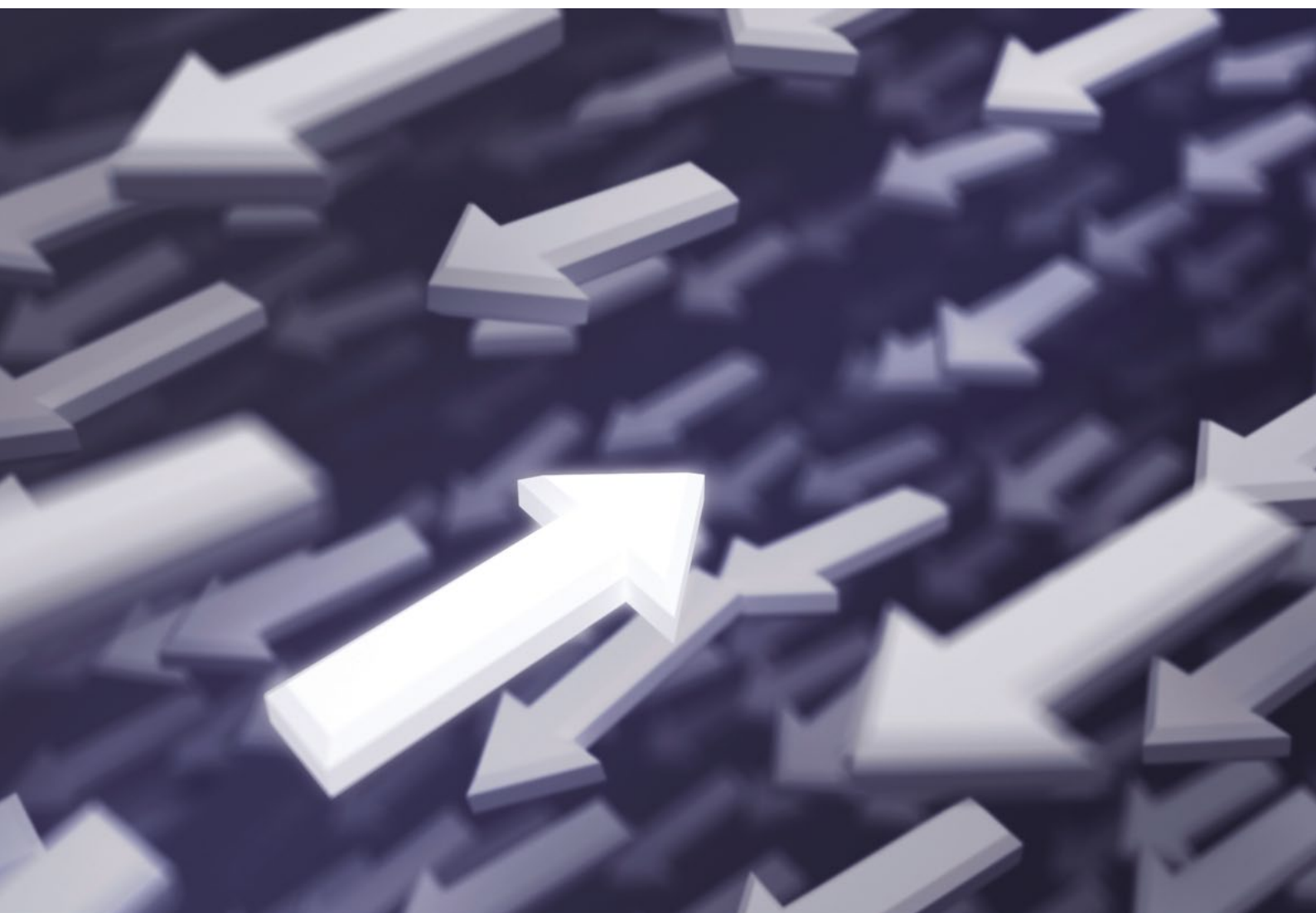




RICS professional standards and guidance,
England, Wales and Northern Ireland

Rural arbitration

1st edition, May 2017



Rural arbitration

RICS guidance note, England, Wales and NI

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RICS professional standards and guidance

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 that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance 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 acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance 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 guidance note, they should do so only for 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 some cases there may be existing national standards that may take precedence over this guidance note. National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should 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 standards, guidance and information documents. These have been defined in the table below. This document is a guidance note.

