesses will be examined under oath and the arbitrator's award, like a court judgment, will provide a statement of the parties' rights and obligations relating to the matters in dispute, which, in general, can be enforced in the same way as a court judgment.

Like litigation, the arbitral process is governed by the rules of natural justice and similar principles are used when allocating and determining the parties' costs.

Although construction arbitration may adopt some procedures similar to those used in litigation, it should not mimic court proceedings. If the parties are represented by lawyers who are more familiar with litigation than arbitration, there may be pressure to adopt a procedure that mirrors that used in the courts. However, this pressure should be resisted. One of the reasons that arbitration lost its way as the default method of resolving construction disputes, towards the end of the last century, was because it became too much like litigation. An arbitrator has a duty to adopt procedures suitable to the circumstances of the particular case (s.33(1)(b)) and a key advantage of arbitration is that the procedure can be tailored to suit the nature and amount of the dispute. This will rarely mean adopting court procedures at every step of the proceedings.

### 1.3 Statutory framework

If parties agree to refer a dispute to arbitration in England, Wales and Northern Ireland, the reference will be governed by the Act. Therefore, the arbitrator should have a good knowledge of the Act.

The general principles of arbitration are set out in section 1, which provides that:

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

The general principle in section 1(a) is reflected by the general duty imposed on the arbitrator under section 33. This requires the arbitrator to: (a) act fairly and impartially between the parties, giving each party a reasonable opportunity of putting their case and dealing with that of their opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined. In section 26(1) it is stated that the authority of the arbitrator is personal and so an arbitrator may not delegate powers to others.



The general principle in section 1(b), allowing party autonomy, is reflected in various sections throughout the Act but, if the parties have not agreed, or cannot agree, how their disputes are to be resolved, the Act provides default provisions. Many sections of the Act set out the powers of the arbitral tribunal that apply 'unless otherwise agreed by the parties'. However, the flexibility and freedom of the parties is limited by the fact that, pursuant to section 4 of the Act, many sections are mandatory and cannot be varied. Section 4(2) states that the mandatory sections, which are listed in Schedule 1 of the Act, are to 'have effect notwithstanding any agreement to the contrary'.

The general principle in section 1(c), restricting court intervention, is also reflected throughout the Act but there are a number of key issues over which the court retains power, such as extending time periods, enforcing awards and dealing with challenges.

## 1.4 Powers of an arbitrator

The powers of the arbitrator are prescribed by one, or a combination, of the following:

- i the Act
- ii agreements of the parties
- iii any arbitral rules that apply
- iv the terms of the arbitration agreement and
- v common law.

In practice, it is the Act and chosen arbitral rules (if any) that generally govern the powers and duties of an arbitrator.

As stated above, the Act provides for party autonomy and it is open to the parties to agree to vary or exclude non-mandatory sections, which generally start with the words 'Unless otherwise agreed by the parties ...' or 'The parties are free to agree ...'. However, in practice, parties rarely make such agreements and the default provisions of the Act apply.

For this reason, the arbitrator will invariably have the default powers to:

- make a ruling on jurisdiction (s.30(1))
- decide procedural and evidential matters (s.34(2))
- appoint experts or legal advisors or technical assessors (s.37(a))
- order a claimant to provide security for costs (s.38(3))
- give directions in relation to any property which is the subject of the proceedings (s.38(4))
- direct that a witness be examined under oath or affirmation and administer the necessary oath or affirmation (s.38(5))
- order the preservation of evidence (s.38(6))
- dismiss a claim due to inordinate and inexcusable delay by the claimant (s.41(3))

- continue the arbitration in the absence of a party (s.41(4))
- issue peremptory orders (s.41(5))
- dismiss a claim due to a failure to provide security for costs following non-compliance with a peremptory order (s.41(6))
- direct that a party may not rely upon any allegation of material which it has failed to provide pursuant to a peremptory order (s.41(7)(a))
- draw adverse inferences from non-compliance with a peremptory order (s.41(7)(b))
- issue an award on the basis of such material as has been properly provided (s.41(7)(c))
- make an order as to payment of costs incurred as a result of a failure to comply with a peremptory order (s.41(7)(d))
- make an award or awards on different aspects of the matters to be determined (s.47)
- make a declaratory award or an award ordering payment of money (s.48(3) & (4))
- order a party to do or refrain from doing anything (s.48(5)(a))
- order specific performance of a contract (s.48(5)(b))
- order rectification, setting aside or cancellation of a deed or other document (s.48(5)(c))
- make an award of interest (s.49)
- decide the date of the award (s.54)
- refuse to deliver an award until payment has been made of the arbitrator's fees and expenses (s.56(1))
- remove any clerical mistake or error arising from an accidental slip or remove ambiguity from an award (s.57(3))
- allocate the costs of the arbitration between the parties (s.61)
- determine the recoverable costs of the arbitration (s.63)
- limit the recoverable costs of the arbitration (s.65) and
- continue the proceedings while a challenge is made to the court under section 67 (s.67(2)).

As stated above, the powers provided under the Act may be added to or varied by any rules that the parties may have agreed. If a dispute is referred to arbitration under the JCT Standard Building Contract 2016 it will be conducted under the Construction Industry Model Arbitration Rules (known as 'CIMAR') (see clause 9.3 of the Contract), which makes some variations to the powers provided under the non-mandatory sections of the Act.

## 1.5 Duties of an arbitrator

The duties of the arbitrator are prescribed by the same five sources as the powers. Under the Act the arbitrator has a duty to:

- act fairly and impartially and to give each party a reasonable opportunity of putting its case and dealing with that of its opponent (s.33(1)(a))
- adopt suitable procedures and avoid unnecessary delay or expense (s.33(1)(b))
- decide the dispute in accordance with the applicable law and such other considerations as the parties agree (s.46(1))
- terminate proceedings if requested following a settlement by the parties and, if requested, record the settlement in the form of an agreed award (s.51(2))
- produce the award in writing and sign it (s.52(3))
- provide reasons for the award (s.52(4))
- state the seat of the arbitration (s.52(5))
- serve copies of the award on the parties without delay (s.55(2))
- make any correction to the award within 28 days of the date of the award (s.57(5))
- make any additional award within 56 days of the date of the award (s.57(6))
- subject to certain restrictions, award costs on the general principle that costs follow the event (s.61(2))
- in general, when determining recoverable costs, allow a reasonable sum in respect of all costs reasonably incurred (s.63(5)(a)) and resolve doubts as to costs in favour of the paying party (s.63(5)(b)) and
- make any order limiting the recoverable costs sufficiently in advance of the costs being incurred (s.65(2)).

As may be expected, the Act provides sanctions for a failure by the arbitrator to comply with the key duties identified above.

Under section 24(1) a party may apply to the court to remove an arbitrator if there are justifiable doubts as to the arbitrator's impartiality (s.24(1)(a)) or if the arbitrator refuses or fails to conduct the proceedings properly (s.24(1)(d)(i)) or refuses or fails to use all reasonable dispatch in conducting the proceedings or making an award (s.24(1)(d)(ii)).

Under section 68(1) a party may apply to the court to challenge an award on the grounds of serious irregularity and this is defined in section 68(2) as including a failure to comply with section 33, among other things.

## 1.6 Confidentiality

One of the main attractions of arbitration, particularly to commercial parties, is that it is a confidential process. The Act does not refer to confidentiality, but the courts have held that it is implicit that arbitration hearings are held in private and that, in general, awards of the arbitrator and documents disclosed during, or produced for, the arbitration remain confidential to the parties.

# 2 Commencement

## 2.1 The arbitration agreement and commencement of proceedings

### 2.1.1 Agreement to arbitrate in the parties' contract

Most construction arbitrations arise from an agreement in the parties' contract. For example, Article 8 of the JCT Standard Building Contract 2016 provides that any dispute or difference arising out of or in connection with the contract shall be referred to arbitration (providing arbitration is stated to be applicable in the Contract Particulars) albeit the parties have a right to refer disputes to adjudication before commencing arbitration. However, if there is no arbitration clause in the contract the parties are free to enter into an arbitration agreement. These are generally referred to as 'ad hoc' agreements. The *Arbitration Act* 1996 only applies to written agreements (s.5).

### 2.1.2 'Ad hoc' agreements to arbitrate

It is always open to parties to agree to refer a dispute to arbitration, even if this is not provided for in their contract. Parties may well see distinct advantages in referring the dispute to a construction specialist rather than a court, particularly if the dispute focuses on technical issues. For example, if the dispute is solely concerned with the measurement and valuation of items in a final account, parties may consider it preferable to ask a quantity surveyor arbitrator to decide the matter. Similarly, if the dispute solely concerns the standard of works carried out, the parties may prefer to appoint a building surveyor or architect as arbitrator.

### 2.1.3 Commencement of proceedings

Section 14 of the Act explains when arbitral proceedings are commenced. This provides that the parties may agree when proceedings are commenced but, failing agreement, there are three possibilities.

First, where the arbitrator is named or designated in the arbitration agreement, proceedings are commenced when one of the parties serves a notice on the other requiring the matter to be submitted to the named arbitrator (s.14(3)).

Secondly, where the arbitrator is to be appointed by the parties, proceedings are commenced when one of the parties serves a notice on the other requiring the appointment of or agreement to appoint an arbitrator (s.14(4)).

Finally, where the arbitrator is to be appointed by a third party (for example, the president or vice president of RICS or another appointing body) proceedings are commenced when one of the parties serves a notice on that third party requesting an appointment (s.14(5)).

