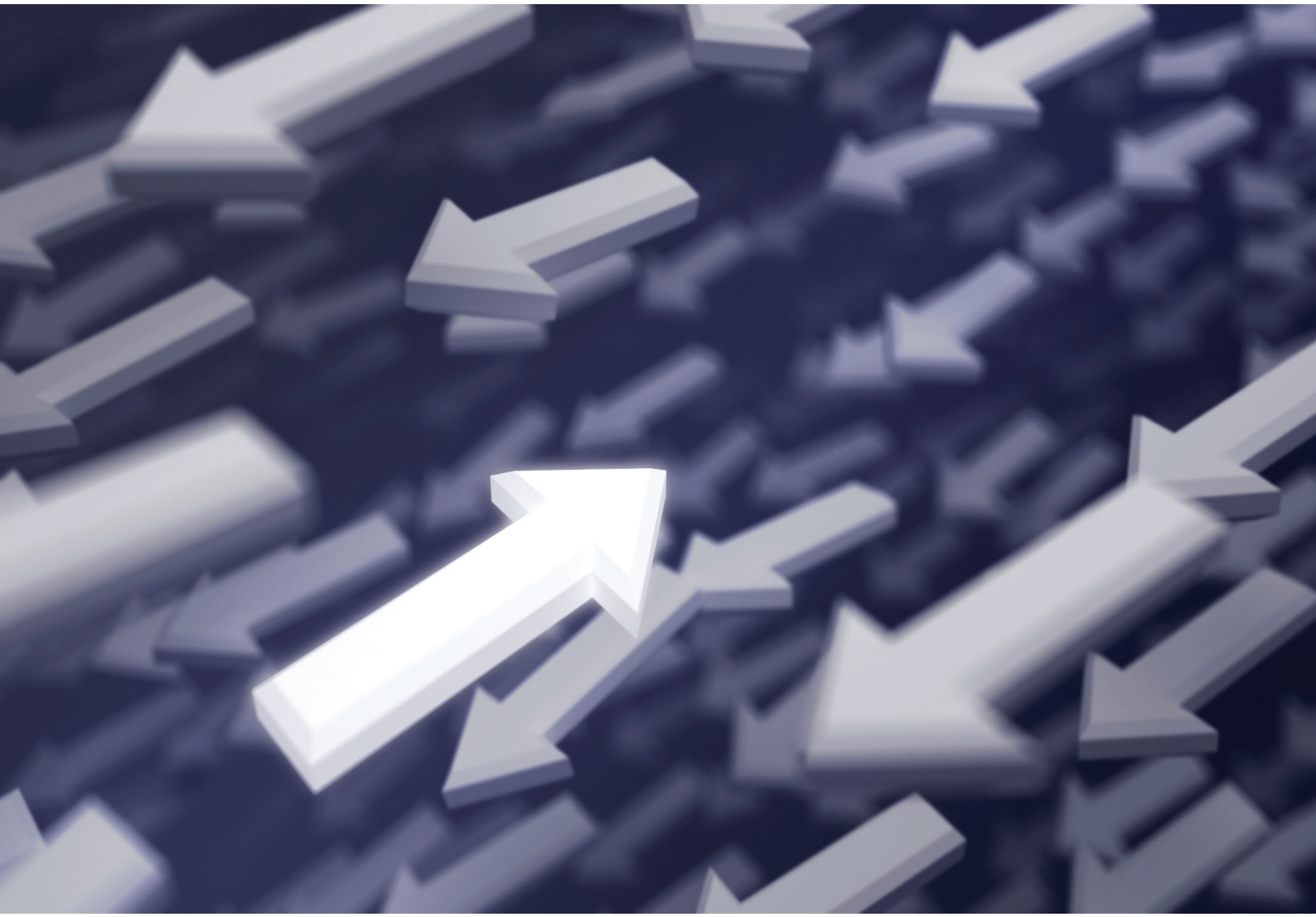
RICS guidance note

RICS Professional Guidance, Scotland

Surveyors acting as arbitrators in commercial property rent reviews in Scotland

9th edition



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Acknowledgments

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Foreword

I am not only honoured but also flattered to be invited to contribute the foreword to this RICS Scotland guidance note, for three main reasons: first, I am well aware of the sterling work being done in Scotland by its rent review arbitrators, as is demonstrated by the considerable rarity of challenges to awards in court; second, rent review has provided us all with important arbitral jurisprudence; third, I note that Lord Neuberger (President, UK Supreme Court) contributed the foreword to the English guidance note.

Arbitration in Scotland changed dramatically on 7 June 2010, the date of the passing into force of the *Arbitration (Scotland) Act* 2010. I had the honour of being involved in the development of the Act and can attest to the valuable contribution to it made by RICS Scotland. This revised guidance note is a major achievement for RICS Scotland, superseding the guidance published in September 2002. It has been fully updated to take account of the Act's provisions which, for the first time in Scotland, not only provide all arbitration law in one compact document, but also brings Scottish arbitration into line with best practice in England and the rest of the world.

Since the property market downturn in 2007/08, the number of actioned rent reviews has declined, among other things, because of encroachment of RPI-geared (and other indices) uplifts allied to a trend in some commercial sectors towards shorter leases. Despite this, there exist a substantial number of leases in Scotland with open-market-based rent review provisions linked to corresponding arbitration clauses and there is no reason to doubt that this will continue for the foreseeable future.

I must stress the scale of the task of revising this guidance involving, as it has, the adapting of corresponding guidance for England and Wales (9th edition, 2013). In addition, while the 2010 Act has much in common with the *Arbitration Act* 1996, it also includes several innovative improvements on the latter.

This revised guidance note not only reflects the very significant and substantial change in the law in 2010, it retains the visibly clear parentage of the 2002 guidance note. Rent review arbitrators are given fully up-to-date and invaluable guidance through clear, logical, and concise summaries of the Act and its procedural and legal requirements. It provides a great deal of best practice and advises how arbitrators can best deal with the many problems that may arise (it is noteworthy that the guidance note is three times the length of the Act!). No sensible professional arbitrator can afford not to have this guidance note close to hand, both on the office desk and by the bedside.

I commend, most strongly and enthusiastically, this revised guidance note to the rent review profession in Scotland.

Hew R Dundas

International arbitrator, mediator and expert determiner

Chartered arbitrator; DipICArb, CEDR-accredited mediator

Honorary Vice President, Scottish Arbitration Centre

Past President (2007), Chartered Institute of Arbitrators

RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up-to-date and have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

Document status defined

RICS produces a range of professional guidance and standards products. These have been defined in the table below. This document is a guidance note.

Type of document	Definition	Status
Standard		
International standard	An international high level principle based standard developed in collaboration with other relevant bodies	Mandatory
Practice statement		
RICS practice statement	Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members	Mandatory
Guidance		
RICS code of practice	Document approved by RICS, and endorsed by another professional body / stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners	Mandatory or recommended good practice (will be confirmed in the document itself)
RICS guidance note (GN)	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners	Recommended good practice
RICS information paper (IP)	Practice based information that provides users with the latest information and/or research	Information and/or explanatory commentary

1 Introduction

1.1 Scope and application of this guidance note

This guidance note is designed primarily to assist those who are appointed to act as arbitrator, either by the Chairman of RICS Scotland, or directly by the parties to a dispute. It is also intended to assist the parties themselves and those acting for them by making them aware of the procedures likely to be followed.

This guidance note is based on the law and practice relating to arbitrations in Scotland, which are governed by the *Arbitration (Scotland) Act* 2010 (the Act). Arbitration in England, Wales and Northern Ireland has evolved by a different route, and has its own Arbitration Act. RICS has issued a guidance note for *Surveyors acting as arbitrators in commercial property rent reviews* (9th edition), and those involved in arbitrations to which that law applies should refer to that guidance note.

The majority of appointments made by the Chairman of RICS Scotland are in landlord and tenant matters, notably rent review. Accordingly, this guidance note has been specifically prepared for rent review arbitrations. Some of the procedures included in the note, and the principles of natural justice, apply to all arbitrations.

1.2 Standing of this guidance note

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

1.3 Reasons for compliance

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

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

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

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

However, surveyor arbitrators have the responsibility of deciding when it is appropriate to follow the guidance. If it is followed in an appropriate case, the surveyor will not be exonerated merely because the recommendations were found in an RICS guidance note.

On the other hand, it does not follow that a member will be adjudged negligent if the practices recommended in the guidance note have not been followed. It is for each individual surveyor to decide on the appropriate procedure to follow in any professional task.

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

1.4 Interpretation

These terms are used in this guidance note with the following meanings:

Act	The *Arbitration (Scotland) Act* 2010 which came into force on 7 June 2010.
Arbitration expenses	Refers to such fees and expenses as set out in Rules 59-61 of the *Arbitration (Scotland) Act* 2010.
Conditional fee	This term refers to any arrangement where remuneration – however fixed or calculated – is to be made conditional upon the outcome of proceedings or upon the nature of evidence given. Other labels in common use are 'incentive-fee', 'speculative fee', 'success-fee', 'success-related fee', 'performance fee', 'no-win, no-fee' and 'contingency fee'.
Chairman	The Chairman of RICS Scotland.
Court	Any Sheriff Court in Scotland or the Inner or Outer House of the Court of Session, as appropriate.
Direction	A requirement set down by a tribunal; see section 13 of this guidance note.
Disclosure	The production of documents in accordance with applicable rules and/or directions of a tribunal.
DRS	The RICS Dispute Resolution Service in Scotland.
Evidence	This may be evidence of fact (whether direct or hearsay – see below) or expert (opinion) evidence. The weight to be attached to evidence by a tribunal will depend on various factors, the importance of which may vary from case to case.
Expert witness	A witness called by a tribunal to give expert opinion evidence by virtue of experience, knowledge and expertise of a particular area beyond that expected of a layperson. The overriding duty of the expert witness is to provide independent, impartial and unbiased evidence to the tribunal – covering all relevant matters, whether or not they favour the client – to assist the tribunal in reaching its determination. See section 9 of this guidance note.
Hearsay evidence	Evidence by way of the oral statements of a person other than the witness who is testifying and/or by way of statements in documents, offered to prove the truth of what is stated. In arbitral proceedings, subject to any agreement between the parties or prior direction given by the arbitrator, hearsay is usually treated as being admissible.
Privilege	A rule that protects a document from disclosure, either because it was written without prejudice, or because it is covered by legal professional privilege (see section 17).
Representation(s)	An oral or written statement that may, depending on the circumstances and context, be used to refer to a statement of case (i.e. a document setting out the case that is to be proved); an assertion of fact(s); expert opinion evidence; or an advocacy submission. Because of its lack of precision, this generic term is best avoided in the course of actual arbitrations, although it is used for convenience in this guidance note.
Rules	Reference to Rules are to the Scottish Arbitration Rules contained in schedule 1 of the *Arbitration (Scotland) Act* 2010.
Sections	In the first instance, sections refer to sections within the guidance note. Sections within the Arbitration (Scotland) Act 2010 will be identified as 'section [xx] of the Act'.
Statement of case	Document setting out each party's arguments in relation to the arbitration, such as particulars (or points) of claim, defence and reply.
Submission(s)	The presentation by way of advocacy of a matter in dispute to the judgment of a tribunal. The term is occasionally used loosely in the surveying community to refer to evidence of fact or expert opinion evidence presented, or to a mix of such expert opinion evidence and advocacy; such usage is misplaced, and should be avoided.

Surveyor-advocate	A surveyor who presents to the tribunal a client's properly arguable case on the evidence and facts available. The advocacy role is markedly different from the role of an expert witness or a negotiator (see section 9).
Tribunal	The way the Act refers to the arbitral tribunal (as opposed to 'the arbitrator'), for the reason that many of the arbitrations with which the Act is concerned will involve a panel of two or three arbitrators.
'Without prejudice'	A rule that generally prevents any reference to written or oral statements made in a genuine attempt to settle an existing dispute. There are a number of established exceptions to the rule, explained in section 17.5.
Witness of fact	A person who, usually on oath or affirmation, gives evidence before a tribunal on a question of fact.

While in general this text is gender neutral, on occasions where masculine terms only are used (such as in legislation quotations) these should be taken as also referring to the feminine (e.g. 'she', 'her'), and to 'they' or 'it' (in the case of a corporate body), as the context so requires.

References to the singular also include the plural and vice versa where the context so requires.

1.5 Comparison of arbitration with determination by independent expert

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

1.6 Further reading

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

Any arbitrator wishing to enhance his/her knowledge of arbitration procedure and practice is recommended to attend one of the courses conducted from time to time by RICS or the Chartered Institute of Arbitrators. The current standard legal textbooks on the subject are:

- *The Handbook of Rent Review* (Reynolds and Fetherstonhaugh, 1981)
- *Arbitration (Scotland) Act 2010* (Davidson, Dundas and Bartos, 2010)
- *The Scottish Arbitration Handbook* (Parratt and Foreman, 2011); and
- *Dundas and Bartos on the Arbitration (Scotland) Act 2010* (Dundas and Bartos, 2014).

2 The nature of arbitration

2.1 Introduction

This guidance note is prepared on the specific assumption that the 2010 Act will apply. It does not apply to arbitrations commenced prior to 7 June 2010. In respect of contracts entered into prior to 7 June 2010 there is the option to disapply the Act. That option will continue for a five year period after 7 June 2010 and that period may be extended by Ministers.

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

In the first instance, the parties have the right to agree all procedural and evidential matters regarding the conduct of their arbitration. In the absence of such agreement, the arbitrator should make any direction they consider appropriate reflecting their duties under Rule 28 of the Act. The arbitrator is not obliged to ascertain the facts and the law relating to any case, but may choose to do so if they wish and if the parties have not agreed otherwise. In such a case, however, the arbitrator should tell the parties what is proposed, as section 18.5 of this guidance note explains.

2.2 The principles of arbitration

Section 1 of the Act sets out the founding principles that apply throughout the Act:

'(a) that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense,

(b) that the parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest,

(c) that the court should not intervene in an arbitration except as provided for by this Act.'

If the parties do not agree on how they are to resolve their dispute, the arbitrator has wide powers to decide the procedures that are to apply (see section 3 of this guidance note).

3 Powers and duties of the arbitrator

3.1 Sources of the arbitrator's powers and duties

There are a number of different sources to which the arbitrator should pay close attention in order to understand the exact extent of his/her powers and duties after they have been duly appointed:

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

The arbitrator must be careful not to infringe any express provisions of the Act or of the other sources set out above (unless in conflict with the Act); it can result in an award being set aside or remitted (see section 27.5 of this guidance note).

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

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

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

3.3 Source (b): the Act

In many circumstances, the lease will simply stipulate that the parties' dispute should be dealt with in accordance with 'the Arbitration Act', such as the *Arbitration (Scotland) Act* 1894. Due to the transitional provisions in section 36 of the 2010 Act, the arbitrator will need the parties to confirm that they wish to proceed under the 2010 Act, or use the former statutory regime which is permissible for a period of at least five years. The arbitrator and parties should be aware that any reference to section 3 of the *Administration of Justice (Scotland) Act* 1972 in the lease being disregarded will mean that Rules 41 and 69 of the Act will not apply, unless the parties agree otherwise. In such circumstances, the arbitrator may nevertheless invite the parties' agreement on how they wish their dispute to be conducted (see section 3.4 of this guidance note).However, there are some matters regulated by the Act that are mandatory, and which neither the parties nor the arbitrator have final control.