Publications status

Type of document	Definition	Status
Standard		
International standard	An international high-level principle-based standard developed in collaboration with other relevant bodies.	Mandatory.
Professional statement		
RICS professional statement (PS)	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term also encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	Mandatory.
Guidance and information		
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). Usual principles apply in cases of negligence if best practice is not followed.
RICS guidance note (GN)	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice. Usual principles apply in cases of negligence if best practice is not followed.
RICS information paper (IP)	Practice-based information that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice. Usual principles apply in cases of negligence if technical information is known in the market.
RICS insight	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS economic / market report	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS consumer guide	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

Foreword

The authors of this latest guidance note for arbitrators – all chartered surveyors – bring to bear their expertise and experience both in matters agricultural and in dispute resolution in this clear and helpful work.

As section 1 states, the aim of this guidance note is to assist not merely rural chartered surveyors who are appointed to act in arbitrations dealing with rural assets and property, whether as advocates, experts or the arbitrator, but also the parties themselves and those acting for them by outlining the procedures likely to be followed.

The guidance note achieves this aim and more. It starts by explaining the statutory basis that distinguishes most agricultural arbitrations from other commercial arbitrations with which surveyors or parties may be familiar. It goes on to a clear explanation of the nature of arbitration, before setting out a step by step guide to the arbitral process. Although the guidance note reaches into the recesses of the agricultural tenancies legislation and the *Arbitration Act* 1996 for its authority, it reduces the complication to a series of easily understandable propositions, garnished with useful advice for the practitioner.

Practitioners will in particular welcome the attention that is rightly drawn throughout the guidance note to the time limits that may apply in this field. They will also approve of the clear and helpful description of the engagement by the Dispute Resolution Service of RICS with the parties as part of the appointment process.

This field is full of traps for the unwary. This guidance note exposes these traps, and details the steps arbitrators and practitioners need to take to steer well clear of them. I commend it as essential reading for all who participate in an agricultural arbitration.

**Guy Fetherstonhaugh QC FCIArb HonRICS
HonARBRIX**

1 Scope and application

This guidance note is designed to assist rural chartered surveyors who are appointed to act in arbitrations dealing with rural assets and property, whether as advocates, experts or the arbitrator.

It is also intended to assist the parties themselves and those acting for them by making them aware of the procedures that are likely to be followed.

This guidance note is based upon the law and practice relating to arbitrations in England, Wales and Northern Ireland, which are governed by the *Arbitration Act 1996*. Part 1 of the guidance is intended for use by those who are involved in rural arbitrations as the representatives of the parties and those giving evidence before an arbitrator; part 2 contains more detailed guidance for arbitrators.

Arbitration in Scotland has evolved by a different route, with its own *Arbitration Act* and is not dealt with in this guidance note

While the majority of rural property disputes involving rural property arise under statute, notably (although not exclusively) the *Agricultural Holdings Act 1986* and the *Agricultural Tenancies Act 1995*, arbitration can occur in a rural context under other legislation and under contractual agreements between the parties such as farming partnerships and share farming arrangements. Appointments as arbitrator are made either by agreement of the parties or by the President of RICS from the members of the rural panel of arbitrators and – although the majority of appointments deal with rent reviews – the procedures included in the guidance note, and the principles of natural justice, apply to all arbitrations.

This guidance note is effective 6 months from publication.