In each case the notice must be in writing.

## 2.2 Appointment of the arbitrator

### 2.2.1 Application to nominating body

Where the arbitration provisions in the contract (or the ad-hoc agreement of the parties) provide for the appointment being made by a third party nominating body, reference is typically made to the appointor being the president or vice president of RICS, RIBA, ICE or the Chartered Institute of Arbitrators.

These organisations are likely to have a standard application form that will have to be completed and, in most cases, submitted with a fee. Application forms will generally require details of the parties and their representatives to be provided, along with outline details of the contract and the dispute and any special requirements or qualifications of the arbitrator. Such forms may also ask for a copy of the arbitration clause to be provided.

### 2.2.2 Direct enquiry to a proposed arbitrator

Where the arbitration provisions in the contract (or the ad-hoc agreement of the parties) provide for the appointment being made directly with the named arbitrator or one agreed by the parties, one party, or both of the parties acting together, should send a written enquiry to the arbitrator. If the enquiry is sent by one party it should be copied to the other party. Telephone calls to the arbitrator should be avoided at all times, even when making enquiries.

It will assist the arbitrator if the names and addresses of the parties and their representatives are provided along with outline details of the contract and the nature and amount of the dispute. It will also help if a copy of the contract or at least the arbitration clause is provided.

### 2.2.3 Pre-appointment checks

Prior to accepting an appointment from an appointing body or from a direct enquiry, the prospective arbitrator should check to see whether any particular qualifications and/or expertise are required. The arbitrator must also check availability and conflicts of interest.

The conflicts check is particularly important given that the arbitrator may be removed and the award not enforced if it later transpires that there was an undisclosed conflict of interest. If this occurs, it may well be devastating to the parties and may have very serious reputational and financial implications for the arbitrator.

It should be remembered that, when considering conflicts of interest, the test applied by the court is whether a fair minded and informed observer would conclude that there was a real possibility of bias; actual bias does not have to be established.

Therefore, the prospective arbitrator should disclose every matter that could be seen as a potential conflict. If there is any doubt as to whether an involvement with a party, representative of a party or project might give rise to a conflict of interest, RICS expects such matters to be disclosed, both to itself and, if the appointment proceeds, to the parties. If the potential conflict of interest is manifest or significant, the prospective arbitrator should decline the appointment.

The test of what constitutes a conflict of interest is not restricted to personal conflicts; it also extends to conflicts between others working at the arbitrator's firm or organisation. Perhaps the most common type of conflict is where an arbitrator finds that someone else in the firm or organisation has acted (or is acting) for one of the parties.

Disclosure of a possible conflict of interest does not mean that the appointing body and/or the parties will decline to make the appointment. Quite often parties are content to proceed, having been informed of the issue.

Further guidance regarding this subject can be found in RICS' *Conflicts of interest* and *Conflicts of interest for members acting as dispute resolvers*, which includes a hierarchy of conflicts, with examples under each category. Arbitrators should have regard to this professional standard, as well as being familiar with case law on conflicts of interest and bias.

Once all these points have been satisfactorily resolved the arbitrator may accept the appointment.

#### 2.2.4 First letter to the parties

Once appointed, the arbitrator should contact the parties (or their representatives) immediately.

There are no rules as to what an arbitrator should include in the first letter sent to the parties but, as a minimum, it is likely that it will include confirmation of the date of the appointment (or confirmation of acceptance of the appointment) and a summary of the information already received. The arbitrator should provide terms of engagement and clarify the proposed means of communication. Communications are likely to be by email but may be by email and post, or some other means.

The arbitrator should remind the parties that all communications must be simultaneously copied to the other party and that telephone calls to the arbitrator (from the parties and/or their representatives) should be avoided.

The arbitrator may also state that copies of communications between the parties should not be provided unless the parties have a particular reason for making such communications known to the arbitrator. Sometimes parties get into the habit of copying all exchanges to the

arbitrator. Sending copies of inter-party communications is generally unnecessary and will incur unnecessary costs, as the arbitrator will be obliged to spend time reading them.

The content of the rest of the first letter will usually depend upon what the arbitrator may already know about the nature and size of the dispute.

If it is clear from information already provided that the reference is likely to be complex and/or there is a large amount of money in dispute, the arbitrator is likely to invite the parties to attend a preliminary meeting, at which the procedure and timetable for all or at least the first part of the arbitration will be decided.

If the size and complexity of the dispute appears to be relatively small, or is uncertain, the arbitrator may ask the parties to make written submissions about the procedure and timetable instead of having a meeting. If the parties are unfamiliar with arbitration the arbitrator should provide guidance or ask specific questions in order to illicit the information required to make procedural decisions.

### 2.2.5 Terms of engagement

The arbitrator should send terms and conditions of engagement to the parties at the earliest point in proceedings.

Where approached by one or both of the parties prior to appointment, the arbitrator can make the appointment conditional upon those terms and conditions being agreed. However, where the arbitrator is named in the contract or appointed by a third party such as RICS, that opportunity may not arise. In such cases terms and conditions should be sent to the parties with the first letter, with an invitation to agree them.

It is a matter for each arbitrator as to precisely what is included in terms and conditions but it is likely that they will include:

- an hourly rate for work carried out
- details of how disbursements and expenses will be charged
- a statement about the application of VAT
- a statement as to whether the charges will be subject to review if the arbitration proceeds beyond a certain future date
- whether interim invoices may be raised and which party or parties are to pay them
- periods for payment
- a procedure for dealing with security for payment of fees and
- a procedure for dealing with any late payment.

If the parties do not agree to the arbitrator's terms and conditions the arbitrator can resign. In the event of resignation, it is open to the parties to agree the amount of fees and expenses that should be paid to the arbitrator (s.25(1)(a)) and to agree any liability incurred by the

arbitrator up to the time of resignation (s.25(1)(b)). If agreement cannot be reached the arbitrator may ask the court to resolve the matter (s.25(3) and (4)).

It would appear from section 25(1)(b) that an arbitrator who resigns unreasonably may be found liable to the parties for the consequences. The arbitrator should therefore seek the parties' agreement prior to resigning.

In practice, resignation is unlikely. In the first place; if the arbitrator's terms and conditions are reasonable, the parties are likely to have no hesitation in agreeing to them. Secondly, if one or both parties do not agree the terms and conditions the arbitrator can note the objections and set the issue to one side for later resolution. The arbitrator can take comfort from the facts that, under the Act:

- i a 'reasonable' amount is be payable for fees and expenses (s.64(1))
- ii a lien can be imposed on an award if fees and expenses are not paid in full (s.56(1)) and
- iii the parties are jointly and severally liable for payment in any event (s.28(1)).

An arbitrator should not become involved in an argument with one of the parties about terms of engagement, as this is likely to give the impression of a possibility of bias. In *Norjarl v Hyundai Heavy Industries Company Limited* [1991] 3 All ER 211, the Court of Appeal held that the arbitrators in that case should not have reached agreement about terms with one party alone.

## 2.3 Setting the procedure

### 2.3.1 Pre-defined or agreed procedure

Some arbitration agreements contain or refer to pre-defined procedures set out within a scheme or rules, which are incorporated into the agreement. In these circumstances the content and timing of submissions is likely to be prescribed. There may be other procedural rules, such as a rule that restricts or excludes hearings and provides for the arbitration to be decided on documents only. Sometimes, particularly if experienced in the dispute resolution field, the parties may discuss and agree a timetable and procedure without reference to the arbitrator.

In some cases the arbitrator may consider the pre-defined or agreed procedure is not appropriate for the dispute referred. In that event, or if the procedure manifestly clashes with the arbitrator's obligations under s.33(1)(b)), it can be raised with the parties and they may agree to changes. However, the arbitrator has no power to overrule party agreements (see s.34 (1)) and, in practice, will have to accept such agreements if the parties are adamant about them. The only other option would be to resign but it would be extremely unusual for an arbitrator to resign in such circumstances.



### 2.3.2 Procedure set by the arbitrator

If the parties cannot agree the timetable and procedure for the arbitration, they will be matters for the arbitrator to decide. Before making decisions about the timetable and procedure, the arbitrator has a duty to give each party a reasonable opportunity of putting forward its views and addressing the views of the other party (see s.31(1)(a) and 31(2)).

The arbitrator's power to decide procedural and evidential matters is set out in section 34(2). Under this section the arbitrator may decide:

- a** when and where the proceedings are to be held
- b** the language to be used
- c** the form and timing of statements of claim and defence (and the extent to which these may be amended)
- d** the nature, extent and timing of document disclosure
- e** the timing and form of questions that may be put to and answered by the parties
- f** whether the 'strict rules of evidence' apply
- g** the extent to which the arbitrator should take the initiative in ascertaining the facts and the law and
- h** the extent of oral or written evidence or submissions.

The power to 'take the initiative in ascertaining the facts and the law' (s.34(2)(g)) might be thought to allow an arbitrator to seek evidence, carry out analyses and review case law in order to resolve the issues, but that is not the case. An arbitrator may take the initiative by raising queries with the parties but should not decide the case on the basis of secret investigations and evidence not disclosed to the parties.

If the arbitrator has relevant knowledge, views about the issues in dispute or knows of case law that may be relevant, these should be put to the parties and they should be given a reasonable opportunity to consider and respond to them. Once such information is out in the open the arbitrator may treat it in the same way as the other submissions made by the parties, but when introducing points in this way the arbitrator should take care not to make out a case for one of the parties.