The Act has 84 rules set out in schedule 1 of the Act, 36 of which are mandatory and 48 default.

An important consideration for Scottish arbitrators is Rule 26 which provides that disclosure by the arbitrator (or any party) of confidential information is actionable as a breach of an obligation of confidence. This can give rise to a claim of damages against the arbitrator. The arbitrator should therefore check whether Rule 26 has been disapplied by the parties. If it has not been disapplied, the arbitrator should explain the consequences of the provision to the parties, and seek confirmation of whether or not they wish to keep Rule 26 applicable to the arbitration. If they do, great care must be taken to avoid any breach of the duty of confidentiality.

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

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

3.5 Source (d): the principles of natural justice

Any matters arising in the arbitration that are not provided for expressly or implicitly in the parties' arbitration agreement or the Act are matters for the arbitrator's discretion. This must be exercised judicially, and in accordance with the rules of natural justice, as reflected in Rule 24 of the Act. The general duties of the tribunal set out by Rule 24 are that:

'1 The tribunal must –

(a) be impartial and independent,

(b) treat the parties fairly, and

(c) conduct the arbitration

(i) without unnecessary delay, and

(ii) without incurring unnecessary expense.

2 Treating the parties fairly includes giving each party a reasonable opportunity to put his/her case and to deal with the other party's case.'

Above all, it is the duty of an arbitrator, as it is of a judge, to hear both sides to the dispute (except when proceeding where one party defaults – see section 20 of this guidance note) and to decide it according to the evidence and the law.

In general, if there is nothing in the Act or in the arbitration agreement to indicate the contrary, the arbitrator should proceed in whichever way seems to be the fairest, consistent with the responsibility outlined in Rule 24 to adopt procedures suitable to the case, avoiding unnecessary delay or expense. Although it is the arbitrator's duty to proceed without delay, this is subject to the agreed wishes of the parties with regard to the conduct of the arbitration. The arbitrator should never be the cause of avoidable delay, but equally should not give the appearance of driving the arbitration forward to suit his/her own, rather than the parties' convenience.

3.6 The arbitrator may not delegate without the parties' consent

The arbitrator acts in a personal capacity and may not, without the consent of the parties, delegate any duties, powers or responsibilities. The arbitrator's decision-making duty can never be delegated. However, where problems outside the range of the arbitrator's expertise and understanding arise (e.g. where a valuation surveyor is required to take into account issues of structural engineering, or highly specialised valuation issues as to part of a property), unless Rules 32 and 34 are disapplied, the arbitrator has the power under Rules 32 and 34 of the Act to appoint clerks, agents, employees or experts to assist in reaching a decision. The arbitrator must give the parties a reasonable opportunity to comment on any information, opinion or advice offered by any such person. As to legal advice generally, see section 13.1.

4 Steps prior to appointment as arbitrator

4.1 Application for the appointment of an arbitrator

An arbitrator may be appointed either privately or via an appointing body, typically the Chairman of RICS Scotland. An application to the Chairman for the appointment of an arbitrator should be in writing and preferably made on the form obtainable on application to the RICS Scotland Dispute Resolution Service (DRS) or from the website www.rics.org/drsscotland. The application will not be processed until the appropriate non-refundable fee has been received by DRS.

4.2 Matters for the arbitrator to check upon invitation

When a surveyor is invited to accept an appointment to determine a dispute, there are a number of matters that should be checked before acceptance. In the case of an appointment by the Chairman of RICS Scotland, these matters are listed in the letter or email sent out by the DRS (see section 4.3 of this guidance note). The list of matters to be checked may be summarised as follows:

(a) Does the appointing body have authority to appoint? See section 4.4 of this guidance note.

(b) Is the surveyor to act as arbitrator or as independent expert, or in some other capacity, such as a mediator? This is discussed in section 6.5.

(c) Will the surveyor have jurisdiction to act? See section 6.2.

(d) Is there to be more than one arbitrator? This is considered in section 4.5.

(e) Does the surveyor meet the criteria for the task? See section 6.6.

(f) Is the surveyor fit to take the appointment? See section 4.6.

(g) Are there any conflicts of interest that would prevent them accepting the appointment? This important topic is dealt with in section 5.

If the surveyor is not sent the copy of the lease (or other document containing the arbitration agreement) at this stage (which will commonly be the case), then it may not be possible to be certain about some of these matters (and in particular (b) and (c)). In such circumstances, the surveyor should ask for a copy of the lease as soon as he/she had been appointed – see section 6.3 of this guidance note.

4.3 Invitation for appointment by the Chairman of RICS Scotland

In the case of an application for appointment by the Chairman of RICS Scotland, the surveyor selected will receive a letter or email from the DRS asking for confirmation about a range of matters concerning his/her suitability for appointment.

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

(i) Does the subject matter fall within the sphere of your own professional practice, not merely that of your firm?

(ii) Can you undertake the task without delay or unnecessary expense?

(iii) Do you have appropriate professional indemnity cover?

(iv) Have you made appropriate enquiries, and are you satisfied you have no current involvements that would give rise to a real or perceived conflict of interest?

(v) Have you made appropriate enquiries, and are you satisfied there are no involvements within the past five years that give rise to a real or perceived conflict of interest?

(vi) Can you confirm that you are not currently acting as an arbitrator or independent expert in another matter that would conflict with this appointment?

(vii) Do you comply with any special requirements (if stated) that may be listed in the case details?

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

It is to be emphasised that the response should be treated not as a formulaic exercise in ticking boxes, but rather as a good opportunity for the prospective appointee to carefully reflect on his/her own appropriateness for the task. For example, the five-year

period with which question (v) deals should be taken as a guide rather than an absolute standard; there may well be matters falling outside that period that should be considered.

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

4.4 The authority of the appointing body

In the case of an invitation for appointment by the Chairman of RICS Scotland, the arbitrator should have no concerns regarding the authority of the appointing body (although it will still of course be necessary to confirm the terms of the arbitration agreement). In the case of a private appointment, by contrast, the arbitrator should check that the parties' agreement is in writing, and whether it contains any specific terms. If a copy of the agreement has not been provided, the arbitrator would be prudent to ask for a copy before proceeding further, and certainly before acceptance of the invitation.

Because there is no requirement for parties to provide a copy of the lease or other relevant document conferring on the Chairman power to make the appointment, the arbitrator should be careful, even in the case of the RICS Chairman's appointment, to ask for a copy of the lease at the earliest opportunity following appointment, in order to check that he/she satisfies the appointment criteria (see sections 6.4, 6.5 and 6.6 of this guidance note). The same obviously applies to a private appointment.

4.5 Where there is more than one arbitrator

In virtually all rent review cases the reference will be to a single arbitrator, and this will be assumed if there is no agreement or direction as to the number of arbitrators. Where the arbitration agreement provides for more than one arbitrator, then the procedures set out in Rules 6 and 7 of the Act should be followed. These also deal with the appointment of an umpire in terms of Rule 30.

4.6 Suitability for appointment

It is essential that the arbitrator has a good knowledge of the Act. Before accepting any such appointments, arbitrators should ensure that they have a sufficient knowledge of the practice, procedures and law of arbitration, as well as the subject matter of the dispute so that they are able to assess the relevance and quality of the evidence presented to them, and by which they arrive at their decision and award.

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

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

4.7 Professional indemnity cover

Under Rule 73 of the Act, an arbitrator is not liable for anything done or omitted to be done in the purported discharge of his/her functions as arbitrator unless the act or omission is shown to have been in bad faith. It may therefore be questioned why the DRS asks on its appointment form whether the prospective appointee has appropriate professional indemnity cover. The question is academic, since the appointee is overwhelmingly likely to be a practising professional who will maintain cover as a matter of course.

5 Involvements and conflicts of interest

5.1 Conflicts of interest

As the summary of the contents of the letter or email from DRS shows (see section 4.3), every effort is made by the Chairman to select a person suitable for appointment, while avoiding any potential conflict of interest.

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

5.2 The overriding principle regarding conflicts of interest

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

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

5.3 Conflicts distinguished from involvements

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

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

Rules 8 and 24 of the Act deal with impartiality and independence, and Rule 77 deals with the independence of the arbitrator.

5.4 Mere involvement not necessarily a disqualification

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

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

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

The prospective appointee requires to be mindful of Rule 77 of the Act relating to independence and the justifiable doubts as to the arbitrator's impartiality.

5.5 The role of the Chairman and the DRS

The role of the Chairman of RICS Scotland in appointing an arbitrator is, on the face of it, a

straightforward one. He/she is concerned to select a member with the appropriate expertise who is not precluded from taking the appointment due to a lack of impartiality and independence. Ideally, therefore, the Chairman should be entirely free to exercise his/her discretion as regards both the requirement of expertise and that of impartiality and independence.

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

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

5.6 Investigations for the prospective appointee to carry out

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

The checks should include:

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

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

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

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

5.7 Disclosure of an involvement

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

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

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

In a further alternative, the Chairman may pass on the prospective appointee's disclosure to the parties or their representatives, inviting comments within a specified period of time. At that stage the Chairman will consider and give due weight to any objections raised by the parties, but will not be bound by them, and the final decision as to the appointment will be the Chairman's alone.

5.8 Effect of failure to disclose an involvement

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

5.9 Disclosure of an involvement after appointment

Once appointed, in the interest of openness, the arbitrator may consider it appropriate again to disclose any involvements to the parties; particularly any involvements with the parties themselves. However, the arbitrator should not allow a party to use this information in an attempt to persuade him/her to resign. By this stage, assuming all the facts were presented, the Chairman will have been satisfied that the arbitrator is suitable. Only the parties by agreement, the arbitrator, or the courts can decide otherwise. The arbitrator should ask the parties to declare immediately if they consider any such involvement gives rise to a conflict. The arbitrator should also request the parties and their representatives to share the responsibility of notifying him/her if they believe a conflict has arisen at any subsequent stage.

Of course, if the arbitrator becomes aware after his/her appointment of an involvement that may amount to a conflict, then that is something that should be disclosed immediately to the parties, without regard to the fact that the arbitration may by then have reached an advanced stage under Rule 8 of the Act (see section 5.2 of this guidance note). The Chairman has no further role to play at this stage, and should not therefore be consulted.

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

6 Action on appointment

6.1 Date of appointment

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

Where the Chairman is to make the appointment, it will probably take effect when the parties are simultaneously advised of the appointment. This creates a tripartite agreement between the parties and the arbitrator. Neither the Chairman nor RICS Scotland are party to the contract.

If the parties themselves make the appointment, it takes effect either

(a) where the agreed appointee has told them he/she would be prepared to be appointed, on the date of the appointment by the parties; or

(b) where there is no prior contact with the agreed appointee, on the date of the arbitrator's letter of acceptance to the parties.

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

Other matters relating to the appointment of the arbitrator are covered by Rules 6 and 7 of the Act.

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

Rule 20 of the Act sets out clearly the grounds on which the parties may make an objection on the grounds of jurisdiction.

If such an objection is raised, the arbitrator should rule on it pursuant to Rule 19 of the Act. Under Rules 21, 22 and 23 if the matter appears complicated (and particularly if either party is legally represented in relation to the challenge), the arbitrator should consider taking legal advice. The arbitrator's ruling may be challenged by either party under Rule 67 of the Act, but the arbitrator may continue the reference notwithstanding that an application to the court is pending. Rule 76 details the grounds on which the parties may lose the right to object.

Whether the arbitrator would be wise to continue the reference in any given case will depend on a balance of considerations, including:

- the gravity and difficulty of the point raised
- the urgency of the arbitration
- the speed with which the point might be determined by the court, and
- the likely effect on costs of proceeding in advance of the determination of the point.

Of course, if both parties have agreed that the matter is to be determined by the court, there is no question of the arbitrator proceeding further with the reference.

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

Rule 12 of the Act provides that a party to an arbitration may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds:

- that the arbitrator is not impartial and independent
- that the arbitrator has not treated the parties fairly
- that the arbitrator is incapable of acting as an arbitrator in the arbitration (or that there are justifiable doubts about the arbitrator's ability to so act)
- that the arbitrator does not have a qualification which the parties agreed (before the arbitrator's appointment) that the arbitrator must have;
- that substantial injustice has been or will be caused to that party because the arbitrator has failed to conduct the arbitration in accordance with:
- the arbitration agreement
- these rules (in so far as they apply); or
- any other agreement by the parties relating to conduct of the arbitration.

The arbitrator may continue with the arbitration and make an award while an application to the court under Rule 12 is pending. As with applications under Rule 20, whether this would be a prudent course for the arbitrator to adopt will depend on a number of factors (see section 6.2). If the court removes the arbitrator, it may make such order as it thinks fit in respect of their entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

6.4 Initial contact with the parties

Once appointed, the arbitrator should write to the parties:

- notifying them of their appointment
- requesting a complete copy of the lease (with properly coloured plans), together with any deeds of variation, licences or other documents material to the appointment
- asking if more time is required for negotiation before taking substantive action
- requesting confirmation that they are authorised to represent the landlord/tenant
- requiring all correspondence with the arbitrator (including attached documents) to be copied to the other side
- forbidding the supply of privileged correspondence reminding the parties of their obligations in terms of Rule 26 (confidentiality) per Rule 26(3) (unless Rule 26 has been excluded by the parties)
- setting out his/her proposed fees and charges (see section 6.9 of this guidance note).

6.5 Checking the appointment documents

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

At this stage, it might become clear to the arbitrator either that their appointment is not as arbitrator (see section 6.6 below); that they do not meet the appointment criteria (see section 6.7 below); or that the lease lays down a timetable with which compliance will be difficult if not impossible, e.g. that the arbitrator must take a particular step within so many days of the review date, being a date that has already passed. Such problems should be rare, because ordinarily the relevant parts of the lease will be extracted or summarised on the application form by the applicant. Nevertheless, it is incumbent upon the arbitrator to carry out their own careful checks as soon as the lease is received.

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

6.6 Arbitrator or independent expert?

Some leases and agreements may be unclear or ambiguous as to whether the appointment is in the capacity of arbitrator or independent expert. Where a lease or agreement, with reference to the appointment of a surveyor, mentions 'arbitrator' or 'arbitration' or 'the Arbitration Acts', even though it may also make reference to a 'valuer', 'independent expert', 'expert' or other such term, it is generally treated as calling for the appointment of an arbitrator, unless it is clear that the parties intend otherwise. An appointed surveyor should resolve any ambiguity concerning the capacity in which he/she is appointed before proceeding with the reference.

If there is any doubt as to the correct interpretation of the lease or other document giving rise to the arbitrator's appointment, the parties may agree which interpretation is correct. However, there is a danger that third parties (such as the original lessee, or a surety) might be able subsequently to dispute that agreed interpretation. For detailed consideration of this topic, see *Handbook of Rent Review* (1981) and the standard textbooks on arbitration.

6.7 Criteria for appointment

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

In this respect, it is not uncommon to find that the arbitration clause requires either that the arbitrator should have particular experience (e.g. expert in retail warehousing in Aberdeen); be qualified in a particular way (e.g. of not less than 15 years' seniority in valuing commercial property or a director in an international practice); or take particular steps in relation to the appointment, such as arrange insurance to a certain level of cover. If the arbitrator is unable to meet such criteria, they should make this known to all parties immediately. Failure to do so may result in a later objection by one of the parties under Rule 10 of the Act (see section 6.2 of this guidance note). It is not necessary to alert the DRS, since, as noted in section 5.9 of this guidance note, the DRS has no further role following appointment.