Part 1: Mainly for party representatives

2 The statutory framework

The Agricultural Holdings Act 1986 (AHA 1986)

Arbitration is the principal dispute resolution method provided for under the AHA 1986 and many tenancy agreements include a dispute-resolution process that refers disputes to arbitration. The AHA 1986 originally had its own arbitration regime in Schedule 11, which was replaced by the *Arbitration Act 1996* (AA 1996). The most common disputes between a landlord and tenant occurring under the AHA 1986 include:

- rent review
- end of tenancy claims
- repairing obligations
- terms of the tenancy
- notices to quit and
- redundant buildings.

In some of these cases the right to refer a matter to arbitration is dependent upon compliance with strict time limits.

The AA 1996 came into effect on 17 June 1996. It was then extended to arbitrations under the AHA 1986 (replacing Schedule 11) on 19 October 2006 upon the *Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006* (SI2006/2805) coming in to force.

The Agricultural Tenancies Act 1995 (ATA 1995)

Most disputes under this Act are concerned with rent or dilapidations. Arbitration is usually provided for within the tenancy agreement itself, but section 28 of the Act provides that any dispute between the landlord and tenant concerning their rights and liabilities under the Act shall be determined by arbitration.

Other statutes and legislation

It is not within the scope of this guidance note to try and cover every possible statutory rural asset-based arbitration, but disputes can occur under a number of different statutes, often relating to matters of valuation, although there may also be legal issues. Regardless of the statutory basis under which the dispute arises, the arbitration itself will be governed by the *Arbitration Act 1996*.

In this guidance note references to 'the Act' refer to the *Arbitration Act 1996*.

Contractual disputes

Frequently, rural disputes arising under a contract, whether a tenancy agreement or otherwise, also involve an issue of valuation. The arbitration clause in the contract may set

out jurisdictional and procedural matters, otherwise the dispute will fall under the 1996 Act. There are a number of mandatory sections in the Act that will override anything in the contract that conflicts with those sections. These are set out in the first schedule to the Act.

Note that the vast majority of arbitrations in which rural arbitrators are appointed are statutory arbitrations. In the view of the courts, there should be no difference between a statutory arbitration and a contractual arbitration, for example, as regards costs.

3 The nature of arbitration

3.1 Introduction

Arbitration is an adversarial process, with each party presenting evidence to support their case.

As the Act covers a wide range of different types of arbitration as well as rural arbitrations and in some cases involves more than one arbitrator, 'the Tribunal' is frequently referred to. This should not cause any confusion as in the context of rural arbitrations, this can just be read as 'the Arbitrator'.

Under section 33 of the AA 1996 an arbitrator must act fairly and impartially between the parties. Due to the judicial nature of the function undertaken, an arbitrator is obliged to weigh the evidence when making an award. He or she is not to use his or her own expertise, albeit that such expertise assists in understanding and evaluating the issues being presented. Under s. 34 of the *Arbitration Act* the parties have the right to agree all procedural and evidential matters regarding the conduct of their arbitration. However, in the absence of such agreement, the arbitrator should make any direction that is considered appropriate, reflecting the fundamental requirement under s. 33 of the 1996 Act to act fairly and impartially between the parties. The arbitrator is not obliged to ascertain the facts and the law relating to any case, but may choose to do so if the parties have not agreed otherwise, provided the parties have an opportunity to comment on any findings.

The parties and their professional advisers also have duties under the 1996 Act, which are set out in section 40 of the Act:

'The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This includes:

- 1 complying without delay with any determination or order of the tribunal as to procedural or evidential matters, and
- 2 where appropriate, to take without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law.'

The principles of arbitration

The fundamental principles of arbitration are set out in section 1 of the 1996 Act:

'(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

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

(c) [...] the court should not intervene except as provided by this Part [of the Act].'

3.2 Steps prior to appointment

The application for the appointment of an arbitrator

An arbitrator may be appointed either privately or via an appointing body, typically the President of RICS. An application to the President for the appointment of an arbitrator must be in writing and preferably made on the form available from the Dispute Resolution Service (DRS) of RICS or from the website www.rics.org.