Under section 34(3) of the Act the arbitrator may fix the time within which directions relating to the procedure are to be complied with (and can decide the extent to which these times may be extended).

### 2.3.3 Preliminary meetings

A preliminary meeting with the parties is a quick and efficient way to set the timetable and procedure for the arbitration. It also provides the arbitrator and parties/party representatives with a chance to meet face to face so that they can better understand

the personalities they are going to be dealing with. Hopefully, the parties will see that the arbitrator is knowledgeable, polite and authoritative and someone they can trust and have confidence in. The arbitrator will be able to gauge the extent of the parties/party representatives' knowledge and understanding of arbitration.

Therefore, unless the dispute is of particularly low value, or if the time and cost of travelling to a meeting would be entirely disproportionate, a preliminary meeting is likely to be advantageous to all concerned. As an alternative to a face-to-face meeting, a telephone conference or online video conference could be held.

The extent and detail of the agenda for the preliminary meeting will depend upon the nature and size of the dispute. In a large case it may be that the points on the agenda only take matters to a certain stage of the proceedings, such as a pre-hearing review, with all points relating to the subsequent conduct and procedure of the arbitration left for determination at a later stage.

A full agenda may include the following points:

- Do the parties agree to the arbitrator's terms and conditions of engagement?
- Are there any issues relating to the arbitration clause or the contract terms?
- What, in general terms, is the nature of the dispute?
- Is the arbitration governed by any arbitration rules?
- Have the parties made any separate agreements that affect the arbitrator's powers and duties; in particular have any agreements been made regarding the non-mandatory sections of the Act?
- What are the seat, language and law of the arbitration?
- Are there any questions relating to the arbitrator's jurisdiction?
- What is to be the scope and timing of:
  - the Statement of Claim
  - the Statement of Defence and Counterclaim (if any)
  - the Statement of Reply and Defence to Counterclaim
  - the Statement of Reply to Counterclaim
- Are there any preliminary issues that could beneficially be addressed and decided upon in an interim award?
- Should certain documents or classes of documents be disclosed and, if so, when and adopting what procedure?
- Are the strict rules of evidence to apply?
- Are witness statements to be provided by witnesses of fact and, if so, when and are they to stand as evidence in chief?
- Are expert witnesses to be appointed and, if so,

- How many experts are required and of what discipline?
- Are they to be tribunal-appointed or party-appointed?
- If tribunal-appointed, what is the date for submission of joint instructions to experts?
- If party-appointed, when are experts of like discipline to meet in order to attempt to narrow the differences between them?
- What is the date for exchange of reports?
- Is there to be a joint statement of experts of like discipline setting out all matters agreed and not agreed? If so, when is it to be served?
- Are brief supplementary reports in reply to be allowed? If so, what is the date for exchange?
- Is there to be a pre-hearing review and, if so, when and where is it to be held and who is to attend?
- Is there to be a hearing or is the matter to be decided on the basis of documents only? If there is to be a hearing:
  - Who is to arrange the venue and facilities?
  - What is the likely duration?
  - At what hour will each working day commence and end?
  - Is there to be a transcript? If so, in what form and who is to arrange it?
  - Is the length of the hearing to be restricted (chess clock procedure)?
- Are the parties to be represented at the hearing and, if so, by who?
- How is the bundle of documents for the hearing to be prepared?
- Are opening statements to be oral or in writing? If in writing, what is the date for exchange?
- Are witnesses to be examined on oath or affirmation?
- Are closing submissions to be oral or in writing? If in writing, what is the date for service?
- Have the parties agreed that the award shall be in any particular form?
- Do the parties choose not to have a reasoned award?
- Should the recoverable costs of whole or part of the arbitration be limited to a specified amount pursuant to section 65 of the Act?
- Is a site inspection required and, if so, when should it take place?
- Is there any other business?

At the end of any meeting with the parties the arbitrator should ask for submissions on the costs of the meeting. Given the nature and purpose of the preliminary meeting, the arbitrator may invite the parties to agree that the costs incurred in preparing for and attending the meeting are to be 'costs in the arbitration' (see section 4.4 of the professional

standard for a discussion of costs). It may well be that many of the timetabling and procedural points will be agreed by the parties but where the parties have different views, for example about how long to allow for service of the defence or other submissions, the arbitrator must hear what both sides have to say and then make a decision.

### 2.3.4 Directions

The agreements of the parties and/or the decisions of the arbitrator regarding the timetable and procedure should be confirmed by the arbitrator. This will usually be done in the form of an order for directions or within a letter. There is no one style or format that an arbitrator should use when issuing an order. An illustration of one approach follows:

**In the matter of the Arbitration Act 1996,  
and in the matter of an arbitration between**

ABC Construction Limited

Claimant

-and-

XYZ Developments Ltd

Respondent

**Arising out of a Contract for Works at  
Office House, London**

**ARBITRATOR'S ORDER FOR DIRECTIONS NO. 1**

Having heard submissions from [names of persons representing the parties] at a preliminary meeting held on [date]

**I HEREBY ORDER AND DIRECT that:**

- 1 The seat of the arbitration is to be England, the language of the arbitration is to be English and the substantive law applicable to the dispute is the law of England and Wales.
- 2 The parties are to serve written statements by the dates set out below:
  - a Claimant's Statement of Claim by [date]
  - b Respondent's Statement of Defence & Counterclaim by [date]
  - c Claimant's Statement of Reply and Defence to Counterclaim by [date]
  - d Respondent's Statement of Reply on the Counterclaim by [date]
  - e Witness Statements by [date]
- 3 Documents and judgments relied upon by the parties/witnesses are to be served with the statements referred to in order 2 (a) to (e) above.
- 4 Each party may provide expert opinion evidence from a chartered quantity surveyor. Experts are to provide/exchange written reports by [date].
- 5 The Award will be based on documents only (there is to be no hearing).
- 6 There is to be no limit imposed on the recoverable costs of the arbitration [or the recoverable costs of the arbitration are to be limited followed by relevant details].
- 7 Costs of the preliminary meeting are costs in the arbitration.

Signature of arbitrator

**[NAME OF ARBITRATOR]**

**[DATE]**

Distribution: Smith & Co – Claimant's solicitors; Jones & Co – Respondent's solicitors

Sometimes arbitrators add the words 'liberty to apply' at the end of an order. This is a legal term, essentially confirming that the parties are free to make an application to amend the order. Whether such a term should be added will be a matter for each arbitrator but there are very good reasons for avoiding terminology that is not easily understood. In reality, a party is likely to apply to the arbitrator to change orders if it is considered necessary to do so, regardless of whether the originating order contains a 'liberty to apply' provision.

### 2.3.5 Request to defer proceedings

Just because the parties have commenced arbitration proceedings does not mean they will stop trying to resolve the dispute by negotiation and anecdotal evidence indicates that the majority of construction arbitrations are resolved by the parties before an award is made in the proceedings. These negotiations are, of course, not a matter for the arbitrator and the parties should keep negotiations confidential between themselves.

If positive progress is being made by the parties in such negotiations, they may want to adjourn or defer proceedings to see if a settlement can be concluded. The arbitrator has a duty to avoid unnecessary delay in the arbitration but a delay to allow the parties a chance to settle the matter is not unnecessary. Therefore, if the parties want to defer or adjourn the proceedings, the arbitrator should agree to this. However, it is good practice to clarify the date to which the adjournment is to run and, if nothing is heard from the parties by that deadline, the arbitrator should not remain inactive. A letter should be sent to the parties asking whether a settlement has been reached and, if not, whether an extension to the adjournment is required or whether the arbitration is to be resumed.

# 3 Interlocutory period

## 3.1 What is meant by the 'interlocutory period'?

In arbitration 'interlocutory period' refers to the period between the commencement of the proceedings through to the hearing or, in the case of a documents-only procedure, through to the last exchange of submissions.

In this period, statements of case will be served and, in many cases, witness statements and expert reports will be exchanged.

It is not uncommon, particularly in larger cases, for parties to make various applications to the arbitrator in this period. Such applications may seek amendments to the timetable or orders for security for costs, disclosure of documents or provisional relief. Parties may also apply to the court for a ruling on a point of law. If there is to be an inspection of site this is also likely to be carried out in the interlocutory period.

## 3.2 Submissions and evidence

### 3.2.1 Statements of case

As discussed earlier, an arbitration procedure should be tailored to suit the circumstances of the case. In practice, it is highly unlikely that the procedure for the arbitration of a construction dispute would proceed without an exchange of written statements of case. As a minimum these are likely to comprise a statement of claim, a statement of response (or defence) and a statement of reply.

In the statement of claim, the claimant will usually identify the parties, the contract, the arbitration agreement and the nature of the dispute and will include an explanation of its arguments on each of the issues and the remedy sought. The section setting out the arguments should include both the factual and legal basis for the claim and, normally, refer to documentary and other evidence appended to the statement.

In the statement of response, the respondent should set out the points of agreement and points of disagreement. Where there is disagreement, the respondent should provide its factual and legal arguments and refer to relevant evidential material that is either appended to its statement or included with the statement of claim.

The claimant should then be given an opportunity to reply to the statement of response. A statement of reply should only address new issues raised in the response and should not raise new matters or adduce new evidence, except in relation to new issues raised in the response.