6.8 Non-receipt of the appointment documents

It will occasionally happen that the parties will fail to supply a copy of the lease or other appointment document to the arbitrator. The arbitrator cannot proceed in the absence of this document. In such circumstances, the arbitrator should remind the parties of their duty to do all things necessary for the proper and expeditious conduct of the arbitration (Rule 25), and give a written warning that if the lease is not supplied within a specified reasonable period it will be necessary to resign from the appointment.

6.9 Establishing the arbitrator's fees and charges

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

Note the following points (which are examined in greater detail in section 24) in relation to the arbitrator's fee proposal:

- the arbitrator should always propose a fair figure or basis
- the arbitrator is entitled to proper remuneration for the work they have done, and it may be appropriate to provide, in common with the almost universal practice (in fields other than rent review), for the arbitrator either to require each party to deposit its share of the arbitrator's estimate of the costs of each stage of the arbitration, or to render interim invoices to be settled at periodic intervals on account of their costs
- it may also be appropriate to build in a mechanism for rate increases if the arbitration is unduly protracted or delayed
- the circumstances may also justify the arbitrator requesting the payment of a commitment fee to cover both the abortive time and costs likely to result if the arbitration is either postponed because the parties are not ready, or does not proceed to an award
- a charge merely for accepting the Chairman's appointment is inappropriate.

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

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

7 Subsequent inability to act

7.1 Problems after the appointment has been made

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

(a) obtain full details of the objection in writing

(b) notify the other party in writing and invite comments from them

(c) make such further enquiries as might be necessary in order to establish, for example, how long the party raising the matter has known about the alleged conflict (which may be relevant to the question whether the right to object has been waived)

(d) apply the overriding principle (see section 5.2) to decide whether there is a conflict of interest that would require the appointment to be terminated

(e) if the answer is yes, seek the agreement of the parties to an orderly resignation and replacement by the Chairman of RICS Scotland, unless both parties agree in writing that he/she should continue (and the arbitrator feels that he/she can do so); or

(f) if the answer is no, continue.

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

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

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

It is to be emphasised that the mere fact of disclosure should not indicate to the parties that the arbitrator considers either that a conflict of interest exists, or conversely that he/she believes that there is no such conflict. Those are matters that the arbitrator can only finally decide having weighed up the parties' reactions to the disclosure (Rule 8 of the Act).

7.3 Resignation of the arbitrator

The Act provides that an arbitrator may resign, under Rule 15. Circumstances in which this may be reasonable are:

- the parties consent to the resignation
- the arbitrator has a contractual right to resign in the circumstances
- the arbitrator's appointment is challenged under Rule 10 or 12
- the parties disapply or modify Rule 34(1) (expert opinions) after the arbitrator is appointed; or
- the Outer House has authorised the resignation.

An arbitrator who resigns unreasonably may be found liable to the parties for the consequences. It is therefore prudent that an arbitrator considering resignation should first consult the parties in writing and, if possible, gain their acceptance that resignation would be reasonable in all the circumstances, with agreement also as to payment of fees and expenses. Liability of the arbitrator is covered in detail in Rule 16 of the Act.

7.4 Replacement of the arbitrator

The procedure for replacement of an arbitrator who resigns, or who is incapacitated in some way, is set out clearly in Rule 17 of the Act:

That is either

- in accordance with the procedure used to constitute the original appointment, or where that fails
- in accordance with Rules 6 and 7 of the Act.

8 Case management

8.1 Introduction

Arbitration differs from litigation, not least in that it is funded privately, with no pressure on the tribunal's resources; and the concept of party autonomy takes precedence. Moreover, the overriding objective, as far as arbitration is concerned, is spelt out in Rule 24 of the Act:

'1 The tribunal must –

(a) be impartial and independent,

(b) treat the parties fairly, and

(c) conduct the arbitration

(i) without unnecessary delay, and

(ii) without incurring unnecessary expense.

2 Treating the parties fairly includes giving each party a reasonable opportunity to put his/her case and to deal with the other party's case.'

It is therefore to be emphasised that the arbitrator is there for the parties, not the other way around.

8.2 Dealing with the parties

In some cases, the arbitrator will be in the fortunate position of dealing with parties that are represented by surveyors, who comply readily with his/her directions. In other cases, the arbitrator will have to deal with parties that are unrepresented, or uncooperative, or whose identities change during the proceedings. See section 10 for more information.

When the parties are represented by surveyors, the arbitrator will need to ascertain whether the surveyors are acting as expert witnesses or as advocates, or in the dual role. This is examined in section 9 of this guidance note. Rule 25 of the Act sets out the general duties of the parties.

8.3 Preliminary meeting or other contact

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

Such preliminary matters are often most effectively and expeditiously dealt with by some form of preliminary contact rather than by correspondence, which may become protracted. In the first instance it is for the parties to decide whether this preliminary contact should be at a meeting, or be conducted by way of conference call or email; failing agreement it is for the arbitrator to decide. In doing so he/she must balance such considerations as the possible savings in costs, the convenience of the parties, and the size and complexity of the arbitration. Preliminary contact is considered in more detail in section 11.

8.4 Directions

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

Arbitrators will usually wish to build up their own standard sets of directions, to serve as an aide-memoire. However, the use of such precedents should not obscure the need to approach each situation afresh, in order for the arbitrator to be able to gauge what is best for the particular parties in that particular arbitration.

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

8.5 The possibility of compromise

An arbitrator is not a mediator and it is not their role proactively to promote negotiations and compromise. However, the arbitrator should, at all times, encourage the parties to achieve their own settlement. It is recommended that at the outset, the arbitrator enquire

of the parties whether there is any possibility of their reaching a negotiated settlement and, if so, whether they wish him/her to defer the arbitration. Either in the initial letter, or at the preliminary meeting if any, the parties should be reminded that they are at liberty to settle between themselves at any time prior to the award, but in this event will be liable for the arbitrator's fees and disbursements to date (see section 24.1).

8.6 Identification of the issues

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

If there are likely to be complex legal or technical issues then the arbitrator will need to put measures in place to deal with these (see section 13).

8.7 Agreeing the facts

The arbitrator should require the parties to agree as many of the facts as possible, with the aim of ensuring that the arbitration is concerned only with matters that are genuinely in dispute, with consequent economies in time and cost (see section 12 for more information).

8.8 'Documents only' arbitrations compared to oral hearings

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

Each way of proceeding has merit.

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

By contrast, the use of written representations may be cheaper and quicker.

The overriding duty of the arbitrator is to act fairly and impartially and to adopt procedures suitable to the circumstances of the particular case. In view of the nature of the matters likely to concern surveyors, and their particular skill in the writing of reports, the written representation procedure is often more appropriate to a rent review dispute, but this is a matter for the parties (if they can agree) to decide and for the arbitrator (if they cannot) to determine based on the circumstances of each individual case.

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

Once the choice has been made between written and oral proceedings, the procedure thereafter will vary according to which has been chosen. Section 14 deals with procedure by written representations and section 15 deals with procedure by way of hearing. Later sections deal with evidence, the award, and fees and expenses, all of which are common to both procedures.

8.9 Dealing with the evidence

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

9 Expert witnesses and advocates

9.1 Introduction

Surveyors acting in rent review arbitrations commonly assume the roles either of expert witness or advocate, or sometimes both (but not at the same time). It is critical to the proper outcome of such an arbitration that:

- the arbitrator should be able to discern which role is being adopted at any one time (because very different rules apply to each); and
- that the arbitrator should be able to depend on the truthfulness of the expert evidence being adduced (because in a market where there are no comparable transactions, there may be no other satisfactory evidence).

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

This section summarises the principal duties in each practice statement.

9.2 The surveyor acting as expert witness

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

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

It is critical that arbitrators recognise that opinion evidence, even unsupported by any other material, is nevertheless evidence, and should be considered and assessed. However, in order for the arbitrator to be able to have faith in such evidence, he/she has to have confidence in the impartiality and competence of the expert witnesses acting for the parties in the arbitration. If an arbitrator has grounds for suspecting that that is not the case, it is incumbent upon them to make that matter clear, as section 9.5 below suggests.

9.3 The surveyor acting as advocate

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

9.4 The surveyor in the dual role

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

Accordingly, both the *Surveyors acting as expert witnesses* practice statement and guidance note and the *Surveyors acting as advocates* guidance note provide that where a surveyor is acting in such a dual

role, they should clearly distinguish between those two fundamentally different roles at all times, whether in oral hearings or in written presentations. The dual role is likely to be more effective in hearings.

9.5 Dealing with unprofessional behaviour

While rare, an arbitrator may be faced with a situation where a surveyor would appear to have failed to comply with a relevant practice statement, in particular those relating to surveyors acting as expert witnesses and advocates. Examples might include exaggeration or economy with the truth in relation to expert evidence, abusive conduct in relation to advocacy (whether written or oral), and opining. Sanctions on surveyors for breaches of practice statements include disciplinary action, culminating possibly in a public reprimand, fine and/or expulsion from RICS, depending on the severity of the breach.

Although all surveyors have a duty to report breaches of practice statements by other surveyors to RICS Scotland, the arbitrator must be mindful of two matters. The first relates to the arbitrator's function, which is to determine the matters in dispute in accordance with the arbitration agreement rather than to exercise a disciplinary role. The arbitrator should therefore resist applications to rule on whether there has been a breach of the practice statements.

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

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

Those steps may include, in order of severity:

- use of the arbitrator's discretionary power to take the initiative to ascertain the facts and the law unless the parties agree otherwise (Rule 28(2)(e)). In taking the initiative, the arbitrator should however be careful not to be seen to be advancing the case for one party, in order to avoid any suggestion of partiality giving rise to an application for his/her removal under Rule 12 of the Act
- a reference to the offending conduct in the award, which the client will then be able to read
- the report of the breach to RICS. Given the confidential nature of arbitration, however, the arbitrator should make it clear that any such report will take effect as an agreed exemption from confidentiality.

10 The parties

10.1 Establishing the identities of the parties

It is essential that the arbitrator should record the names of the parties correctly. A preliminary meeting with the parties' representatives (see section 11) or directions will provide an opportunity for this. Remember that the application will have been made by one side to the dispute and it is conceivable that they will not have been in possession of the full facts. The following situations should be treated with care:

One of the parties might be a company that has changed its name following a takeover or amalgamation. Here the new name should be given, perhaps with the company number if available (although it would do no harm to refer to the old name as well – for example, 'Bigco plc (formerly Bigco (UK) Ltd)'.

One of the parties might be a partnership, or carrying out business under a trade name. Suppose, for example, that the tenant's letters are headed 'Joe Bloggs Builders'. This might either be a trading name for, say, J Bloggs Ltd, or a partnership consisting of Joe Bloggs and Fred Bloggs. In the former example, the tenant's name in the heading would be 'Joe Bloggs Ltd trading as Joe Bloggs Builders'; in the latter case, it would be 'Joe Bloggs and Fred Bloggs trading as Joe Bloggs Builders'.

The parties might not be the same as the parties shown on the lease – for example, the subjects might have changed hands or the lease might have been assigned. Care should be taken to show the current name. The reason for the change can then be explained in the introduction to the award.

The parties might change their identities during the course of the arbitration, for example, through assignment. In such an event, the arbitrator should ensure both that the new party is aware of its obligations in relation to the arbitration and that provision is made for the recovery of costs from the outgoing party.

10.2 Unrepresented parties

Special care will have to be taken by the arbitrator where one or both of the parties is unrepresented by a surveyor and has no relevant valuation expertise. The problem becomes more acute when one of the parties has professional assistance and the other does not. It will not be fair if the arbitrator treats the unrepresented party as if he/she were on equal terms with the represented party.

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

10.3 Liquidators/receivers and guarantors

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

A properly appointed liquidator, receiver or administrator for either party may take over the relevant role. Financial difficulties of a party (including expected insolvency) are not grounds for delay providing that the other party is aware of the circumstances and wishes to proceed. The arbitrator may also consider whether it would be appropriate to require security for the cost of the arbitration (Rule 64). The arbitrator should, however, be careful to act impartially and independently, and should not suggest such a course other than in exceptional circumstances.

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

11 Preliminary 'meeting'

11.1 Format of the 'meeting'

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

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

11.2 Party autonomy

One of the founding principles of the Act is that the parties should be free to agree how to resolve disputes (section 1(b) of the Act). In other words, it should, in the first instance, be for the parties to decide how their arbitration should be conducted, subject only to the mandatory provisions of the Act. In particular, the arbitrator cannot override the procedural agreement of the parties. The arbitrator should reflect this principle of party autonomy in the execution of their duties in Rule 24 of the Act.

11.3 Agenda for the preliminary meeting

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

The draft directions for the conduct of the arbitration will also provide a suitable opportunity for the arbitrator to remind the surveyors that he/she will expect compliance with the relevant duties laid down in the practice statements (see section 9 above). The matters that the arbitrator may wish to consider for the agenda will include those set out in section 11.5.

11.4 Representation at the preliminary meeting

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

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

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

11.5 Matters for discussion at the preliminary meeting

Rule 28 of the Act deals with procedural and evidential matters. This is the starting point for deciding what matters to address at the preliminary meeting. The arbitrator's approach to the list of matters to be discussed should be informed by a consideration of what steps need to be taken that can best combine speed in obtaining an award with the need to give each party a reasonable opportunity to prepare their case.

There follows below a list of topics that may be discussed at the meeting. It is to be emphasised that this is not an exhaustive checklist of matters for the arbitrator to raise with the parties, but merely a reminder for the arbitrator of matters that in some cases should, but in others may, be raised. Some of

the matters (for example, disclosure and interest) are for the parties to raise themselves rather than for the arbitrator to mention. Matters for discussion include:

- What documents are agreed to be relevant and who will supply them to the arbitrator?
- What facts concerning the subject property and what comparables are agreed, and who will supply a statement and full details accordingly? (See section 12.)
- What procedure do the parties wish to adopt? In particular, does either of them at this stage wish to ask for a hearing? See section 8.8 for more information on other matters to be considered in relation to a hearing.
- Is the representative attending the meeting on behalf of a party the same person who will be representing them thereafter, or is it intended to instruct someone else to act as advocate, e.g. a solicitor or counsel? If so, has the representative discussed the procedure with the designated advocate? Are any designated representatives authorised to receive communications from the arbitrator?
- Is any question of law likely to arise? If so, which of the procedures mentioned in section 13 of this guidance note are most appropriate? Do the parties wish to remove the arbitrator's power to appoint a legal adviser? If not, do the parties wish to agree upon the legal adviser to be consulted, and what are the arrangements for the payment of the fees and expenses of the adviser for which the arbitrator is liable as expenses of the arbitration?
- Are statements of case necessary, or will the issues be sufficiently defined by lodging expert reports/adversarial submissions and (in due course) counter submissions?
- What form should the parties' evidence and submissions take? How should they be exchanged; and how should copies be delivered to the arbitrator? See the communications protocol in sections 11.6 to 11.8.
- Does either party wish to apply for disclosure? If so, is the disclosure likely to be restricted to a specified document or class of documents, or will it extend to everything that is relevant? See section 17.
- Should all the issues be dealt with together, or should they be split in some way?
- What rules of evidence are to apply to the arbitration? (See section 16.) In particular, are arbitrator's awards and independent expert determinations to be admitted?
- Have the parties agreed on responsibility for expenses after the dispute has arisen? If not, do the parties wish the arbitrator to issue an award dealing with all matters in issue including the allocation of expenses (i.e. who pays), with the determination of the recoverable expenses (i.e. the amount payable by one party to the other consequent on the allocation) reserved if not agreed? Or do they wish the arbitrator to issue an award final as to all matters except expenses, and to give them an opportunity to make representations on expenses before deciding how to deal with them? Do the parties wish to know what, if any, policy the arbitrator has regarding 'near misses' (see section 25.10)?
- Have the parties agreed to dispense with reasons as otherwise required by the Act? See section 22.

11.6 Communications protocol

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

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

There are many other aspects of communication between the parties and the arbitrator which should be covered by an appropriate direction. See section 11.7 (below) for suggested email protocol and section 11.8 for a protocol covering communication by other means.

11.7 Communications protocol – email

Communication by email is now common in arbitrations, and is to be encouraged not merely for its speed and inexpensiveness, but also for the ease with which it can be demonstrated that all relevant parties have been copied in on messages. As with any other

form of communication, however, certain rules should be laid down, to ensure that the procedure remains fair. The preliminary meeting will provide a suitable opportunity for the arbitrator to lay down such rules.

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

Where email is agreed as the primary means of communication, consider the following rules:

- an acceptable type of virus-checking software must be used
- each party and the arbitrator should supply one email address for the purposes of communications
- all communications sent to the arbitrator should be copied to the other side
- communications sent to the other side should not be copied to the arbitrator unless it is necessary for him/her to see them
- all communications to and from the arbitrator should be acknowledged to establish safe receipt
- during periods of absence, out-of-office assistants should be used
- the time of service of the documents sent electronically shall be deemed to be as defined by Rule 83 of the Act
- a typed name (or electronic signature) in an email will be regarded as the authenticating signature of the named sender
- email chains should not be sent to the arbitrator, to avoid inadvertent inclusion of without prejudice material
- where documents are attached to emails:
  - (i) they should not exceed a certain size (to be agreed by reference to each party's receiving capacity)
  - (ii) documents that are too large for attachment should be sent separately in hard copy
  - (iii) the documents should be in an agreed format that all recipients can open and read
  - (iv) any further drafts of such documents should be clearly marked as such (e.g. 'v 2') to assist with identification
- where documents are supplied as images, the file should be clearly identified with the format used and should always be subject to detailed agreement of procedures between the parties prior to transmission
- the arbitrator should state in their directions that a specified period, say five working days, is to elapse before they will examine the documents, during which either party may object to the admissibility of any evidence. This gives each side the opportunity of checking the opposite side's documents to ensure that they do not disclose 'without prejudice' negotiations.

11.8 Communications protocol – means other than email

Formal communications protocol is set out in Rule 83 of the Act, which sets out in detail the service and delivery of documents.

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

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

11.9 Request to defer proceedings

If both parties request the arbitrator, in writing, not to take any action, then he/she should defer to their wishes, but may remind them of their duty under Rule 25 to ensure that the arbitration is conducted without unnecessary delay. The arbitrator should inform the parties that he/she will proceed on the application of either party at any time. The arbitrator's duties under Rule 24, or indeed the parties' duty under Rule 25 (see section 20.2), however, should not be neglected. Parties should be required to provide regular updates.

12 Agreeing the facts

12.1 Agreeing facts

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

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

12.2 The facts that are to be agreed

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

The agreement should be recorded in writing.

12.3 Comparable evidence

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

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

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

(a) the address of the property

(b) the identities of the parties and any agents

(c) a brief description of the property (including its age and construction, floor areas, and any amenities and ancillary services)

(d) the nature of the comparable evidence, e.g. an open market letting; a rent review; the failure of a property to let

(e) the figure which has been agreed or determined (or not, as the case may be);

(f) in the case of a new letting, the dates when the terms were agreed and when contracts were exchanged

(g) the amount of any rent-free period granted, any capital contributions made or any other incentive

(h) in the case of a rent review or lease renewal, the date of the lease, the term commencement date and the length of term

(i) relevant details of terms and conditions in the lease documents which might affect rental value

(j) any relevant matter not recorded elsewhere (e.g. in side letters, related transactions) that affects value.

12.4 Matters that cannot be agreed

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

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

13 Dealing with points of law and other technical issues

13.1 Introduction

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

The arbitrator is required to disclose any expert opinion obtained and allow the parties a reasonable opportunity to make representations, hear any oral expert opinion, and ask questions of the expert giving it. This is a default rule and the parties are free to modify or disapply it (see Rule 34 of the Act).

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

(a) obtaining an estimate of what the expenses are likely to be (including the drafting of instructions, the fee for the advice itself, and any discussion concerning it), and how long it will take for the advice to be obtained, and giving the parties the opportunity to comment

(b) informing the parties that the expenses of taking the legal advice will form part of the expenses of the arbitration for which they will both be liable in the first instance (that is to say, until liability for expenses is finally determined) on a several basis

(c) seeking an interim payment from the parties to cover the costs rather than waiting until the award is finalised.

13.2 Disputes involving issues of law

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

The following are the main possibilities:

The arbitrator may decide the legal issue after considering submissions from both parties. The decision could then either be given as a separate award on the preliminary point of law, or it could be incorporated into the substantive award on rent. The arbitrator should raise with the parties the benefit that might be associated with making an alternative award, but should only then proceed to do so if the parties agree.

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

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

The parties may agree after the dispute has arisen that no reasons shall be given for the award, in which event this will exclude the court's jurisdiction with the result that the parties will then be bound by the arbitrator's decision on the issue (Rule 69(2) of the Act).

13.3 Disputes involving other technical issues

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

13.4 Procedure in relation to legal or technical issues

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

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

a hearing will be required, or whether the issue will be determined on the basis of written reports/submissions alone

- statements of case will be required
- it would be appropriate to direct that facts should be agreed in relation to that issue
- disclosure is required in relation to that issue
- sequential exchange of evidence is appropriate
- sequential or simultaneous service of submissions is appropriate.

13.5 Using an expert

In straightforward cases, the arbitrator need do little more than set down the timetable for submissions and counter-submissions to be provided for the chosen expert. Following receipt of the expert's advice on the point at issue, the arbitrator must disclose it to the parties for their comments (see Rule 34 of the Act). The arbitrator should consider any comments made by the parties (in conjunction as necessary with an expert). If there is any modification to the advice as a result of that process, the arbitrator may find it necessary to revert to the parties. At the end of that process, the arbitrator must decide whether to accept the advice.

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

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

13.6 Referral to court

As an alternative to the preliminary point being decided by the arbitrator, it may be decided by the court under Rule 41 of the Act.

Such an application is valid only if:

(a) the parties have agreed that it may be made or

(b) the tribunal has consented to it being made and the court is satisfied that:

(c) determining the question is likely to produce substantial savings in expenses,

(d) the application was made without delay; and

(e) there is a good reason why the question should be determined by the court.

Unless otherwise agreed by the parties, the arbitrator may continue the arbitration proceedings and make an award while an application to the court under Rule 41 is pending. It would obviously be wrong to do so if the remainder of the arbitration depends upon the outcome in relation to the preliminary issue.

13.7 The raising of legal issues as a means to delay

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

14 'Documents only' arbitrations

14.1 Introduction

The arbitrator will have established during the course of the preliminary contact with the parties (see section 11) whether the parties wish to have their dispute determined by way of written representations or an oral hearing.

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

14.2 Terminology

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

It would be proper practice to require surveyors to adopt the wording used in RICS practice statements and guidance notes such as *Surveyors acting as expert witnesses* and *Surveyors acting as advocates*.

14.3 Form of written representations

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

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

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

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

14.4 Content of written representations

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

- it should be moderate in tone, avoiding pejorative and hyperbolic criticism of the other side
- it should not contain inadmissible material such as reference to 'without prejudice' negotiations (see sections 17.5 and 17.6)
- in the case of expert evidence, it should comply with the practice statement *Surveyors acting as expert witnesses* (2014) (see section 9.2 of this guidance note)
- in the case of advocacy, it should comply with the practice statement for *Surveyors acting as advocates* (2008) (see section 9.3 of this guidance note).

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

14.5 Directions

Rule 28 provides for the arbitrator to decide procedural and evidential matters (listed in Rule 28(2)), subject to the right of the parties to agree any matter. Accordingly, the arbitrator should establish at the earliest possible stage what procedural matters have been the subject of agreement between the parties. Subject to any such agreement, the arbitrator must exercise his/her power under Rule 28, having regard to his/her duty under Rule 24. The arbitrator should enlist the parties' cooperation in reaching agreement on directions, reminding them, where necessary, of their duty under Rule 25 to do all things necessary for the proper and expeditious conduct of the proceedings.

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

(a) to state that the 2010 Act applies unless the parties have agreed otherwise

(b) to clarify whether any of the default rules are to be disapplied, with specific regard to Rule 26. In the absence of a specific agreement to disapply any default rule, all rules will apply, unless varied elsewhere in the directions

(c) any requirements of the arbitration agreement

(d) the relevant communications protocol (see sections 11.6 to 11.8)

(e) the documents to be agreed and put before the arbitrator

(f) the date for service of a statement of agreed facts (see section 12)

(g) that, in advance of service of representations, any comparable transaction intended to be relied upon by a party shall be disclosed to the other party; the parties to agree the like details (as in section 12.3) with respect to each comparable transaction. As to agreeing facts generally, see section 12

(h) that any 'without prejudice' negotiations or offers or other privileged material, whether oral or contained in correspondence, shall not be referred to in the representations

(i) where either party wishes to raise any point of law (e.g. as to the meaning of the rent review clause) affecting the dispute, how the point is to be resolved. As to disputes involving issues of law, see section 13

(j) the timetable and mechanism for service upon the arbitrator and each party of their representations and cross-representations

(k) what rules of evidence are to apply (see section 16)

(l) whether awards and expert determinations will be admissible

(m) a reminder concerning the duties of surveyors acting as expert witnesses and/or as advocates (see section 9)

(n) the arbitrator's requirements for inspecting the subject property and comparables (see section 21)

(o) unless otherwise agreed the arbitrator's right to call for a hearing if at any time he/she considers it necessary (see section 8.8)

(p) whether the parties wish to dispense with the requirement for reasons

(q) whether the award will be a final award dealing with all matters in issue, including the expenses of the arbitration, or an award with the expenses of the arbitration reserved if not agreed but otherwise final on the substantive issue(s) in the award (see section 22)

(r) that the award will only be released upon payment of the arbitrator's fees and expenses

(s) unless agreed otherwise, the right for the arbitrator to impose a cap on the expenses (see section 25.10)

(t) whether, and if so which, offers to settle will be regarded as 'near miss' offers (see section 25.10)

(u) unless agreed otherwise, the right for the arbitrator to issue such further directions as he/she thinks necessary, together with liberty for the parties to apply for variations or further directions.

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

14.6 Directions to be confirmed in writing

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

14.7 Exchange procedure

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

14.8 Allowing time for objections

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

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

14.9 Cross-representations/replies

This second stage of the exchange of documents between the parties is ordinarily limited to comments upon the initial written representations. For that reason, these documents are commonly referred to as 'cross-representations'.

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

14.10 Further written representations

It is important that the arbitrator makes it clear (subject of course to the parties' right to agree otherwise) that there should be a limit to the opportunity to file documents in rebuttal. Nevertheless, parties sometimes deliberately use the opportunity afforded by cross-representations to ambush their opponents by including fresh material. In such circumstances, the arbitrator should be prepared to indulge the party taken by surprise by allowing an opportunity for further written representations, should that be requested.

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

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

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

15 Arbitration by oral hearing

15.1 The right to a hearing

There is no automatic right to a hearing under the Act (see Rule 28). The following situations may be distinguished:

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

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

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

15.2 Privacy

An arbitration is a private tribunal, and the only persons entitled to attend are the parties themselves and those whose attendance is required in order to assist the parties in presenting their cases, whether as advocates or witnesses. Other persons, e.g. students or pupils, may only be present with the consent of both parties and the arbitrator. The arbitrator should bear this in mind and be prepared to make such directions as the circumstances merit in order to preserve privacy. These general principles are important due to strict confidentiality provisions in Rule 26.

15.3 Directions for the hearing

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

The arbitrator should establish at the earliest possible stage what procedural matters have been the subject of agreement between the parties. Subject to any such agreement, the arbitrator should exercise his/her power under Rule 28 to decide all procedural and evidential matters, having regard to their duty under Rule 24. The arbitrator should enlist the parties' cooperation in reaching agreement on directions, reminding them where necessary of their duty under Rule 25 to do all things necessary for the proper and expeditious conduct of the proceedings.

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

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

15.4 Statements of case

In 'documents only' arbitration written representations will be a combination of factual evidence, expert opinion evidence and legal arguments. An oral hearing will require a more detailed and wide-ranging approach to the documents required. The service of 'statements

of case' (i.e. the points of claim and replies) may be an appropriate way to identify and narrow the issues. If so, this would normally be undertaken by a solicitor or counsel.

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

15.5 Witness statements

If the evidence of fact cannot all be agreed, there may need to be a direction for evidence to be given by way of witness statements, to cover the evidence that either party needs formally to prove. Such a direction will ordinarily allow each party to provide witness statements by way of simultaneous exchange.

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

15.6 Expert evidence

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

The arbitrator may also need to be prepared to deal with a request for the provision of evidence by multiple experts from different disciplines, and to consider how such evidence should be sequenced. The arbitrator may find it necessary to strike a balance between the need to allow each party a fair opportunity properly to present their case, on the one hand, and the avoidance of unnecessary delay and expense, on the other (see Rule 24 of the Act).

15.7 Skeleton arguments and authorities

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

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

15.8 Arrangements for the hearing

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

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

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

15.9 Procedure at the hearing

The usual procedure at a hearing is set out below.

- The arbitrator opens the proceedings and announces the arrangements for the hearing. It will be helpful if arrangements (e.g. the order of appearance of the witnesses) have been discussed and agreed with the parties beforehand. It may well be beneficial for an administrative meeting

with the parties to be held in good time before the hearing specifically for this purpose.

- One of the parties or their representative opens and presents their case and, where appropriate, their reply to any counterclaim, probably by summarising their case upon each.

(a) The first party calls their first witness and examines him/her upon the evidence given.

(b) The second party cross-examines the witness.

(c) The first party may re-examine the witness by asking further questions, but only on matters arising out of stages (a) and (b) above.

(d) The arbitrator questions if necessary (see section 15.12).

(e) The arbitrator gives each party the opportunity to ask questions arising out of the witness' answers to the arbitrator's questions.

(f) Stages (a)–(e) are repeated for each subsequent witness called by the first party.

(g) The second party outlines his/her case if he/she wishes.

(h) The second party calls their first witness and examines him/her upon the evidence given.

(i) The stages above are repeated for this and for each subsequent witness called by the second party.

(j) The arbitrator raises any matter within his/her knowledge, not hitherto raised, that he/she considers relevant, and invites submissions on it.

(k) The second party makes his/her final submissions (although in a more complex matter, it will usually be appropriate for the arbitration to be adjourned to allow both parties to prepare written submissions, following which a further hearing to allow oral submissions accompanying the written submissions, and arbitrator's questions may be appropriate).

(l) The first party makes his/her final submissions.

(m) The arbitrator closes the hearing and makes arrangements to inspect.

Arbitrators should bear in mind that, in the interest of saving time and costs during the hearing in furtherance of the aim set out in Rule 24 of the Act, it may occasionally be appropriate to warn the parties that disproportionate and prolonged examination or cross-examination of witnesses will be guillotined. This is a device which is sometimes used in litigation, and there is no reason why it should not be equally effective in arbitration.