Sometimes the respondent will not only want to defend the claim but will also want to make a counterclaim against the claimant. In this case the usual procedure is for the respondent to serve the counterclaim with the statement of response, the claimant to serve a statement of defence to the counterclaim with the reply and the respondent to be given an opportunity to serve a reply to the defence to the counterclaim.

In some cases, following the statement of reply, it may be appropriate to allow the respondent to serve a rejoinder and the claimant a reply to that rejoinder (sometimes referred to as a surrejoinder). The most likely reason for allowing a further round of submissions would be if new points were raised in the reply and both parties wanted the arbitrator to deal with those points in the award or if there were good reasons for the new points in the reply not to have been raised earlier.

### 3.2.2 The burden and standard of proof

The general rule in arbitration (and litigation) is that 'he who asserts must prove'. Therefore, at the outset, the legal burden of proof is upon the claimant (and the respondent in respect of any counterclaim), who must provide evidence to show that all aspects of the points of claim appear to be correct. If the claimant succeeds, the evidential burden will shift to the respondent to show why the points of claim are not correct.

In order to succeed, the party bearing the legal burden should provide evidence to prove its case on the 'balance of probabilities'. This is a lower threshold than the one that applies in criminal cases, where the standard of proof is 'beyond all reasonable doubt'.

On each particular point of contention, the arbitrator should find in favour of the party who has, on the balance of probabilities, best proved its case.

Occasionally, an arbitrator may find that the arguments about an issue are so finely balanced that it is impossible to decide one way or another. In such circumstances the decision should go against the party making the assertion, as it has not satisfied the burden of proof.

### 3.2.3 Supporting evidence

Statements of case are usually supported by documentary and other evidence. This is likely to include a copy of the contract and, subject to the nature of the dispute, may include the contract specification, drawings, letters, emails, meeting minutes, progress reports, diaries, programmes, price build-ups, photographs, videos, accounts, remeasures, trade literature, judgments, statutes, extracts from legal texts and samples of materials. Witness statements and expert reports may also be provided with the parties' submissions, but these may also be provided later.

It is good practice for documents appended to a statement or submission to be consecutively numbered, to allow for easy identification. The arbitrator should consider requesting this to be done when issuing the first order for directions.



It is also good practice for the date, location and purpose of any photographs to be provided and the key passages of any legal authorities relied upon to be highlighted. Sometimes, parties assume that photographs and legal cases are self-explanatory and need no further comment but this is rarely the case.

### 3.2.4 The rules of evidence

Under section 34(2)(f) of the Act the arbitrator can decide whether to apply the 'strict rules of evidence' or any other rules relating to 'the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion ...'

There has been some debate as to what exactly is meant by the 'strict rules of evidence'. The term may mean strict compliance with the *Civil Evidence Act 1995* and/or part 32 of the Civil Procedure Rules. It is not intended to discuss such matters here. Most arbitrators will find that they only ever have to deal with two issues relating to the rules of evidence: evidence that is 'privileged' and evidence that is said to be 'hearsay'.

### 3.2.5 Privilege

In general, a party cannot refuse to disclose documents that are relevant to the dispute (see paragraph 3.3.4 below) but certain documents are classed as 'privileged', meaning that they do not have to be disclosed.

Privileged documents and discussions are often referred to as being 'without prejudice' but this term is sometimes misused and misunderstood by parties. It will reduce the risk of doubt and argument if parties do make it clear when they wish to have privileged, without prejudice, exchanges, but the fact that a document or discussion is stated to be 'without prejudice' does not automatically mean it is privileged and a document or discussion may be privileged even if it is not stated to be 'without prejudice'. There are various classes of privilege that are recognised. In most construction disputes privilege is limited to three situations.

- First, correspondence and communications between the parties and their solicitors/ barristers are, almost always, privileged, where dealing with the subject matter of the dispute. This allows the parties and their legal representatives to discuss doubts and all aspects of the case without fear that those discussions will come before the arbitrator or the other side. For this reason solicitors will generally advise parties to obtain advice from experts and others through them so as to protect that advice in the same way.
- Secondly, documents or discussions relating to offers to settle or compromise the dispute are generally privileged.
- Thirdly, documents or discussions exchanged between expert witnesses, when trying to narrow differences between their opinions about the issues in dispute, remain privileged until agreements are reached.

From time to time, privileged documents are referred to in submissions and/or appear in bundles of documents provided to the arbitrator. Sometimes this situation is quickly spotted

and notified by one of the parties and the arbitrator can take steps to avoid them being seen, for example by asking someone else to find and remove them. However, on other occasions it may be that the arbitrator will have already read a submission or seen a document, or the disclosure may be made orally in the front of the arbitrator. In these circumstances the arbitrator will have to consider whether the privileged information can be put out of mind.

It should not come as a surprise to an arbitrator to find that the parties had tried to compromise the dispute and had made offers to settle; in many cases that would be expected. However, the arbitrator may have to resign if knowledge of an offer or other privileged information is likely to influence the thought process when deciding the dispute.

It is not unusual for parties to disagree whether disclosed information is in fact privileged. If the arbitrator has not seen the document, it may be that the question can be put to, and decided by, another arbitrator. If the information has been seen or heard, the arbitrator should invite submissions from the parties and then decide whether the information is or is not privileged.

Where it is decided that the information in question is privileged, the arbitrator should go on to consider whether knowledge is significant and whether it can be put it out of mind. If it is significant and cannot reasonably be put out of mind, the arbitrator should resign.

### 3.2.6 Evidence of witnesses of fact

Statements by witnesses of fact may be used to fill evidential gaps left by the documentary evidence, particularly where there has been an oral agreement or discussion that was not recorded, or not fully and accurately recorded, in writing. Statements can also be used to explain the contents and context of the written documents

Subject to certain exceptions, a witness statement should be limited to facts about which the witness has direct knowledge (but also see the following paragraph 3.2.7 regarding hearsay). However, it is not unusual for witnesses to include submissions about the issues in dispute, arguments about the law or technical issues, statements of opinion and/or to merely recite the contents of the documents; this is of little, if any, help to the arbitrator. The case of *JD Wetherspoon Plc v Jason Harris & Others* [2013] EWHC 1088 (Ch) provides a useful reminder that factual witnesses should not merely recite the contents of documents and should not, in general, give opinion evidence.

Written witness statements may be exchanged after statements of case but before the hearing or may be provided with the statements of case, particularly in smaller cases.

If there is to be a hearing in the arbitration, written witness statements will usually stand as evidence in chief, meaning that the witnesses will not have to repeat the contents of their statements under questioning by their own side's advocate. In this event, the witnesses will usually start by being asked to swear an oath or affirmation and to confirm their names and the truthfulness of their statements. They will then be cross-examined by the other side's advocate. It is normal for the party putting the witness forward to have an opportunity to

ask questions by way of re-examination (following cross-examination) but any questions at this stage should be restricted to dealing with points raised during cross-examination.

The testing of witness evidence under cross-examination will assist the arbitrator to decide how much reliance and weight to give to the witness testimony. The weight to be attached to any piece of evidence, whether fact or of opinion, is a matter of judgment for the arbitrator.

If the arbitration is to be decided on documents only it will be more difficult for an arbitrator to decide controversial issues arising out of witness statements. However, the arbitrator may be able to form a view about the reliability or persuasiveness of such statements by reference to other evidence. The arbitrator may also form a view about a witness's credibility if the statement contains inconsistent or contradictory statements.

### 3.2.7 Hearsay evidence

If witnesses refer to information that someone else has told them, or to something they have overheard someone else say, that evidence is known as hearsay. Hearsay evidence is evidence that is not within the direct personal knowledge of the witness.

Section 1(1) of the *Civil Evidence Act* 1995 provides that hearsay evidence is not to be excluded on the grounds that it is hearsay. Under this Act a party wishing to rely on hearsay evidence must first serve notice on the other party, giving particulars of the evidence. Such notice, if required, is generally provided in arbitration proceedings by the written witness statements exchanged prior to the hearing.

If no such notice is given, hearsay evidence is admissible under the *Civil Evidence Act*, albeit the failure to give notice may be taken into account when deciding the weight to attach to that evidence. The *Civil Evidence Act* provides guidelines as to the weight to be applied.

Ordinarily in arbitration, all relevant evidence is admissible, and that evidence is given such weight by the arbitrator as is appropriate in all the circumstances.

### 3.2.8 Expert evidence

As in litigation, expert witnesses are engaged in arbitration to provide independent specialist analysis and opinion evidence on specific issues in dispute. In construction cases these specialists might typically be a quantity surveyor, an architect or building surveyor, a structural engineer or a programmer (delay analyst):

- a quantity surveyor is likely to be engaged to give opinion evidence on disputes about the measurement, valuation or cost of the works
- an architect or building surveyor is likely to be engaged to give opinion evidence on disputes about the design or standard/quality of the works carried out
- a structural engineer is likely to be engaged to give opinion evidence on disputes about the design or reasons for structural failures

- a programmer is likely to be engaged to give opinion evidence on disputes about the causes of delay to a contract completion date and
- experts may also be engaged to give opinion evidence where a professional of the same discipline is accused of negligence.

Experts can be appointed by the parties or by the arbitrator (under s.37(1)(a)). In the majority of cases parties prefer to appoint their own experts. This may be more costly than having a single joint expert, appointed by the arbitrator, but parties usually want to obtain confidential advice and guidance on specialist technical issues at various stages of the proceedings and they would not be able to get this from an expert appointed by the arbitrator.