15.10 Compelling witnesses to attend

Rule 45 of the Act provides that the parties or the arbitrator may apply to the court to secure the attendance of a witness.

It is important to bear in mind that it is for the arbitrator to determine the procedure to be followed in the arbitration.

In the case of an application under Rule 45 by a party, the party may wish to seek an order from the arbitrator, confirming that the attendance of the witness is necessary.

Where the arbitrator has confirmed that the attendance of the witness is necessary, the court will normally accept this.

Where no such order has been sought, or where it is the arbitrator seeking the order, the court will decide whether to order the witness to attend.

There is no specific guidance as to how the court will deal with the application, but the arbitrator and the court must have regard to the founding principles of the Act.

Accordingly, the court will consider the costs that may be associated with the attendance of the witness, whether the application will cause unnecessary delay or expense, and as part of that assessment, whether the application is speculative, or soundly based.

15.11 Oath or affirmation

It is routine for evidence in civil proceedings to be taken on oath. Rule 36 of the Act provides that unless otherwise agreed by the parties the arbitrator may also take evidence on oath or affirmation, and it will be good practice to ensure that this is done, in order to emphasise the importance of giving full and truthful evidence, particularly in major cases. Note that Rule 36 empowers the arbitrator to administer an oath or affirmation, but does not empower a party's legal adviser to do so.

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

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

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

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

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

15.12 Conduct by arbitrator of the hearing

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

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

15.13 Where a surveyor is both advocate and expert witness

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

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

It may help both the surveyor and the arbitrator (and indeed the other party) if the surveyor occupies a different seat or position when giving evidence from when making submissions (or, if this is too disruptive, by standing when making submissions and sitting when giving evidence). The problems encountered, and the duties to be observed, when a surveyor is acting as an advocate, are addressed in the RICS guidance note *Surveyors acting as advocates* (2008).

15.14 Note of evidence and argument

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

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

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

16 The rules of evidence

16.1 Introduction

In an attempt to ensure that evidence given to the court is relevant, truthful and given fairly, certain 'rules' have evolved, such as those set out in the *Civil Evidence (Scotland) Act* 1988. Such rules govern the admissibility, relevance or weight of material submitted to the court, and the time, manner and form in which it is presented.

The position in arbitration is different. Under Rule 28(2)(h) of the Act, subject to the right of the parties to make their own agreement on these matters, it is for the arbitrator to decide whether to apply strict rules of evidence as to admissibility, relevance or weight of evidence. The arbitrator is therefore allowed considerable latitude in relation to the rules of evidence. The essential task for him/her is to require parties to prove their assertions (whether as to fact or opinion) without undue formality, unless of course the parties agree otherwise. It is then for the arbitrator to evaluate the evidence (see section 18).

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

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

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

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

(a) that all facts should be properly proved
(b) that the rules of evidence used in civil legal proceedings should apply
(c) that a specially tailored set of rules should apply; or
(d) that there will be no rules of evidence.

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

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

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

However, it is important for the arbitrator to keep an open mind regarding which of these approaches should be adopted. For example, if it is clear that the

primary dispute is going to revolve around the exact factual circumstances of a particular comparable transaction, and these are hotly disputed, then it may be appropriate to direct that the facts should be strictly proved, even if this would be exceptional in other circumstances.

16.3 Hearsay evidence

Hearsay evidence is second-hand evidence, which is obviously less satisfactory than evidence given by someone with direct knowledge of the evidence in question. The *Civil Evidence (Scotland) Act* 1988 allows hearsay evidence to be given in civil proceedings. It states at section 2(1)) that 'in any civil proceedings –

(a) evidence shall not be excluded solely on the ground that it is hearsay;

(b) a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible; and

(c) the court, or as the case may be the jury, if satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by the evidence notwithstanding that the evidence is hearsay.'

16.4 The 'strict rules of evidence'

Rule 28 of the Act provides that, subject to the right of the parties to agree any procedural or evidential matter, it shall be for the arbitrator to determine the admissibility, relevance, materiality and weight of any evidence.

The parties and the arbitrator should consider precisely how information may be rendered admissible, and how it is to be treated.

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

16.5 The burden of proof

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

16.6 Evidence of transactions occurring after the review date

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

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

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

There is case law covering post-review date events and evidence. For a more detailed consideration of post-review date events and evidence, see *The Handbook of Rent Review* (1981).

16.7 Admissibility of arbitration awards and independent expert determinations

Contrary to the position in England, where an arbitrator's award may be said to be inadmissible because it is of insufficient relevance to the issue in the present arbitration, in Scotland awards have

conventionally been regarded as admissible. It is largely a matter of quality and weight.

In practice, parties often agree to allow such evidence to be put before the arbitrator. Where they do not, the arbitrator may have to decide for themselves to what extent the evidence is admissible, given the authorities on the subject, and given the wide discretion conferred by Rule 28. The matter is best dealt with at the preliminary meeting and in the arbitrator's initial directions (see section 11.5). If the point arises later, further directions and perhaps a short meeting may be necessary.

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

16.8 'Late' evidence

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

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

16.9 The giving of evidence by pro forma or schedule

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

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

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

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

17 Disclosure

17.1 Recovery of evidence in litigation

Note that the underlying principle regarding the recovery of documents is very different in Scotland to the principle in England and Wales.

In Scotland, documents and other evidence can only be recovered if they will assist parties either in establishing the case, or making their case more specific.

While a party must produce the documents on which they rely, there is no general duty on parties or their advisers to produce documents prejudicial to their position.

Where one party considers that the other has documents or evidence that would assist in establishing their case, they may lodge an application for commission and diligence. That procedure commences by the party lodging a 'specification of documents' for the approval of the court. If the motion is granted, the specification is served upon the person holding the documents (known as the 'haver') who must then produce the documents falling within the terms of the specification. If the haver fails to produce the documents, or if the party making the application is not satisfied that all documents falling within the ambit of the specification have been produced, the party may apply to the court for the appointment of a commissioner. The commissioner will then fix a hearing and the haver must attend the hearing to be examined.

Documents falling within the specification approved by the court must be produced unless the haver is entitled to claim privilege. In this case the documents are placed in a sealed envelope and a further motion is made to the court to allow them to be inspected.

17.2 Disclosure in arbitration

The arbitrator's power to order disclosure by the parties is conferred by section 28(2)(e) of the Act. This provides that (subject to the right of the parties to agree any procedural matter) it shall be for the arbitrator to decide 'whether and if so what documents or classes of documents should be disclosed between and produced by the parties and at what stage'.

As with litigation, although parties must lodge documents that they found their case upon, there is no general duty of disclosure.

Parties may apply to the arbitrator for an order requiring a party to disclose specified documents or classes of documents. If a party requests disclosure the arbitrator should ask the party to identify the documents or other evidence that they require and their reasons for wanting it or them to be produced. The other party should then be given an opportunity to comment or object.

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

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

By virtue of Rule 45.1, the court may order disclosure of documents or other material evidence to the tribunal by the parties, or by any third party.

In the case of an application by a party to recover evidence in the hand of another party to the arbitration, it is expected that the party seeking disclosure will apply to the arbitrator and exhaust any remedy available in the arbitration process before an application is made to the court.

In the case of documents or evidence in the hands of a third party over whom the arbitrator has no jurisdiction, it is still expected that the arbitrator will be asked, as the person closest to the process to approve the list of documents and evidence prior to any application being made to the court.

17.3 Documents privileged from disclosure

A document is privileged if it falls within one of the recognised classes of privilege. The classes most relevant to rent review arbitrations are legal professional privilege (see section 17.4 below) and without prejudice privilege (see sections 17.5 and 17.6). The arbitrator's recourse when apparently privileged material is disclosed is considered in section 17.7 of

this guidance note. Confidentiality, which is a quite separate topic, is considered in section 17.8.

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

17.4 Legal professional privilege

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

(a) Legal advice communications: correspondence and other communications between a client and his/her solicitor that are generated for the purpose of giving or obtaining legal advice for the client are almost always privileged. By contrast, where a party instructs a surveyor to advise on the meaning of a rent review clause, that advice will not be privileged.

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

Some examples may illustrate this categorisation.

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

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

It is the second example above that gives the most difficulty in practice. Where one of the parties has acquired its interest in the property shortly before the review, it will be common to expect that valuation advice may have been obtained as to the likely outcome of the review. If the valuation was commissioned by the client's solicitor for the purpose of giving advice on the acquisition, or if it is sufficiently proximate to the review (and may therefore be said to have been prepared with a view to a likely dispute), then the valuation may be privileged under category (a) or (b) respectively. If it is neither of these things, then it will not be privileged – but that does not mean that it should have to be disclosed. The party seeking disclosure will often suspect that the valuation may support a different figure to that contended for by the party in the arbitration, and will wish to undermine the party's expert evidence by reference to that different figure. While the difference may well be embarrassing, it may not assist either party's case. The task for the arbitrator is to determine the dispute by reference to relevant evidence. A valuation by a different surveyor at a different time, may be quite irrelevant. Moreover, the arbitrator's task is to determine the rental value, and not what a third party thought that value might be. Accordingly, an order for disclosure of the valuation may have the quite unfair result of imposing unfair pressure upon that party to settle the arbitration, rather than face hostile cross-examination regarding the valuation.

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

whether it is privileged or not. If this situation arises it may be supportive to consider the appointment of a legal clerk to review the relevant documents in order to avoid exposure to information that might be sensitive to the arbitration. If the arbitrator does this themselves, and decides that the document was in fact privileged, he/she will then have to consider whether it would be fair for him/her to continue with the arbitration. This is considered further in section 17.5 below.

17.5 Without prejudice privilege

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

Accordingly, the approach in England and Wales can be said to be context based. The courts will look at the circumstances in which the communication is made.

The Scottish approach, on the other hand, is to look at the content of the communication. While a without prejudice offer is not to be taken as a concession of liability, clear admissions of fact contained within such an offer are not privileged and may be relied upon.

Accordingly, parts of a without prejudice letter may attract privilege, whereas other parts of the same letter may not.

Where without prejudice privilege is established, it may only be lifted with the consent of the offerer.

In Scotland it is common for the offer letter to make clear that it may not be founded upon or referred to 'save at the instance' of the offerer.

17.6 Third party without prejudice material

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

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

Accordingly, a witness in an arbitration who had taken part as agent of a third party in without prejudice negotiations to settle a rent review on neighbouring premises can be required to give evidence of those negotiations in the arbitration, since neither of the parties to the arbitration had been involved in those negotiations. However, see section 17.8 below on confidentiality.

17.7 Inadvertent or deliberate disclosure of privileged material

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

(a) If the arbitrator has made a direction that they will not look at representations immediately, in order to give time for objection (see section 14.8) then the remedy will normally be for the other party to require the withdrawal of the material before the arbitrator has seen it.

(b) If the offence is acknowledged and the arbitrator has not yet seen the material, then they should return the representation and direct that it should be resubmitted excluding the offending material.

(c) Where apparently privileged material is nevertheless brought to the arbitrator's attention, then the arbitrator will have to decide what course to take. In the first place, they should invite the offending party to comment on the admissibility of the information, with opportunity for the opposing party to comment.

(d) If the arbitrator decides that the material was indeed privileged, they should then decide whether it is of such import that it would be difficult to proceed with the arbitration, in which case they should offer to resign. Depending on the circumstances and the value of that information, they could equally decide that it would be possible to dismiss it, and still be able to proceed fairly and judicially with the arbitration. The views of the non-offending party will be relevant, as will the principle that a party should not benefit from its own misconduct.

(e) Where the submission of the privileged material to the arbitrator was deliberate, this constitutes unprofessional conduct.

The arbitrator should consider reporting the incident to RICS Scotland, which will then consider whether disciplinary action is appropriate.

17.8 Confidentiality

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

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

17.9 Witness summonses

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

17.10 Failing to comply with directions for disclosure

If, without showing sufficient cause, a party fails to comply with the arbitrator's order or direction for disclosure, the arbitrator may make a Rule 39 Order to the same effect (see section 20.5), with such time limits as he/she considers appropriate (Rule 39(1)).

If the party still fails to comply, the arbitrator may exercise his/her powers under Rule 39(2) to do any of the following:

(a) direct that the party is not entitled to rely on any allegation or material which was the subject-matter of the order

(b) draw adverse inferences from the non-compliance

(c) proceed with the arbitration and make its award

(d) make such provisional award (including an award on expenses) as it considers appropriate in consequence of the non-compliance.

The threat of these powers will often be sufficient to ensure compliance and in many cases the exercise of these powers would be an appropriate penalty for non-compliance. If the matter is of sufficient importance, however, the party seeking disclosure or (much less likely) the arbitrator may apply to the court under Rule 45 for an order of disclosure. If the order for disclosure has been approved by the arbitrator, it is very likely that the court will approve the order as a matter of course.

18 Evaluating the evidence

18.1 Introduction

The modern tendency in litigation is for most evidence, whether hearsay or otherwise, to be admitted, and then accorded such weight as the tribunal considers appropriate. This approach lends itself well to arbitration, since the arbitrator, with his/her specialist expertise in the subject matter of the dispute, will be especially adept at evaluating the evidence. This section deals with the arbitrator's approach to that task.

18.2 The arbitrator's powers concerning procedural and evidential matters

The arbitrator is given wide powers by Rule 28 of the Act to decide procedural and evidential matters unless the parties otherwise agree. These powers include:

- Rule 28(1)(b) – weighing the evidence (see section 18.3)
- Rule 28(2)(e) – conducting his/her own enquiries (see section 18.5).

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

It is frequently the case that a party obtains evidence late in the proceedings and either serves it on the other side (who then objects), or seeks to adduce it. In such cases, the arbitrator will have to rule whether the evidence should be admitted, and how it should then be dealt with. The arbitrator should in such circumstances, make every effort to balance two conflicting principles:

1 that the rent that is determined should be based on the best possible evidence that the parties can adduce; and
2 that the arbitration should be conducted fairly, and without unnecessary delay or expense.

18.3 Weighing the evidence

One of the main reasons for the parties choosing to have their dispute determined by a chartered surveyor as an arbitrator is that they can be expected to have the appropriate expertise and experience to weigh the evidence properly. In some cases, both parties may put in inadequate submissions; for example, they may concentrate on the evidence of comparables which are out of date in relation to the review date, and put forward little or no discussion of evidence of how the market has moved over the relevant period. In other cases, the evidence will conflict substantially.

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

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

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

18.4 Where there is little or no evidence

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

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

experience of the relevant market, to opposing opinion evidence apparently or allegedly supported by comparable transactions.

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

Alternatively, the arbitrator could employ the powers under Rule 28(2)(e), and carry out the requisite investigation him/herself (see section 18.5 below).

18.5 The arbitrator's own enquiries

The arbitrator's powers include deciding whether and to what extent they should take the initiative in ascertaining the facts and the law (Rule 28(2)(e)). The arbitrator has to exercise this power with discretion, balancing the need to be aware of relevant evidence with the need to avoid unnecessary delays or expense. The arbitrator is not obliged to ascertain the facts and the law relating to any case, but may choose to do so if they wish and the parties have not agreed otherwise.

However, in the latter case it would be advisable for the arbitrator to tell the parties first (in accordance with the duty under Rule 24(1)(c) to avoid unnecessary expense), in case they wish to provide that information themselves and possibly thereby save costs.

This initiative should be exercised very carefully, to avoid an aggrieved party alleging partiality by the arbitrator in advancing the case for the other party. Quite clearly it is not the function of the arbitrator, within the context of Rule 28, to become a third expert in the arbitration. Introduction of new evidence by the arbitrator should therefore be restricted to direct evidence rather than hearsay, to avoid the prospect of the arbitrator being subjected to cross-examination.

Bear in mind that the arbitrator is also under a duty in Rule 24 to act fairly and impartially between the parties and to provide each party with a reasonable opportunity of putting their case and dealing with that of their opponent. The arbitrator would therefore be required to ensure that any information obtained is placed before the parties and they are given a reasonable period in which to make representations.

Observance of Rule 24 and the rules of natural justice should enable the arbitrator to exercise his/her powers under Rule 28(2)(e) of the Act without being guilty of 'serious irregularity'.

18.6 Use by the arbitrator of his/her own knowledge

Because the arbitrator has been selected on the grounds of special expertise and experience, it is likely that he/she will possess knowledge that may have been gleaned from involvement in the market, or, indeed, from other arbitrations or expert determinations. The distinction between the arbitrator's knowledge as opposed to professional expertise as an arbitrator and surveyor should be carefully observed. It is one thing for the arbitrator to perform an evaluative role by using general skills; it is quite another for them to deploy a piece of evidence or valuation method drawn from his/her experience, which neither party has had an opportunity to deal with.

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

Similar duties arise in the case of a difference of opinion as to valuation method. Accepting that the choice of the 'correct' valuation method is a 'fact' within Rule 28(2)(e), it is clear that the identification and use of an alternative valuation method is derived from the arbitrator's own knowledge.

18.7 The bracket of the parties' contentions

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

19 Overlapping arbitrations

19.1 Introduction

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

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

19.2 The problems

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

(a) the arbitrator has no power to consolidate the proceedings or arrange concurrent hearings unless the parties so agree (see Rule 40). It may be found that no procedure for a combined hearing or combined representations can be devised which would be acceptable to all the parties

(b) each set of parties is entitled to insist on confidentiality being observed in relation to their arbitration, with the result that the arbitrator will not be able to divulge any of the detail of arbitration A to the parties in arbitration B

(c) the parties to each arbitration are entitled to insist that the arbitration proceeds at a speed and cost which suits their own particular circumstances. The result may well be that the arbitrations will become out of step with each other, and that evidence or legal submissions in arbitration B that could have had a bearing upon the conduct or outcome of the delayed arbitration A will have to be left out of account

(d) if the parties insist on their arbitrations being dealt with separately and privately, the arbitrator will have to consider whether they will be able to maintain impartiality. However, if they feel that the circumstances are such that they may not be able to proceed in accordance with the statutory duty to act fairly, the arbitrator may decide to resign one or more of the appointments, but whether there are any circumstances which might make them liable for the abortive costs incurred should be taken into consideration (Rules 15 and 16). Section 19.3 below suggests some possible solutions to these problems.

19.3 The solutions

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

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

19.4 Action on appointment

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

(a) the arbitrator must follow any procedural requirements laid down in any of the leases, even if these vary from lease to lease

(b) as already noted, the arbitrator has no power to order combined hearings or submissions unless the parties consent

(c) the arbitrator must respect the parties' rights to have their arbitrations dealt with separately and privately

(d) the arbitrator should strive to obtain the parties' agreement to a procedure that will enable both arbitrations to run concurrently, even if they are not to be consolidated (see section 19.5).

19.5 Cooperative procedure

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

(a) the arbitrator should ensure that the parties' agreement is recorded in writing

(b) the arbitrator should invite all the parties to a preliminary meeting, mindful however of the parties' right to require their own arbitration to be conducted privately, and without reference to any other at that meeting

(c) the arbitrator should explain the nature of a consolidated hearing with particular reference to the matters set out in sections 19.1 and 19.2

(d) the arbitrator should seek to give directions for the conduct of the references bearing in mind the matters set out in sections 19.1 and 19.2

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

19.6 Uncooperative procedure

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

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

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

20 Proceeding where a party is in default

20.1 Introduction

Rule 25 of the Act imposes a duty on the parties to ensure that the arbitration is conducted without unnecessary delay and without incurring unnecessary expense.

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

20.2 Examples of default

Breaches of the Rule 25 duty will inevitably consist of a party's failure or refusal to take a required step in the arbitration in any respect. Typical cases might include:

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

20.3 Where neither party wishes to cooperate

If neither party wishes the arbitrator to proceed with the arbitration, there is then, on the face of it, a conflict between Rule 25 and party autonomy. On the one hand, it could be said that the arbitrator cannot simply condone an ongoing breach of Rule 25. On the other hand, arbitration is a consensual dispute resolution method, and it would be contrary for the arbitrator to insist upon formal compliance when this would be contrary to the parties' wishes. It would therefore be impractical for the arbitrator to attempt to override the parties' joint agreement.

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

20.4 Remedies in case of unilateral default

Rules 37, 38 and 39 of the Act set out the procedure where a party is in default:

- Where a party unnecessarily delays in submitting or pursuing a claim, without good reason, and where there is a substantial risk that it will not be possible to resolve the issues fairly or if there is likely to be serious prejudice to the other party, the arbitrator must end the arbitration as it relates to the subject matter of the claim in accordance with Rule 37.
- Where no defence is submitted without good reason, the arbitrator remains under an obligation to proceed with the arbitration.
- Where a party fails to attend a hearing or to submit a document or evidence requested by the arbitrator, without good reason, he/she remains under an obligation to proceed with the arbitration based upon the evidence and documents that have been submitted.

20.5 Steps to take before proceeding in default

An arbitrator will not wish to be put in the position of having to resort to the use of powers set out in Rules 37 to 39. A prudent arbitrator will accordingly take such steps as are open to them to ensure that the arbitration is run in such a way as to avoid such resort.

1 The arbitrator may, on occasion, find it helpful to remind the parties of their general duty under Rule 25 of the Act to ensure the proper and expeditious conduct of the arbitral proceedings.

2 If a case of possible default arises, before using their powers, the arbitrator should make sure that the party seemingly in default is actually in default. That will mean checking that the party:

   – received notice of the obligation in question (e.g. a direction to file written representations by a certain date) and

   – has no good reason for the failure to comply with that obligation. This is no more and no less than the Act requires.

3 The arbitrator should ensure that the parties' principals receive copies of correspondence in the

event that the lack of cooperation appears to be attributable to a representative rather than the party itself.

4 The arbitrator should remind the uncooperative party of the arbitrator's duty to avoid unnecessary delay (Rule 24) and the mandatory duty of the parties to cooperate with the arbitrator (Rule 25).

5 The arbitrator should consider giving the party in default notice in accordance with the provisions of Rule 83 of the Act, stating that they intend to proceed with the arbitration on a specified date, and will do so even if that party does not comply with the direction. The arbitrator should take steps to ensure that evidence of service of such a notice is available. The most obvious example is pre-paid recorded delivery. If this is unsuitable for some reason, the arbitrator should keep a good record of how service was affected, and may even consider using a process server, from whom a witness statement should then be obtained.

6 The arbitrator should ensure both that notification of the date for any adjourned hearing event (or other timetabled step in the arbitration) is given to the party concerned and that they can, in fact, show that the defaulting party has had the notification.

7 If there is any doubt about notification or the existence of sufficient cause, it would be wise to adjourn the event (e.g. meeting, hearing, delivery of documents) to a later date. These steps are particularly important if the party in default is not professionally represented.

20.6 Rule 39 orders

In accordance with Rule 39(1), the arbitrator may order a party that is in breach to comply with a direction, an obligation imposed by the arbitration agreement, the Act or any other agreement between the parties relating to the conduct of the arbitration to comply with that direction, obligation or agreement. The order should specify a time for compliance.

Rule 39(2) details the remedies available to the arbitrator, where a party fails to comply with a Rule 39(1) order. These remedies include directing that the party may not rely on the subject matter of the order, the arbitrator drawing adverse inferences from the failure to comply, proceeding with the arbitration and making the final award and making such provisional award as the arbitrator considers appropriate in consequence of the non-compliance.

21 Inspections

21.1 The requirement for inspections

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

Where a tenant of the subject property is uncooperative and refuses access, the arbitrator has a general power under Rule 35(a) of the Act to give directions for inspections, etc. which may then be enforced. By contrast, where a tenant of a comparable property, unrelated either by ownership or occupation, refuses access, the arbitrator is in the hands of the parties or their surveyors, because neither they nor the court has power to require access to the comparable property to be given.

21.2 Attendance at inspections

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

21.3 Dealing with oral evidence at inspections

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

On those occasions when the arbitrator inspects the premises unaccompanied by the parties or their representatives, they should be careful not to engage in conversation with any third parties. Should the arbitrator come across any matter that might be relevant to the issues in the arbitration, they should treat the matter like any other piece of evidence (see section 21.4 below).

21.4 Dealing with the evidence gained from inspections

The purpose of an inspection is to enable the arbitrator to form his/her own view of the evidence already submitted, rather than to gain fresh evidence. From time to time, however, the arbitrator will gain evidence that will either contradict or supplement the evidence in the arbitration. In such a case, natural justice requires that the matter be raised with the parties and that they are given the opportunity to comment, just like any other matter forming part of the arbitrator's own knowledge to which the parties are not privy (see section 18.5).

22 The award

22.1 Introduction

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

In order to be valid and enforceable, the arbitrator's award must comply with a number of requirements drawn from the *Arbitration (Scotland) Act 2010*, the common law, and the agreement between the parties. This section reviews those requirements.

22.2 Types of award

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

In the latter case, the parties may want the arbitrator to decide all such issues together, and produce one award. Alternatively, it may be appropriate (particularly where the determination of one issue will affect the approach to another) for the arbitrator to deal with the issues sequentially, by making a series of awards called part awards. Rule 54 of the Act gives the arbitrator the flexibility to do this.

Under Rule 53 the arbitrator has the ability to make a provisional award granting any relief on a provisional basis which it has the power to grant permanently.

Under Rule 55 the arbitrator can make a draft award and issue it to the parties and if it does so, must consider any representations from the parties about the draft received within the time specified.

22.3 Award as to arbitration expenses

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

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

22.4 Agreed awards

If the parties compromise all or part of their dispute in the course of an arbitration, their agreement may either be that their dispute is resolved upon the agreed terms, or that they will agree before the arbitrator what award he/she should make. In either event, unless the parties agree otherwise, the arbitrator must terminate the proceedings as regards the part so agreed, and record the settlement in the form of an agreed award under Rule 57(4) of the Act.

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

(a) The arbitrator should only proceed to make such an award if the parties agree in writing that he/she should.

(b) The arbitrator should check the agreement to ensure that it is clear and capable of performance.

(c) If the parties wish the arbitrator to draft the award, he/she should do so and supply the draft to the parties for their approval.

(d) Save that it need not state reasons (Rule 51(2)(c)), an agreed award should be set out in the same form as any other, following the requirements of the parties or Rule 51 as appropriate.

(e) If the agreed award does not deal with the payment of the expenses of the arbitration then the authority of the arbitrator continues to run in relation to those expenses.

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

22.5 The essentials of a valid award

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

(a) The form of award – see Rule 51 of the Act. The award must include such basic matters as being signed by the arbitrator or arbitrators assenting to the award, the seat of the arbitration, when the award is made and when it takes effect, the reasons for the award, or whether any provisional or part award has been made. An award will be defective if it does not comply with these requirements – see Rule 68. If they do not, the arbitrator is bound by the common law and the Act requirements detailed below. Each of these requirements should however be read as if prefaced by the words 'unless the parties otherwise agree'.

(b) The award must not be delayed – see section 22.7 below.

(c) The award must be signed by all the arbitrators – see Rule 51(1).

(d) The award must contain reasons unless default Rule 51 is waived – see Rule 51(2)(c).

(e) The award must be certain and unambiguous. The arbitrator must make it clear exactly how he/she has decided the dispute. If they fail to do so, the award may be challenged under Rule 68(2)(e) of the Act.

(f) The award must be complete. If the award fails to determine all the disputes submitted for the decision of the arbitrator, it may be vulnerable to a challenge based on serious irregularity under section 68(2)(c) of the Act.

(g) The award must not deal with matters that have not been referred to the arbitrator. If the award purports to determine matters beyond those submitted, the award will be bad for excess of jurisdiction, and liable to be set aside under Rule 68(2)(b).

(h) The award must be final. The arbitrator will often be asked to determine a matter in the alternative – for example assuming (a) that the tenant's contention regarding the effect of the disregard of improvements is correct; and (b) that it is not. It will not be sufficient for the arbitrator just to express the rental values in terms of (a) and (b) – he/she must also go on and decide which of those alternatives is correct, without which the award will not be final.

(i) The award must state the seat of the arbitration – see section 22.10 below.

(j) The award must be enforceable. The award should be framed in such a way as to ensure that it can be enforced under section 12 of the Act.

22.6 The contents of the award

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

22.7 Time for making the award

The arbitrator's general duty to avoid delay in the arbitration extends, of course, to the making of the award. Accordingly, if the arbitrator fails to proceed without using all reasonable despatch in making an award once the evidence and submissions are complete, he/she may be removed by the use of the mandatory powers available to the court under Rule 12 of the Act. The arbitrator should therefore proceed with inspections and award as soon as the hearing or the written representations have been concluded.

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

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

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

22.8 Date and delivery of the award

When the award is ready for issue the arbitrator should notify both parties that it is available to be taken up.

The award must state the date on which it is made and when it takes effect – see Rule 51(2)(b) of the Act. This date is important because it triggers the 28-day period within which any errors may be raised for correction (see section 22.10), and challenges may be made (see Rule 71(4) of the Act).

The arbitrator might delay publishing the award until receipt of final payment, informing the parties that it is available. To avoid any ambiguity of when the 28-day period for correction/challenge shall commence, it would be best practice when setting out directions to agree the procedure for signing and dating the award. The arbitrator should also consider the impact of extended public holidays, and whether it is appropriate to publish an award immediately prior to them, particularly if it is unlikely to be taken up until after the holiday.

If one party pays the full amount of the arbitrator's fee the award should nevertheless be issued to both parties at the same time. This is important because of the time-limits referred to above. If the party who has paid all or part of the fee in this way is not required by the terms of the award to bear such responsibility for the arbitrator's fee, it may obtain appropriate reimbursement (see section 25.3).

The arbitrator should supply VAT invoices to the parties if and as requested. In the unlikely event that, having been advised that it is available, neither party takes up the award within a reasonable time, the arbitrator should issue the award to both parties. If necessary, the arbitrator should eventually sue both parties for recovery of his/her fees in accordance with the award, on the basis of several liabilities.

22.9 The seat of the arbitration

Rule 51(2)(a) of the Act requires the 'seat of the arbitration' to be stated. For the purposes of this guidance note, it will be presumed that the seat of arbitration will be Scotland, and that the Act applies.

22.10 Correction of mistakes in the award

All tribunals make mistakes from time to time. Unless the parties have agreed otherwise, Rule 58 of the Act allows the arbitrator, on their own initiative or on the application of a party to correct such mistakes within a specified timetable. This topic is discussed fully in section 27 of this guidance note.

23 The contents of the award

23.1 Introduction

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

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

23.2 Heading of the award

The heading serves as a ready indicator of the parties to the award, and establishes the fact that the *Arbitration (Scotland) Act 2010* applies (as it usually will). There is no legal requirement for such details to be set out in this or any particular way, but this way of commencing the award is now so well-established that it may be best to follow the convention.