A common complaint, in litigation as well as arbitration, is that expert witnesses adopt a partial position on the issues they are instructed to consider and give evidence seeking to assist the party that has appointed them. This is contrary to the duty of an expert; an expert's primary duty is to the arbitrator, not the appointing party. An expert's opinion evidence should be impartial, complete and honest. In practice, an expert who is partial and behaving in the manner of an advocate is likely to find that such behaviour turns out to be of no assistance to the appointing party (and may be counter-productive) because, in these circumstances, an arbitrator may well discount or even reject the expert's entire evidence.

Other common problems with expert witnesses are that they:

- give views about factual and legal issues and/or technical issues that are not within their expertise
- purport to decide the facts
- make submissions about the dispute and
- redefine the scope of the dispute, by introducing issues that have not been raised by the parties.

The arbitrator should be alert to such failings and ensure that no evidential weight is given to inappropriate sections or statements in expert reports.

Expert reports are usually exchanged after service of statements/submissions and witness statements.

It is common practice to ask party experts of like discipline to meet prior to the hearing, usually after producing their reports, to see if they can narrow differences between them. Such meetings are usually conducted on a 'without prejudice' basis, as this enables experts to speak freely and to raise concerns and doubts without fear that these will be used against the party instructing them. The privilege that attaches to such 'without prejudice' discussions ends if and when an agreement is reached. Experts are often instructed by the arbitrator to produce a joint report following such meetings to set out points of agreement and disagreement. The parties are not bound to accept any concessions or agreements made by the experts but in most cases do so.

Meetings of experts can be extremely beneficial to the arbitral process. However, if one or both of the experts is being uncompromising and/or adversarial, meetings can be an expensive waste of time.

Joint statements of experts, setting out points of agreement and points of disagreement, can also be very helpful but a great deal of time (and cost) can be expended trying to agree the final wording of such statements, particularly if lawyers insist on editing and amending the wording before the statement is signed off.

In order to try to avoid unnecessary costs being incurred by experts, the arbitrator may consider setting a limit on the number of meetings. It will be open to the parties to ask for further meetings to be sanctioned if good progress is being made towards a joint statement.

### 3.2.9 Secret evidence

An arbitrator must decide a dispute exclusively on the basis of the evidence and arguments made by the parties and should not take account of 'secret' evidence. Secret evidence would include knowledge or thoughts that the arbitrator may have about the facts, expert opinions or law that has not been raised by or shared with the parties. This knowledge should not be used to decide issues.

If the arbitrator has knowledge about a particular legal case or term of contract or cause of a problem that is relevant to the dispute, that knowledge must either be put out of mind or, alternatively, provided to the parties for comment.

The Court of Appeal judgment in the case of *Fox v Wellfair Ltd* [1981] provides an illustration of a situation where an arbitrator decided a case on the basis of secret evidence.

## 3.3 Interlocutory applications

### 3.3.1 Challenges to jurisdiction

Challenges to the jurisdiction, or legal authority, of the arbitrator may be made by a party for a number of reasons, for example the appointment procedure in the contract has not been followed or there is no arbitration agreement, or the dispute does not fall under the agreement to arbitrate.

A party that seeks to challenge the jurisdiction of the arbitrator must not delay in making an application or objection. Section 31(1) of the Act provides that an objection that the arbitrator lack substantive jurisdiction at the outset of the proceedings must be raised not later than the time the party takes the first step in the proceedings to contest the merits. Section 31(2) provides that any objection during the course of the proceedings must be made as soon as possible after the matter alleged to be beyond jurisdiction is raised.

Section 73(1) provides that if a party takes part, or continues to take part, in the proceedings without making an objection that the arbitrator lacks substantive jurisdiction, it may not

raise the objection later unless it shows that, at the time, it did not know (and could not with reasonable diligence have discovered) the grounds for the objection.

The arbitrator has power, under section 30, unless otherwise agreed by the parties, to making a ruling. The ruling may be given in an award dealing only with the question of jurisdiction (s.31(4)(a)) or as part of the award on the merits (s.31(4)(b)). Alternatively, a party may apply to the court for a ruling under section 32.

If an objection is made, or when dealing with any other application, the arbitrator must order a procedure that gives both parties a reasonable opportunity of putting its case and dealing with that of its opponent (s.33(1)(a) and 33(2)).

### 3.3.2 Amendments to timetable

Perhaps the most common type of interlocutory application made to arbitrators is a request to amend the timetable.

As with all applications, a party should generally try to agree any proposed amendment with the other side but, if agreement cannot be reached, it will have to make an application to the arbitrator.

There are many reasons why allowing more time to the parties may be justified but the arbitrator must balance this against the duty imposed under section 33(1)(b) to adopt procedures so as to avoid 'unnecessary' delay.

### 3.3.3 Security for costs

'Security for costs' refers to the provision of a deposit that may be held to meet the other party's costs of the arbitration. The arbitrator's power to order security of costs, which is provided at section 38, is limited to making an order against a claimant (s.38(3)), not a respondent, (albeit by virtue of s.82 an order may be made against a counterclaimant).

The primary purpose of this power is to protect a successful respondent in the event that a claimant cannot meet an adverse costs award at the end of the arbitration. It would clearly be unfair to allow an impecunious claimant to bring a spurious claim and then to avoid paying the legal and other costs incurred by the respondent in successfully defending the claim.

An application for security for costs is likely to include submissions on case law and evidence that the claimant would be unlikely to meet an adverse costs award.

By virtue of section 82(1) a claimant may apply for security of costs against a counterclaimant.

### 3.3.4 Disclosure/inspection of documents

Applications by one party for disclosure of documents by the other party are frequently made in the interlocutory period. The arbitrator has power to order disclosure under section 34(2)(d).

Parties who have no prior experience of litigation or arbitration are often surprised by the fact that documents that they thought were private, or internal company documents, may have to be disclosed, if relevant to the dispute. Such documents may include internal memos, minutes of board meetings, diaries, build-ups to cost estimates, accounts and communications with third parties – the fact that a document is confidential or commercially sensitive does not, of itself, mean that it does not have to be disclosed. The only documents in the power or possession of a party that do not have to be disclosed are those that are protected by privilege (see paragraph 3.2.5) and those that are not relevant to the dispute.

The *Arbitration Act* 1996 does not define the extent to which disclosure may or should be ordered. Arbitrators may look to the civil court procedure for guidance on this point, albeit the procedures of the courts do not have to be adopted in arbitration.

Under the Civil Procedure Rules (CPR) there are two types of disclosure, 'standard disclosure' and 'specific disclosure'. Standard disclosure requires a party to disclose only:

- a** the documents on which it relies and
- b** the documents which:
  - i** adversely affect their own case
  - ii** adversely affect the other party's case
  - iii** support the other party's case
- c** the documents which they are required to disclose by a relevant practice direction.

Disclosure under the CPR is provided by listing the documents and providing a 'disclosure statement', explaining the extent of the document search, and certifying that the party understands its duty of disclosure and that to the best of its knowledge it has performed that duty. In arbitration, disclosure along similar lines may be ordered with the statements of case.

Problems with disclosure arise if one party believes that the other has not disclosed certain specific documents. In these circumstances, if agreement cannot be reached, the aggrieved party may make an application for an order of specific disclosure. In such a circumstance, it is for the arbitrator to determine if such documents are likely to exist, whether they are likely to be relevant and whether or not they are privileged. If the arbitrator is persuaded appropriately on all these issues, specific disclosure can be ordered.

### 3.3.5 Points of law

Parties may apply to the court to determine a preliminary point of law under section 45. Such applications are not common but they can be of significant benefit in certain circumstances.

An application can be made either with the agreement of all the parties (s.45(2)(a)) or with the arbitrator's permission (s.45(2)(b)). If made with the arbitrator's permission, the court will only deal with it if satisfied that (i) the determination is likely to produce substantial savings in costs and (ii) the application was made without delay.

### 3.3.6 Provisional relief

An application may be made by one of the parties under section 39 for an 'order on a provisional basis [granting] any relief which [the arbitrator] would have power to grant in a final award'. Therefore, an application may be made under this section for an order relating to payment of money, costs of the arbitration or for the disposition of property. Any such order is subject to the arbitrator's final award on the matter, which must deal with any adjustment to (or confirmation of) the provisional order (s.39(3)).

This is not a default power under the Act; it is only available to the arbitrator if the parties so agree.

### 3.3.7 Inspection of site

If the arbitrator and/or the parties believe that an inspection of the site would be beneficial it will usually take place in the interlocutory period. An inspection is likely to assist the arbitrator to understand the scale of the project and the relationship of one part of the works to another. If there are allegations of defective works a site inspection will allow the arbitrator to view the nature and extent of those works.

The inspection should, in general, be conducted in the presence of both parties and/or their representatives. At the inspection, parties may be keen to make comments and submissions and try to 'score points'. However, that is not the purpose of a site inspection and the arbitrator should warn the parties of this prior to the visit so that they restrict their comments to drawing the arbitrator's attention to areas that are relevant to the issues in dispute.

### 3.3.8 General duty of the parties

Under section 40(1) of the Act the parties have a general duty to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings'. More specifically, 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' (s.40(2)(a)). Therefore, although the general duty applies throughout the arbitration, it is particularly relevant in the interlocutory period.



### 3.3.9 Peremptory orders

If, without showing sufficient cause, a party fails to comply with an arbitrator's order or directions, the arbitrator should consider making a 'peremptory order' (s.41(5)).

A peremptory order will repeat the requirements of the original order but will also state time limits for compliance and the sanction that will apply if the peremptory order is not complied with.

By virtue of section 41(7) the arbitrator has power to:

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

If a claimant (or counterclaimant) fails to comply with a peremptory order requiring payment of security for costs, the arbitrator should consider making an award dismissing the claim (or counterclaim) (s.41(6)).

The arbitrator has further powers under sections 41(3) and 41(4) to deal with situations where a party has not complied with its duties.

Under section 41(3) the arbitrator is empowered to make an award dismissing the claim if there has been 'inordinate and inexcusable' delay on the part of the claimant in pursuing the claim. This power should only be used in exceptional circumstances. Under sub-section (a) the delay must give rise, or be likely to give rise to 'a substantial risk' that it will not be possible to have a fair resolution of the issues, and under sub-section (b) the delay must have caused, or must be likely to cause, 'serious prejudice' to the respondent. The power should rarely (if ever) be used to dismiss a claim prior to the expiry of any legal limitation period that applies to the dispute.

Under section 41(4) the arbitrator may proceed in the absence of a party (or without evidence from a party). The arbitrator may go on to make an award on the evidence provided if a party inexcusably fails to attend an oral hearing, or, in a documents-only arbitration, fails to submit written submissions or evidence. Before doing so, the arbitrator must be satisfied that the offending party has not shown 'sufficient cause'.

# 4 Hearing and award

## 4.1 The hearing

### 4.1.1 Who can attend?

Arbitration is a private process and so, unlike court proceedings, which are generally open to the press and public, the only people entitled to attend an arbitration hearing are the parties themselves (or, if the party is a company or other organisation, its authorised representatives) and the parties' advocates and witnesses. As a result, it is normal practice for an arbitrator to require the identities of all those attending to be provided.

It is open to the parties to agree that others may attend, but this is unlikely to extend beyond those appointed to record the hearing and any pupil of the arbitrator (see paragraphs 4.1.7 and 4.1.8 to follow).

### 4.1.2 Procedure

The procedure at the hearing is flexible and can be tailored to suit the nature of the dispute and the parties' wishes. A typical procedure for a large dispute is set out below:

- the arbitrator opens the proceedings and announces the arrangements for the hearing
- the claimant (or its representative) makes its opening submissions, in which it usually provides a background to the contract and the dispute and a brief outline of the issues and arguments
- the respondent may then wish to provide additional comments by way of an opening submission
- the claimant calls its first witness
- the arbitrator administers the oath or affirmation
- the claimant asks the witness to confirm his or her identity and the truthfulness of his/her written witness statement
- the respondent cross-examines the witness
- the claimant may re-examine the witness on matters raised during cross examination
- the arbitrator may ask questions of the witness and give each party the opportunity to re-examine on issues raised by these questions
- the claimant calls its second and subsequent witnesses and the procedure described above is followed
- the respondent calls its first witness

- the arbitrator administers the oath or affirmation
- the respondent asks the witness to confirm his or her identity and the truthfulness of his/her written witness statement
- the claimant cross-examines the witness
- the arbitrator may ask questions of the witness and give each party the opportunity to re-examine the witness about these questions
- the respondent calls its second and subsequent witnesses and the procedure described above is followed
- the respondent makes its closing submissions
- the claimant makes its closing submissions and
- the arbitrator closes the hearing.

There are many other permutations. It may be that opening and closing submissions are made in writing with no oral presentation; it may be that written witness statements are not provided and that witnesses give oral evidence during examination by their side's advocate (known as examination in chief); it may be that expert witnesses are examined at the same time rather than consecutively (sometimes referred to as 'hot-tubbing'); in small cases it may be that the arbitrator will act inquisitorially and ask most of the questions.

### 4.1.3 Party representation

In court, a party can be represented by a lawyer or it can represent itself. The same is true in arbitration, but in arbitration a party can also be represented by others. Section 36 of the Act provides that a party may be represented by a lawyer or other person.

It is likely that another person would be a claims consultant or professional person who understands the case and knows how to present it.

### 4.1.4 Written opening and closing submissions

The possible hearing procedure outlined in paragraph 4.1.2 provides for oral opening and closing submissions, but openings and closings are frequently reduced to writing. This can save time and cost but an arbitrator faced with a large volume of reading material may welcome oral submissions, which allow any questions and queries to be raised and resolved there and then.

If opening submissions are made in writing, they will usually be exchanged by the parties and provided to the arbitrator a few days before the commencement of the hearing.

Written closing submissions will usually be provided a short time after the end of the hearing. Closings may be exchanged simultaneously or consecutively. If the latter, the respondent's submission would usually be made first, followed by the claimant's. The claimant is usually given the opportunity to have the first and last word in a case.

### 4.1.5 Witnesses: oath or affirmation

When a witness is called to give evidence in an arbitration hearing the first task is usually for the arbitrator to administer the oath or affirmation. The arbitrator's power to direct that evidence is to be examined under oath or affirmation, and the power to administer such oath or affirmation, is provided by section 38(5) of the Act.

The form of the oath is set out in section 1(1) of the *Oaths Act 1978*, which provides that an oath may be administered as follows:

‘The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words “I swear by Almighty God that...”, followed by the words of the oath prescribed by law’.

The words prescribed by the court are: ‘I swear by Almighty God that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth’.

Section 1(3) of the *Oaths Act 1978* provides that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in ‘any lawful way’. This may involve a different holy book being held and substitution of the words ‘Almighty God’ with other equivalent expression for the witness's faith. The arbitrator should ensure that appropriate holy books are available and wording known for the faiths of all the witnesses who are to give evidence at the hearing.

Section 5(1) of the *Oaths Act 1978* provides that any person who objects to being sworn shall be permitted to make a solemn affirmation instead and, by virtue of section 5(4) a solemn affirmation has the same force as an oath.

The wording of the affirmation required under section 6(1) of the *Oaths Act 1978* and by the court is: ‘I do solemnly, sincerely and truly declare and affirm that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth’.

Many arbitrators have the wording of the oaths and the affirmation available on cards, from which the witnesses can read.

The arbitrator does not have to use this power to require evidence to be given under oath or affirmation but most prefer to do so.

### 4.1.6 Role of the arbitrator at the hearing

The primary role of the arbitrator at the hearing is to listen and not to intervene. An arbitrator should seek clarification of points that have not been understood but should be careful not to unnecessarily interrupt the advocate and/or witness.

It is likely that while listening, the arbitrator will take notes. The extent of these notes will be a matter for the arbitrator. Some like to have a complete and detailed record of all the questions asked and answers given. Others may keep a shorter note of key points. The

latter approach allows the arbitrator to spend less time writing and more time observing the witness, but it may leave the arbitrator with an inadequate record of the evidence.

#### 4.1.7 Recording of the hearing

The need for the arbitrator to keep a full note will be removed if the parties agree to the proceedings being recorded and a transcript being produced. The cost of appointing a specialist company to record and transcribe the hearing may be partially off-set by an increase in the speed at which the proceedings can be conducted, as the advocate and witnesses will not have to slow down to allow the arbitrator time to make a long-hand note of what is being said.

#### 4.1.8 Pupils

In order to complete training to become an arbitrator, it is usually necessary for students to complete pupillage with an experienced arbitrator. This will often include attending a hearing. Therefore, an arbitrator may ask the parties to allow a pupil to attend to observe what goes on and to discuss the case, in private, with the arbitrator. Attendance can only occur with the agreement of both parties and it may be necessary for the pupil to provide a written undertaking regarding confidentiality.

### 4.2 The awards(s)

#### 4.2.1 Types of award

An arbitrator can (and frequently does) make a single award dealing with every aspect of a dispute. However, particularly on larger arbitrations, there may be multiple awards (as allowed under s.47). These may include an award relating to jurisdiction (see s.30(1)), partial awards (for example dealing with liability or quantum only), an award on interest and an award on costs (see s.61). An additional award may also be made in respect of a claim that was presented by the parties but not dealt with by the award (see s.57(3)(b)).

If the parties reach an agreement about the dispute, the arbitrator may be required to issue an agreed award reflecting the terms of the settlement (see s.51(1)). Setting out an agreement in an award ought to be a formality but the arbitrator should check that the wording is free of any obvious errors or inconsistencies and that all issues, including interest and costs, have been dealt with.

The arbitrator can also issue a single award dismissing the claim in limited circumstances (see s.41(3) and s.41(6)) but this is not common.

Any award issued by the arbitrator is final on the points decided. Therefore, if there is a partial award dealing only with liability, the arbitrator cannot vary or alter the contents of that award when making any subsequent award.

The only times that an award may be altered are: (i) to remove a clerical mistake or error arising out of an accidental slip or omission or to clarify or remove an ambiguity (see s.57) or (ii) to deal with matters remitted by the court following an appeal (see s.71).

In the margin to section 39 of the Act reference is made to the power to make provisional awards. However, sub-clauses 39(2) and 39(3) make it clear that this clause relates, in fact, to a power to make a provisional order. This is an important distinction because the requirements for an award (as set out in s.52), in particular the requirement to give reasons (s.52(4)), do not apply when making an order and the final and binding effect of an award (as set out in s.58) does not apply.

#### 4.2.2 Statutory requirements

In section 52 of the Act, certain requirements for an award are set out (to the extent that the parties have not agreed any particular format). These require the award to be signed (s.52(3)), reasons to be given (s.52(4)) and the 'seat' to be stated (s.52(5)).