A typical example of a heading will be:

In the matter of the *Arbitration (Scotland) Act* 2010 and in the matter of an arbitration between:

BIGCO (UK) LTD Landlord

- and –

SMALLCO (EASTERN) LTD Tenant

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

23.3 Title of the award

The Act prescribes names for different types of award, for example, part, provisional or draft, and, with the obvious difference that the final award discharges the arbitrator's obligations to the parties, arbitrators should not think that different types of award have different characteristics that require special treatment. Nevertheless, it will be helpful to those considering the award if it is labelled clearly to indicate which stage of the arbitration it is dealing with. This topic is dealt with in section 22.2.

23.4 Introduction to the award

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

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

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

- a description of the lease, including the rent review provisions
- a reference to the arbitration clause in the lease
- a brief description of the dispute that has arisen
- the way in which the matter was referred to arbitration
- the way in which the arbitrator was appointed (by agreement of the parties, by an appointing body, by other arbitrators, by default, or by the court)
- the arbitrator's acceptance of his/her appointment, together with the date
- details of any written agreements by the parties that affect the arbitrator's powers or jurisdiction
- details of any correspondence that might have a bearing on the matters the arbitrator has to decide or the procedure to be adopted
- a description of any preliminary meeting held, with date, location and representatives attending
- a summary of any directions given (brief details only unless there is some important matter such as specific disclosure, jurisdiction, etc.)

- the date of receipt of any Statement of Agreed Facts
- the date of receipt of any written submissions/ expert reports, counter- submissions/replies or witness statements
- if the arbitration involved any hearings, details of venue, dates, and what happened, including:
- who represented each party
- which factual witnesses gave evidence for each party, and their position in the organisation they work for; and
- which experts or surveyor advocates gave evidence, their respective disciplines and on which party's behalf they appeared
- if an inspection of the subject matter of the dispute was carried out, when and where and who else was present at the inspection
- if an inspection of the comparables was carried out, when and where and who else was present at the inspection
- to what extent the arbitrator has taken the initiative in ascertaining the facts and the law.

23.5 Background to the award

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

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

23.6 Rent review provisions

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

23.7 The issues

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

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

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

23.8 The reasons

The statutory duty to give reasons (albeit a default rule (Rule 51)) has two underlying purposes. The first is that it is a requirement of common fairness that the losing party should know why they have lost. The fact of losing may of itself produce a sense of injustice, which will be greatly increased if the losing party is left ignorant or unclear as to why their case has been rejected. Conversely, the giving of proper and intelligible reasons may go a long way toward preventing any feeling of injustice in the first place. This point needs to be continually borne in mind by arbitrators when considering the adequacy of their proposed reasons. A good test on every occasion is to say 'If I were the losing party, would I be left in no doubt as to why I have lost on this issue?' The second purpose behind the giving of reasons is for the benefit of the arbitrator. A duty to give reasons compels them to consider and articulate why they have decided the issues in the way they have. That process may itself uncover faulty reasoning or inconsistencies of approach. It is everyday professional experience that the solution to what seems an intractable problem can become much clearer in the course of explaining the apparent difficulty to someone else, or (perhaps more significantly) that a point which seemed absurdly

straightforward at first glance becomes much more difficult when mentioned to a colleague. The practitioner may realise even as they explain the point that they have approached it from the wrong angle, or that their proposed solution cannot be justified. The process of drafting reasons can perform a similar function for the arbitrator.

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

The arbitrator should not be defensive in the way they expresses themselves, but should seek to satisfy the requirement for reasons by revealing what they really thought. Arbitrators should take care, however, to express themselves in a professional and temperate manner. They should not express personal sentiments or sympathy for a losing party in fear of conveying partiality. In the event of a challenge under Rules 67, 68 or 69 of the Act, the court may order the arbitrator to give reasons, or provide more detail for the purpose of considering that appeal.

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

(a) Summarise the evidence

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

(b) Summarise the arguments

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

(c) Arrive at a reasoned conclusion

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

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

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

Thirdly, the degree of detail required will vary from case to case and from issue to issue. The arbitrator should steer a course between, on the one hand, being too brief and sketchy, and on the other, going into matters in greater detail than the parties reasonably need to

understand the decision on the relevant issues. Precisely how the arbitrator resolves this will depend on all the circumstances. He/she does not need to provide a reasoned decision on every single point raised by the parties, particularly those that are not relevant to their overall decision on value. What they need to provide are the reasons why they have decided the relevant issues in the way they have, and provide enough to ensure that the parties understand how and why they have arrived at their decision.

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

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

23.9 The decision

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

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

The arbitrator may also need to make decisions on ancillary matters such as whether to award interest under Rule 50 of the Act (see section 26 of this guidance note).

23.10 Closing formalities

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

If the arbitrator has not already done so in the preliminary parts of the award, he/she should state the seat of the arbitration at this point (see section 22.9).

The arbitrator should then sign and date the award. Despite there being no legal obligation to do so, it is suggested that best practice would be for the arbitrator to sign, state the place of signature, date and have witnessed the arbitrator's signature.

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

24 Fees

24.1 Introduction

The parties' several liabilities to an arbitrator are covered in Rule 60 of the Act. The following issues, which may require consideration, are:

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

24.2 The basis of charge

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

In some cases it will be desirable for the arbitrator to fix the fee at the outset of the arbitration, especially when the amount at stake is small. However, in many cases it will be impossible for the arbitrator to name a precise fee at the outset; although, as previously stated in section 6.9, they should give an indication as early as possible as to the basis they are going to adopt.

Where the amount or rental value of the subject property is small, a fee based on a normal hourly or daily rate of charging may be large in relation to the amount involved. In such cases it is common for the surveyor arbitrator to charge a lower fee as part of the service that members of RICS traditionally give to the public. It is therefore suggested that in formulating their proposal the arbitrator should:

(a) start with the hourly or daily rate that they would charge for other professional work they undertake of average complexity

(b) adjust this rate, as they would in any case, having regard to the importance of the matters in dispute, the degree of responsibility, skill and specialised knowledge involved, whether the parties were represented (and therefore the extent to which the arbitrator was assisted), and the amount or value in dispute

(c) estimate the time reasonably likely to be spent dealing with the reference, reflecting whether or not a reasoned award is required

(d) look at the resultant figure and consider whether it is a fair amount to charge, having regard to the interests of the parties who have to pay it and to the interests of the profession in providing the rent review service to the public

(e) possibly consider agreeing a fixed sum if certainty is a request of the parties.

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

24.3 Expenses incurred by the arbitrator

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

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

24.4 Recording time spent

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

24.5 Commitment or acceptance fees

It is not unusual in arbitrations in spheres other than rent review for the arbitrator to request a commitment fee. However, RICS regards it as unacceptable for an arbitrator to charge a commitment or acceptance fee merely for accepting his/her appointment. Often, however, the arbitrator will find that nothing substantive happens for long periods during the appointment, perhaps while the parties negotiate. The question whether it is appropriate for the arbitrator to charge waiting fees in such circumstances is considered in section 24.6 below.

24.6 Waiting fees

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

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

Alternatively, the arbitrator may charge a fee (either on a one-off basis, or repeatedly periodically) if nothing has happened after a specified period of time. If the arbitrator wishes to preserve his/her right to collect such fees, then the matter should be raised and agreed with the parties at the outset of the arbitration (see section 6.9).

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

24.7 Fees on account

It is common in arbitrations in spheres other than rent review for the arbitrator to request payment of their fees in tranches in advance and on account of their work at various stages in the arbitration. Again, the right to such fees is not expressly sanctioned by the Act, and it cannot be said that the arbitrator is entitled to them as an implied term of the arbitration. Accordingly, if the arbitrator wishes to preserve their right to collect such fees, then they should raise the matter at the outset of the arbitration (see section 6.9).

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

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

However, in terms of Rule 56, the arbitrator does have power to withhold the award until such time as any fees or expenses due by the parties have been paid in full.

24.8 Increases in fee rates

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

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

While it is impossible to make specific recommendations (because the appropriate fee must depend on the circumstances of each individual case) the following, read in conjunction with section 24.2, may provide some guidance. See the table below.

24.10 Repetitive work

Where an arbitrator is appointed to determine a series of similar disputes (e.g. several units in a parade of shops, or as regards the same premises, between a head lessor, head lessee and under-lessee) or where the work is repetitive, a fee on the previously

mentioned basis might be appropriate for a selected test unit, with reduced fees for the allied and subsequent arbitrations concerning the adjacent properties or under-let parts of the property.

Time of settlement	Appropriate fee
(a) After appointment and before (b) below.	Nominal charge, if any. A charge merely for accepting the appointment or for work carried out before the appointment (e.g. conflict searches) is not appropriate.
(b) After perusal of documents and/or preliminary meeting and issue of directions, but before proceedings in accordance with those directions are commenced.	Quantum meruit (usually based on time) plus disbursements. In default of agreement, the arbitrator has a residual jurisdiction to award expenses (Rule 62). In the meantime, the arbitrator is entitled to fees in accordance with Rule 60.
(c) After action in (b) together with submission of statement of agreed facts and delivery of pleadings, representations, and cross- representations, perusal by the arbitrator, preliminary inspection and general preparation for the hearing.	On a time basis, or if not time-based, a fee of a quarter to a half of the full fee that would have been charged had the arbitration proceeded to its end.
(d) After action in (b) and (c), and holding the hearing, or giving detailed consideration to the representations and counter-representations and detailed inspections of the subject property and comparables, but before preparation of the award.	On a time basis, or if not time-based, a fee of say half to three-quarters of the full fee as above.
(e) After action in (b), (c) and (d) and completion of the award and notification to the parties that it is available to be taken up.	The full fee plus disbursements.

24.11 Objections to charges

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

It is therefore suggested that the arbitrator should merely state the amount which (or the basis on which) he/she proposes to charge. If one party objects, the arbitrator should reply that the objection is noted.

Any party may apply to the auditor of the Court of Session for the determination of a reasonable arbitration fee, even after a fee has been paid to the arbitrator (see Rule 60 of the Act).

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

24.12 Fee upon removal or resignation

Upon resignation or removal, the arbitrator may be entitled to a reasonable fee to be agreed by the parties or determined by the court (see Rule 16 of the Act).

25 Arbitration expenses

25.1 Introduction

The combined effect of Rules 61 and 62 of the Act is that, after making their award final on the substantive issue in the rent review arbitration, the arbitrator may then have to deal first with the allocation of arbitration expenses (who pays) and then with the liability for the allocation of expenses (the amount to be paid consequent on the allocation). Accordingly, the decision as to how the arbitration expenses shall be allocated between the parties is usually reserved to a further award after receiving submissions on expenses.

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

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

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

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

Appendix B to this guidance note contains a flowchart setting out a suggested approach to the allocation of expenses, applying the principles set out below.

25.2 Meaning of 'arbitration expenses'

The expression 'arbitration expenses' is defined in Rule 59 of the Act and includes:

(a) the arbitrator's fees and expenses for which the parties are liable under Rule 60

(b) any expenses incurred by the tribunal when conducting the arbitration for which the parties are liable under Rule 60

(c) the parties' legal and other expenses

(d) the fees and expenses of any arbitral appointments referee; and

(e) any other third party to whom the parties give powers in relation to the arbitration for which the parties are liable under Rule 60.

The parties are free to agree that the arbitration expenses should be dealt with in a particular way (see Rules 60 to 66 of the Act). Subject to that, if a party has won, in applying the principle that expenses follow the event the arbitrator has a duty to deal in the award on the allocation of expenses, with the expenses incurred by a party in preparing and presenting their case, including the fees of expert witnesses, solicitors and counsel.

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

Rules 59(c) and 61(2)(a) are sufficiently widely drawn to permit expenses incurred prior to the commencement of the arbitration. Typically, a party will take legal advice before serving a Notice of Arbitration and the costs thereof are recoverable applying the fundamental general principle of law concerning litigation costs (the indemnity principle). This principle means that, for example, a successful claimant who would not otherwise have had to seek (and pay for) legal advice had the respondent not failed to pay its bills, is entitled to be put in the same position he/she would have been had the respondent paid on time. It follows that all expenses relating to the arbitration are potentially recoverable.

25.3 Reimbursement of arbitration expenses

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

25.4 Agreements between the parties as to arbitration expenses

Under Rule 63 of the Act, any agreement entered into before a dispute has arisen to the effect that a party shall pay the whole or part of the arbitration expenses is void. A dispute arises when one party makes a claim against the other which is ignored or denied by the other. Thus the provision often found in leases and other arbitration agreements, stipulating an equal division between the parties of the arbitration expenses, is void.

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

25.5 The arbitrator must make an award on arbitration expenses if not agreed

In the absence of the parties' agreement on the allocation of the arbitration expenses and, if relevant, the amount of them, the arbitrator has a duty to determine them by an award. If the parties have not agreed upon how the costs shall be allocated between them, and the arbitrator fails to deal with the matter of costs in the final award, the award is defective for want of finality, and can be challenged by either party in court on that ground. In such an instance, if there were no other grounds for challenging the arbitrator's award, the court would probably remit the award to the arbitrator for amendment by including in the award their decision on the matter of costs.

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

25.6 The general principle: arbitration expenses follow the event

It is the settled practice of the courts that in the absence of special circumstances costs should follow the event – that is to say that the successful litigant should receive his/her costs. This principle is repeated for arbitrations under Rule 62(2) of the Act, except where the arbitrator considers it inappropriate in the circumstances. Usually rent reviews have only a single 'event' (the quantum of rent) on which the award of costs should be based. Thus, if the arbitrator's award favours the figure put forward by one party (or is substantially the same), then, unless any of the criteria examined below apply, that party should have an order for costs made in its favour. Whether it is appropriate for the arbitrator to award a party its costs if its figure is closer to the award than that of the other party is examined in section 25.11 of this guidance note.

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

(a) the winning party lost on a discrete issue, in respect of which substantial costs were incurred (see section 25.6)

(b) a party has made an offer in the nature of a 'Calderbank' offer to settle the dispute (see section 25.11)

(c) a party has behaved in an obstructive or uncooperative manner and has thereby increased the costs of the arbitration

(d) a party has produced an unnecessary volume of submissions or evidence having little or no bearing on the subject matter, or has unreasonably extended the work involved in the reference.

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

25.7 Expenses on an issue-by-issue basis

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

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

25.8 The exercise of the arbitrator's discretion as to arbitration expenses

The arbitrator has discretion as to arbitration expenses, but this discretion must be exercised judicially.

That means it must be exercised according to the rules of reason and justice, not according to the private opinion of the arbitrator, nor from motives of, for example, benevolence, or sympathy, or annoyance. There are many factors affecting the exercise of the discretion as to costs.

25.9 Awards of arbitration expenses must be reasoned

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

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

25.10 Cost capping

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

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

25.11 The allocation of expenses where there is no clear winner

In rent review or other valuation disputes where there is a clear winner, for example a party whose rental valuation has been accepted by the arbitrator, then that party should ordinarily receive its expenses, as section 25.6 explains. This approach is not inflexible, since it counts as effective wins those figures which were 'close enough', or 'near misses'.

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

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

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

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

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

The arbitrator should be careful not to constrain the exercise of their discretion by deciding, in advance of the result (and, worse, by telling the parties) what they will regard as a win, or, conversely, a non-win. If, for example, the arbitrator was to announce at the preliminary meeting that a figure within two per cent of the award would be regarded as a 'near miss', then they would automatically have to rule out a figure within 5.5 per cent of the award. Such individual rules of thumb may concentrate the parties' minds on settlement, but they forfeit any measure of a discretionary approach to the question of expenses.