The 'seat' of the arbitration is defined in section 3 of the Act as 'the juridical seat of the arbitration'. The 'juridical seat' means the location for judicial or legal proceedings. It may be thought that this 'seat' must be the place where the arbitration is conducted and/or where the award is signed. However, that may not be the case; the 'seat' may be designated or determined to be England even if the arbitration is held in Paris, the contract was signed in Kenya and the parties are based in the USA. The significance of the 'seat' is that it will determine the courts that the parties will have to apply if they need to resolve administrative and enforcement issues.

Therefore, the seat can be an important (and contentious) issue in international arbitrations but in the vast majority of construction arbitrations held in England there will be no doubt that the 'seat' is England and that administration and enforcement of the arbitration will be governed by the English courts. Nonetheless, the arbitrator should confirm this with the parties at the outset.

#### 4.2.3 General requirements

In general terms, an award is required to be cogent, certain, complete, final and enforceable.

A cogent award will be clear, logical and coherent. Monetary awards should set out a specified sum to be paid; declaratory awards should be in the form of unambiguous statements.

An award that is certain will be free from ambiguity and will clearly provide what is to be done by which party and why. An award that is vague and/or inconsistent is likely to lead to further disagreements between the parties.

It has been stated in paragraph 4.2.1 of this guidance that there may be one or several awards in an arbitration but even if there are multiple awards each one must be complete on the issues it deals with. However, in order to be complete, an award does not have to

expressly address each and every argument, submission and piece of evidence provided. In the majority of arbitrations there will be material that is not directly relevant to the issues to be decided and this does not have to be discussed by the arbitrator in the award. A complete award is one that deals fully with all the relevant material.

The award must be final and conclusive, with nothing left undecided in relation to the issues arising out of the relevant submissions.

Ultimately, the parties require an award to be enforceable and expressed in a form that can be enforced, if necessary, by legal action under section 66 of the Act.

#### 4.2.4 Form and contents

Subject to the statutory requirements referred to in paragraph 4.2.2 and any agreement made by the parties as to form and content, there is no prescribed format for an arbitrator's award. That said most awards will follow a similar style.

Typically, an award will have a cover page giving the names of the parties, the name and location of the project, a title such as 'Arbitrator's Award', the name of the arbitrator and the date of the award. If the award is one of a number of awards the title will make clear what is and/or what is not included. For example, the title may be 'Arbitrator's Final Award Excluding the Costs of the Arbitration'.

The body of the award may then be split into a number of sections, starting with an introduction or preamble. This is likely to set out non-controversial background information such as the full names and addresses of the parties and their representatives, the name and address of the project, the type of contract (whether it is a standard or bespoke form), the basic details of the contract (including the date it was agreed, the value and the commencement and end dates for the works), a very brief outline of the nature of the dispute, an outline of the arbitration procedure adopted (including when the appointment and submissions were made) and may include a list of abbreviations used in the award. The seat of the arbitration would normally be confirmed in this section.

The award may then set out a list of the main issues to be decided.

The largest part of the award will be the section summarising the arguments and evidence relating to each issue (and the facts and legal issues that are agreed) and concluding with the arbitrator's reasoned decisions on each issue.

The penultimate section of the award is likely to deal with liability for and ascertainment of the costs of the arbitration, unless costs are excluded for consideration in a future award.

The final section is normally a short summary of the award on each issue.

The award must always conclude with the arbitrator's signature and date.

### 4.2.5 Reasons

There are many reasons, both positive and negative, why an arbitrator might decide an issue one way rather than another.

Some decisions will turn on a question of fact, some on a point of law and some on a combination of the facts and the law.

On factual issues, it may be that the arbitrator prefers one side's case because its witness has a clearer recollection of events and/or appears to be more honest and/or consistent, or that documentary or photographic evidence tends to support the assertions made.

The arbitrator may prefer one side's legal arguments on the grounds that its submissions are supported by case law or other authorities and are based on sound legal principles.

Whatever the basis for each decision on a point of controversy, section 52(4) of the Act provides that reasons must be given (unless the parties have agreed that they do not want reasons). If reasons are set out logically and clearly in the award, the parties (and, if necessary, a judge) should be able to understand why each decision has been made.

### 4.2.6 Corrections of awards

Section 57 of the Act entitles the arbitrator to correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission, or to clarify or remove any ambiguity. This can be done on the arbitrator's own initiative or following an application by a party.

In the case of a party application, unless there has been an obvious error, the arbitrator should give the non-applicant party a reasonable opportunity to make representations about the matter.

Any correction of an award should be made within 28 days of the date of the award, if made on the arbitrator's own initiative, or within 28 days of the date of an application by one of the parties, or such longer period as the parties agree (see s.57(5)).

### 4.2.7 Challenges

In general, subject to making of corrections under section 57, an arbitrator's award is final and binding and enforceable in the same manner as a judgment of the court (see s.66(1)). However, there are limited grounds on which an application can be made to the court to challenge the award:

- under section 67 a party may challenge an award on the grounds that that the arbitrator did not have jurisdiction to decide the dispute
- under section 68 a party may challenge the award on the grounds that there has been 'serious irregularity' (as defined under s.68(2)) and



- under section 69 (unless otherwise agreed by the parties) a party may challenge the award on a question of law arising out of the award.

In each case the challenge can only be made after notice has been given to the other party and to the arbitrator.

By virtue of section 70(2) an application under sections 67, 68 or 69 may not be brought unless the applicant or appellant has first exhausted (a) any available arbitral process of appeal or review and (b) any available recourse to correct an award or issue an additional award under section 57.

An application is also restricted by section 70(3), which requires that it must have been brought within 28 days of the date of the award (or any appeal).

By virtue of section 73, a party may also lose a right to make an application under sections 67 and 68 unless it can show that, at the time it took part in the proceedings, it did not know, and could not with reasonable diligence have discovered, the grounds for the objection.

An appeal under section 69 can only be made with the agreement of all the parties or with the leave of the court (see 69(2)). Leave shall only be given if the court is satisfied that the determination 'will substantially affect the rights of one or more of the parties'; it was a question put to the arbitrator, the decision of the arbitrator is 'obviously wrong' (or the question is of 'general public importance') and it is just and proper for the court to determine the question (see 67(3)).

Therefore, the Act puts a number of very significant hurdles in the way of a challenge being made against an arbitrator's award and the grounds for mounting a challenge are narrow.

If a challenge is successful under section 67, the court may (a) confirm the award, (b) vary the award, or (c) set aside the award in whole or in part.

If a challenge is successful under section 68, the court may (a) remit the award to the arbitrator, in whole or in part, for reconsideration, (b) set aside the award, in whole or in part, or (c) declare the award to be of no effect, in whole or in part.

If a challenge is successful under section 69, the court may (a) confirm the award, (b) vary the award, (c) remit the award in whole or in part for reconsideration or (d) set aside the award in whole or in part.

## 4.3 Interest

### 4.3.1 Power to award interest under the Act

Under section 49(3) of the Act, the arbitrator has power to award interest on the whole or part of any amount (a) awarded up to the date of the award and (b) claimed and outstanding at the commencement of the proceedings but paid prior to the award, and under section 49(4), the arbitrator has power to award interest from the date of the award until payment is made.

The award of interest is a matter for the arbitrator's discretion, and it may be calculated as simple or compound interest.

Simple interest is relatively easy to calculate and, if the principal amount, interest rate and/or duration are relatively low, the difference between simple and compound interest may not be significant. However, interest borrowed from, or saved at, a bank is calculated on a compound basis and so awarding interest on this basis will generally better reflect the loss incurred.

### 4.3.2 Power to award interest under the parties' contract

Many forms of building contract now provide for simple interest to be added to late payments, often at a rate above the official bank rate (sometimes referred to as the 'base rate') of the Bank of England. Where interest is provided, the parties are likely to rely upon the terms of their contract for the determination of interest in the arbitration.

### 4.3.3 Power to award interest under late payment legislation

By virtue of the *Late Payment of Commercial Debts (Interest) Act 1998* parties to commercial contracts have a statutory right to imply a term into their contract for the payment of simple interest on a 'qualifying debt'.

The rate of interest was set by the secretary of state, in the *Late Payment of Commercial Debts (Rate of Interest) (no.3) Order 2002*, at 8% per annum over the official dealing rate in force on 30 June (for interest that starts to run between 1 July and 31 December) or 31 December (for interest that starts to run between 1 January and 30 June).

In addition to interest, commercial parties are also entitled to claim compensation on late payments under the *Late Payment of Commercial Debts Regulations 2002*. The amounts set are £40 for debts under £1,000, £70 for debts over £1,000 but less than £10,000, and £100 for debts over £10,000.

These fixed sums are clearly quite small, and an amendment came into force, by virtue of section 3(2) of the *Late Payment of Commercial Debts Regulations 2013*, which provides that 'if the reasonable costs of the supplier in recovering the debt are not met by the fixed sum, the supplier shall also be entitled to a sum equivalent to the difference between the fixed sum and those costs'.

## 4.4 Costs of the arbitration

### 4.4.1 The general rule

The Act deals firstly with the allocation, or liability, for costs and secondly with determination of the amount of those costs.

Section 61(2) of the Act requires the arbitrator to allocate the costs of the arbitration (as defined in s.59) on the general principle that costs should follow the event, except where it

appears to the arbitrator that, in the circumstances, this is not appropriate in relation to all or part of the costs.

The term 'costs follow the event' means that the unsuccessful party will be required to bear its own costs and be liable for the costs incurred by the successful party.

It is open to the parties to agree in advance how all or some of the costs of the arbitration are to be allocated but, by virtue of section 60 of the Act, such agreement will only be valid if entered into after the dispute has arisen.

#### 4.4.2 Exceptions to the general rule

An arbitrator may decide to depart from the general rule (of costs following the event) if:

- a party has made an offer to settle the dispute which exceeds the amount awarded and which the other party has not accepted
- a party has behaved in an obstructive or uncooperative manner and has therefore caused unnecessary costs to be incurred
- 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 or
- the successful party has spent a large amount of time on an issue upon which it failed.

When allocating costs, an arbitrator should also take into account any directions as to costs made in connection with any interlocutory orders. An unsuccessful party may have been awarded the costs of an interlocutory application regardless of the overall outcome of the arbitration.

The most likely reason to depart from the general rule is listed in the first bullet point; offers to settle.

In many, or perhaps most, commercial arbitrations there will be offers made to settle the dispute on a 'without prejudice save as to costs' basis. These offers remain confidential and cannot be shown or made known to the arbitrator until the issue of the costs is being decided. For this reason, among others, parties will often ask the arbitrator to reserve to a later award a determination of the costs of the arbitration.

If a party makes an offer to settle that is not accepted by the other party, and if the amount finally awarded by the arbitrator is less than that offer, the normal rule is that the recoverable costs of continuing beyond the date when the offer should have been accepted are to be borne by the party who failed to accept the offer.

For this reason, offers are usually seen as serving a dual purpose: they provide an opportunity for the dispute to be brought to an end but, failing that, they provide costs protection.

The rules applied to offers made in litigation proceedings are usually also applied in arbitration. This means that, in order to be effective and valid, an offer should be in writing, be unconditional, state a reasonable time period for acceptance and include an offer to pay the reasonable costs of the other party.

#### 4.4.3 Determination of amount of recoverable costs

The parties will frequently try to agree the amount of the costs of the arbitration following the award on the substantive dispute. If the parties are unable to reach agreement the costs may be determined by the arbitrator (s.63(3)) or the court (s.63(4)).

Section 63(3) provides that the costs may be determined on such basis as the arbitrator thinks fit but the award must specify the basis of determination and the amount of each item of recoverable cost. It may appear that, under section 63(3), the arbitrator has the widest discretion but section 63(5) provides a firm guide as to how that discretion should be exercised. It provides that, unless the arbitrator determines otherwise, the recoverable costs shall be determined on the basis that there shall be a reasonable amount allowed in respect of all costs reasonably incurred and any doubts are to be resolved in favour of the paying party.

The presentation of costs information may vary from broad and rather vague lump sums for each element of work to a detailed bill of costs setting out each item of work, the date the work was undertaken, who carried out the work and what rate they are charged at. A detailed build-up can be expensive to produce and will take time and further costs to consider and decide.

Without detailed bills of costs the determination may have to be 'broad brush', but this will generally be understood and accepted by the parties.

#### 4.4.4 Limiting recoverable costs

Under section 65 of the Act the arbitrator is given the power to direct that the recoverable costs of the arbitration, or any part of the proceedings, shall be limited to a specified amount.

It is an unfortunate but perhaps unavoidable fact that the total costs of an arbitration can end up being more than the amount awarded (or even claimed). Therefore the use of the power to limit costs has its attractions and it is one of the most direct ways in which an arbitrator can take a positive step to meet the general duty imposed by section 33(1)(b) to adopt procedures which 'avoid unnecessary delay or expense'.

However, a limit on recoverable costs does not stop a party from incurring costs in excess of the limit. For example, a party may incur costs of £100,000 in an arbitration where costs have been limited (or 'capped') at £50,000. In this situation the party would only recover a maximum of £50,000, even if it was entirely successful and even if its expenditure was shown to be efficient and reasonable. It may be considered that a successful party should not be denied recovery of its costs by setting a low cap.

Another key point to note when considering limiting recoverable costs is that limits must be set 'sufficiently in advance of the incurring of costs' (see s.65(2)). A limit cannot be imposed on costs that have already been incurred. Therefore, if a limit is imposed at the outset, it should be kept under review.

If there is a counterclaim in the arbitration, consideration should be given as to how the cap is to be applied. It may be that separate limits should be set for the costs of the claim and the costs of the counterclaim.

## 4.5 Fees and expenses

### 4.5.1 Recording time worked

In paragraph 2.2.5, typical terms of engagement were considered. It was noted that an arbitrator will typically charge for work carried out on the basis of an hourly rate. In these circumstances it is essential that the arbitrator keeps a careful and accurate record of time worked.

Lawyers record their time in one tenths of an hour (six-minute intervals) and many arbitrators do the same. Records of time worked should be updated each time there is a change or pause in the work being undertaken.

A proper record will show, among other things, the date and time spent reading and writing letters or emails, time spent travelling to/from and/or attending hearings, time spent reading particular submissions and documents and time spent making the award.

### 4.5.2 Interim and on-account payments

There is no provision in the Act for the arbitrator to receive reimbursement on an interim or on-account basis, but many arbitrators include such provision in their terms, particularly if the arbitration is likely to be long running.

### 4.5.3 Responsibility for payment

Regardless of how costs are agreed or allocated, the parties remain jointly and severally liable to pay to the arbitrator such reasonable fees and expenses as are appropriate in the circumstances (see s.28(1) of the Act). This means that each party is, in principle, legally liable for the whole of the arbitrator's charges. Therefore, even if the parties agree that all the costs are to be paid by one party, the arbitrator retains a legal right of recovery against the other party.

If there is a disagreement about whether the sum charged by the arbitrator is appropriate, a party can apply to the court for a determination (s.28(2)).

# 5 Termination/post award

## 5.1 Resignation, removal and replacement of the arbitrator

It is possible that circumstances may arise where an arbitrator may resign or be removed and replaced.

An arbitrator may have to resign due to a conflict of interest which has arisen or due to ill-health, or for other reasons.

Dependent upon the reasons for the resignation, the parties may agree (under s.25(1)(a)), or a court may decide (under s.25(3)(b)) that the arbitrator may have an entitlement to be paid fees and expenses. However, the parties may also agree (under s.25(1)(b)), or a court may decide (under s.25(3)(a)) that the arbitrator has a liability for the consequences of the resignation. If an arbitrator resigns after an arbitration has been running for some time it is likely to cause considerable delay and expense to the parties, though the particular circumstances of the resignation will be taken into account in determining the parties' and the arbitrator's respective rights and remedies.

It should be noted that the immunity from action provided by sub-sections 29(1) and (2) of the Act does not apply in the event of resignation under section 25 (see s.29(3)).

Removal of an arbitrator may occur due to justifiable doubts about the arbitrator's impartiality, lack of qualifications, physical or mental incapacity, failure to conduct the proceedings properly or failure to use 'all reasonable dispatch in conducting the proceedings or making an award' (see s.24(1)(a) to (d)).

An arbitrator's powers may also be revoked either by the parties acting jointly or by an arbitral or other institution or person vested by the parties with the power to do so (see s.23).

It is open to the parties to agree how to replace an arbitrator but, failing agreement, the court will use its powers under section 18 to ensure that an appointment is made (see s.27). It is possible that the applicable rules or contract provisions may address this situation.

## 5.2 Enforcement of an award

An arbitrator's award is enforceable, by leave of the court, in the same manner as a judgment or order of the court (see s.66) and this is one of the default powers under the Act that the parties cannot exclude or vary. It is unlikely that the arbitrator would be involved in such a process and may not even be aware of it.

### 5.3 Arbitrator's position following publication of an award

In times when Latin terms were more regularly used in the legal world, the term *functus officio* was used to describe the position of the arbitrator following publication of the final award on all matters in dispute. The term was (and sometimes still is) used to mean that the arbitrator's powers and duties have come to an end.

Subject to the power to make corrections under section 57 (see paragraph 4.2.6 of this guidance) or deal with an award that has been remitted (see paragraph 4.2.7) the arbitrator has no power or duty to carry out any further work once the final award is complete and published to the parties.

### 5.4 Complaints to RICS

An RICS member acting as an arbitrator is deemed not to be carrying out surveying services within the normal surveyor/customer relationship. This means that, unless otherwise agreed, the usual complaints handling procedure of the arbitrator (or the arbitrator's firm) may not be applicable. Nevertheless, RICS Regulation may investigate an RICS member for any alleged breach of professional conduct arising out of their acting as an arbitrator.

An adjudicator who is a member of the RICS President's Panel is subject to the Customer Complaints Procedure (CCP) of the Dispute Resolution Service (DRS) of RICS.

In addition to dealing with complaints received under the CCP, DRS may also investigate all issues relating to the competencies to be reasonably expected of an arbitrator, as well as issues relating to the manner in which the arbitrator conducted the arbitration. However, it is important to note that neither RICS Regulation nor RICS DRS can investigate complaints regarding the substance of an award. Consequently, any investigation by RICS will not result in an adjustment or modification of the arbitrator's award.

## Delivering confidence

We are RICS. As a member-led chartered professional body working in the public interest, we uphold the highest technical and ethical standards.

We inspire professionalism, advance knowledge and support our members across global markets to make an effective contribution for the benefit of society. We independently regulate our members in the management of land, real estate, construction and infrastructure. Our work with others supports their professional practice and pioneers a natural and built environment that is sustainable, resilient and inclusive for all.

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