25.12 Offers to settle

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

(a) an unconditional written offer, capable of acceptance by the offeree, to settle the rent review at a specified rental figure

(b) a reasonable proposal regarding the parties' expenses incurred up to the date of the offer. In rent review disputes it is usually appropriate to propose that each party bears its own expenses plus one-half of the arbitrator's fees

(c) a statement that it is made 'without prejudice save as to expenses'. If the offer is simply made on a 'without prejudice' basis, where the right has not been expressly reserved to refer to it in connection with expenses, then neither party may refer to it, without the consent of the other, because that would offend against the without prejudice rule (see section 17.5). Where the offer has correctly been made 'without prejudice save as to expenses', then it may only be referred to on the question of expenses: it retains its privilege in all other respects (unless both parties agree that it should be waived).

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

If the offer states a time within which it must be accepted the time allowed must be reasonable (see section 25.13 below).

25.13 Effect of an offer to settle

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

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

The notional date for acceptance of the 'Calderbank' offer should take into account a reasonable time for the party receiving the offer to take advice and consider it. The period must be reasonable in all the circumstances.

In most circumstances, a reasonable period for acceptance would not normally be less than ten days, and more usually a period of 14 to 21 days is applied. In the event of a dispute on the period, the arbitrator will have to make a finding of fact in his/her award, after receiving representations.

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

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

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

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

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

25.14 Withdrawal of offers to settle

A question that often arises is whether any reference may be made on the question of expenses to an offer to settle that was made but has been withdrawn. If the awarded figure would have been within the offered amount, the maker will wish to make something of the fact that it had been willing to settle at what will have been determined retrospectively to be a reasonable figure. By contrast, the other party will wish to point to the fact that the maker obviously had better thoughts, and will contend that it is to be judged by reference to its later, and not its former, position.

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

25.15 Award final on all matters except arbitration expenses

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

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

25.16 Assessment of arbitration expenses – in principle

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

If the parties are unable to agree on the assessment of the amount of the expenses, then the arbitrator must determine the amount of other arbitration expenses recoverable or arrange for the auditor of the Court of Session to do so (Rule 61(2)).

25.17 The basis of assessment of arbitration expenses

To avoid any ambiguity it is suggested practice to make a direction for assessment referring to the default basis of assessment set out in Rules 61 and 62 of the Act. This limits the recoverable expenses to a reasonable amount which was reasonably incurred. Any doubts on what constitutes a 'reasonable amount' or as to whether an amount was 'reasonably incurred' should normally be resolved in favour of the party who is ordered to pay them.

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

25.18 How to assess arbitration expenses

In some relatively small arbitrations a successful party's claim for recoverable expenses may be as a lump sum. In larger cases the claim will be based on an itemised bill, setting out in sufficient detail: what was done and by whom, when it was done, how long it took and the rate per hour in respect of each person engaged in the matter. Time engaged is usually divided into units of 6, 12 or 15 minutes. In appropriate circumstances an arbitrator should not seek to carry out the determination in accordance with the court's requirements and procedures, as this may incur unnecessary delay and expense (Rule 24 of the Act).

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

The arbitrator will normally allow the lower of the costs actually incurred by a party or the cost at which a party could reasonably have obtained the services required. The arbitrator may wish to see the relevant fee accounts and/or letters of engagement relating to the actual costs incurred. A surveyor's recoverable costs claimed on a time basis should not be allowed if the actual remuneration was on some other basis. The arbitrator will also consider whether the costs incurred were reasonable.

26 Interest and other supplementary awards

26.1 The power to award interest

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

Rule 50(1) of the Act expressly allows the tribunal to award interest on

'(a) the whole or part of any amount which the award orders to be paid (or which is payable in consequence of a declaratory award), in respect of any period up to the date of the award,

(b) the whole or part of any amount which is -

(i) claimed in the arbitration and outstanding when the arbitration began, but

(ii) paid before the tribunal made its award,

in respect of any period up to the date of payment,

(c) the outstanding amount of any amounts awarded (including any award of arbitration expenses or pre-award interest under paragraph (a) or (b)) in respect of any period from the date of the award up to the date of payment.'

Since the determination of the arbitrator in awarding a reviewed rent is declaratory in its nature, it is likely that the award would be treated by a court as an 'amount' awarded for the purposes of Rule 50.

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

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

26.2 Award of interest on arbitration expenses

The arbitrator has power to award interest on arbitration expenses (see Rule 50 of the Act). Once the allocation and quantification have been determined it may well be appropriate for the arbitrator to award interest on the amount owed by one party to the other, either from the date of the award on the allocation of expenses, or from a future date (say, 21 days thence) by which the payment should reasonably be made.

27 Events after the award

27.1 Closing the case

With the exception of the matters discussed in sections 27.2 to 27.6 of this guidance note, once the arbitrator has made the final award, they have completed their task; they are functus officio, to use the legal expression.

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

27.2 Correction of awards

Rule 58 of the Act allows the arbitrator on their own initiative or on the application of a party, to:

- correct a clerical, typographical or other error in the award arising by virtue of accident or omission, or
- clarify or remove any ambiguity in the award.

It is important to appreciate the limitations of this Rule 58 power so far as 'changing' the award. It entitles the arbitrator to correct an accidental clerical mistake (for example, wrong addition) or (where the award is ambiguous) to clarify what was meant. But it does not entitle them to change their award in any other respect, even if they have a subsequent change of mind or one party wishes to adduce further evidence on some issue. Once the arbitrator has made the award, their jurisdiction is at an end, and any further recourse is a matter for the court.

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

27.3 Examples of matters suitable for correction

Examples of the types of accidental clerical error that are suitable for correction under Rule 58 include:

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

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

27.4 Timetable for correction of awards

Rule 58 of the Act sets out the following timetable for the operation of the power to correct awards other than by agreement:

- any application for the exercise of the Rule 58 power must be made within 28 days of the award, or such longer period as the parties agree
- once the matter has been raised with the arbitrator, he/she must give the other party a reasonable opportunity to make representations
- any correction of the award must then be made within 28 days of the date the application was received by the arbitrator (in the absence of a contrary agreement by the parties)
- where the matter has been raised by the arbitrator, he/she must make any requisite correction within 28 days of the award (unless, again, there is agreement to some other effect).

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

27.5 Legal challenges to the award

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

- under Rule 67, for a ruling upon the substantive jurisdiction of the arbitrator
- under Rule 68, on the ground that there has been serious irregularity affecting the arbitration. Such

an application may be made when substantial injustice has been done to the applicant due to the arbitrator acting unfairly; or exceeding his/her powers; or failing to conduct the proceedings in accordance with the procedure agreed by the parties; or failing to deal with all the issues put to them. Further, when there is uncertainty or ambiguity as to the effect of the award; or otherwise not acting according to law (which includes fraud); or failing to comply with the requirements as to the form of the award; or any irregularity in the conduct of the proceedings of the arbitration (e.g. using personal knowledge, investigations or expertise without disclosing it or them to the parties)

- under Rule 69 (unless otherwise agreed by the parties) on a legal error arising out of the award. An appeal on a point of law may only be brought with the agreement of all the other parties or otherwise with the leave of the court and then only if the court is satisfied that the determination of the question will substantially affect the rights of one or more of the parties; or that the question is one which the arbitrator was asked to determine; or that on the basis of the findings of fact in the award the decision of the arbitrator is obviously wrong, or the question for the arbitrator is one of general importance and there is serious doubt as to the arbitrator's decision.

A party can lose the right to object on any of the grounds set out above if it has not made that objection to the arbitrator as soon as it arises, and in any event an appeal against an award must be lodged within 28 days of the date of the award under Rule 71(4). Fundamental to the appeal process is a requirement under Rule 71(2) that the challenger has first exhausted any available arbitration process of appeal or review and any available recourse by way of correction of the award or additional award.

27.6 Reaction to legal challenge to the award

It follows from the discussion above that the arbitrator has little role to play in any legal challenge to the award, unless they are required by the court to provide reasons.

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

27.7 Response of court to legal challenge

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

On an application by a party to challenge the award on the grounds of serious irregularity under Rule 68, the court may

(a) confirm the award

(b) order the tribunal to reconsider the award (or part of it); or

(c) if it considers reconsideration inappropriate, set aside the award (or part of it).

On an appeal on a legal error under Rule 69, there are various procedures set out in Rule 70 and 71 which require to be considered.

Where the award is remitted to the arbitrator in whole or in part for reconsideration, the arbitrator shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission (or such other day as the court may direct) – see Rule 72 of the Act.

27.8 Order setting aside award

Where the arbitrator's award is set aside in its entirety, then the arbitrator will obviously have no jurisdiction to consider the matter further (in contrast to cases where the award is remitted to the arbitrator, considered in section 27.7 above). The Act expressly provides for the issue of expenses in the case of a successful appeal on grounds of serious irregularity, where the court can order repayment of such arbitration expenses (Rule 68(4))

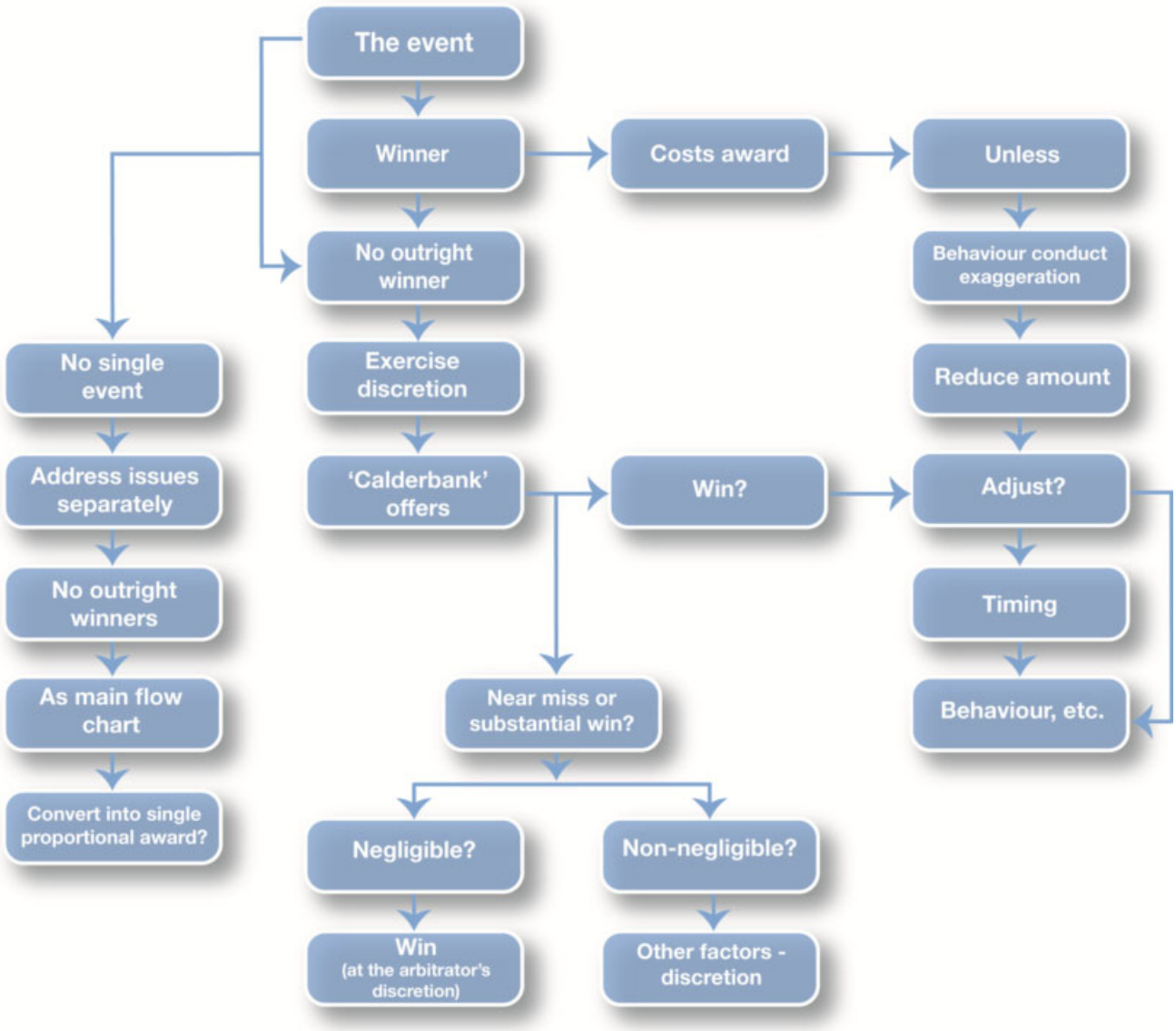
Appendix A: Comparison of arbitration with determination by independent expert

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

Arbitrator	Independent expert
(a) The arbitrator acts (as does a judge/sheriff) only on evidence and arguments submitted to them, but they are able to draw the parties' attention to matters of which they may not be aware. They are also able to take the initiative in ascertaining facts and the law (see section 18.5). The award must lie between the extremes contended for by the parties. The arbitrator is, however, expected to use their expertise in assessing the relevance and quality of the evidence and arguments submitted.	(a) The independent expert has the duty of investigation to discover the facts, details of relevant comparable transactions, and all other information relevant to their valuation (though they may receive information regarding these matters from the parties).
(b) The arbitrator cannot decide without receiving evidence from the parties, or from one of the parties when they are 'proceeding in default' by the other, except where proceeding on their own initiative.	(b) The independent expert bases their decision upon their own knowledge and investigations, but may be required by the instrument under which they are appointed to receive submissions from the parties.
(c) The procedure for arbitration is regulated by the Act.	(c) There is no legislation governing procedure for the independent expert and they have to, therefore, settle their own contract with the parties.
(d) A party to an arbitration can seek and (through the courts) compel disclosure of documents or the attendance of witnesses (see section 17).	(d) The independent expert has no such powers.
(e) An arbitrator may not delegate any duties, powers or responsibilities, although they can seek assistance (see section 13).	(e) The independent expert has a duty to use their own knowledge and experience in arriving at their own decision. However, during the course of the investigation the independent expert may seek routine administrative or other assistance from any other person. This is always provided that they are in a position to vouch for the accuracy with which such tasks are carried out.
(f) In an arbitration the arbitrator can award that one party shall pay all or part of the arbitrator's fees and all or part of the other party's expenses. They can also assess the quantification of those fees and expenses.	(f) An independent expert has no power to make any orders as to their fees, or as to the expenses of a party, unless such a power is conferred upon them by the lease or by agreement between the parties.
(g) The arbitrator's fees can be determined by the court under the Act (see section 24.6).	(g) There is no procedure for formal determination of an independent expert's fees.
(h) There is some (albeit limited) right of appeal against the award of an arbitrator on a point of law. An arbitrator's award may also be challenged in the courts on the basis that the arbitrator did not have jurisdiction or on the grounds of 'serious irregularity'. If a serious irregularity is shown, the court may (in whole or part) remit the award, set it aside or declare it to be of no effect.	(h) There is no right of appeal against the determination of an expert, although in some very limited circumstances the court may set it aside.
(i) Provided they have not acted in bad faith, the arbitrator is not liable for negligence and enjoys immunity under Rule 73 of the Act.	(i) The independent expert is liable in damages for any losses sustained by a party through their negligence. This is so notwithstanding that the court will not interfere with a final and binding determination that they have made.

Appendix B: Expenses flow chart

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



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