The application will not be processed until the appropriate non-refundable fee has been received by DRS.

Parties making an application are entitled to name surveyors whom they believe may have a conflict of interest and who therefore should not be approached by the DRS as a potential arbitrator, but this should not be done for tactical reasons in an attempt to influence the appointment process.

Further guidance on genuine conflicts of interest can be found in the RICS professional statement *Conflicts of interest*, 1st edition.

3.3 Dispute avoidance

Time-limited disputes

Many rural based disputes such as rent reviews under the AHA 1986 and ATA 1995 arise out of a notice served by one of the parties on the other. In rent reviews there is a long lead-in time (often 12 months or more) and surveyors advising clients should use this time to try and negotiate a compromise between the parties, thus avoiding the need to apply for an arbitrator.

If, due to an impending statutory time limit (such as under section 12 of the AHA 1986), an application has to be made to RICS to protect a client's position, the use of RICS form DRS5 should be considered in order to secure the appointment of an arbitrator while delaying any action being taken by him in order to minimise costs if it is evident that a settlement is imminent.

The DRS5 should not however be used as a tool to avoid addressing the issue.

Other disputes

Some disputes are not time limited and an arbitrator need only be appointed when a dispute arises. These disputes often arise as a result of an arbitration clause in a contract or a statutory reference to arbitration such as a request for a written tenancy agreement or a request for consent to carry out an improvement.

Reasonable efforts should be made to resolve the dispute by negotiation and discussion rather than simply resorting to appointing an arbitrator. If a matter cannot be resolved,

the terms of an arbitration clause should be considered carefully before an application is made to ensure that the arbitrator is validly appointed. Many arbitration clauses will specify certain requirements and criteria of a potential arbitrator such as geographical location or a number of years of experience in a particular discipline. These should be specified on the application form to RICS if seeking a presidential appointment.

Accepting an appointment from the President of RICS

Once an application for the appointment of an arbitrator has been received the DRS of RICS will send an 'Invitation to Act', usually by email to one of the panel. This will set out the particulars of the case, the names of the parties and other important details. Panel members will, before accepting an appointment, consider whether they are conflicted or are for any other reason unable to act and are expected to respond to such an invitation within seven days. It is not uncommon for a panel member to be unable to act at which point RICS will approach another panel member and therefore delays between application and appointment are sometimes inevitable.

In order to assist with an RICS led appointment, the following should be considered as good practice:

- Surveyors applying on behalf of parties should consider the requirements of any arbitration clause (if applicable) carefully and notify RICS accordingly.
- Surveyors should ensure that an application is made in plenty of time because it is not the role of RICS to question an application or consider whether it is validly made. The DRS is purely an administrative body with no other function.
- Parties' representatives can often reduce delays by providing a copy of the critical documents at the outset (for example the lease or contract containing the arbitration clause) or identifying panel members who have a clear and unequivocal conflict of interest.

Once RICS receives a reply (and assuming there is no reason not to appoint) an appointment will usually be made within two to three days and the parties and the arbitrator will be notified.

Accepting a private appointment

It is advisable for an arbitrator receiving a request for a private appointment to follow a similar procedure and checklist to that carried out by RICS. Practitioners acting for parties contemplating a private appointment need to ensure that the arbitrator is in place in plenty of time if (as is often the case) there are strict time limits for an arbitrator to be appointed and the appointment has to be accepted in writing by the arbitrator before the expiry of any time limits.

Individual arbitrators will often have their own form of appointment that will need to be completed by both parties before the appointment is effected. The arbitrator usually sends this to the parties when he/she has accepted an appointment and expects them to complete and return it.

4 Documents and fee on application

4.1 Documents

While there are no minimum requirements in terms of documents to be provided with an application, it is good practice to at least include copies of:

- the lease or contract from which the dispute has arisen
- copies of any relevant notices and
- copies of any correspondence indicating matters agreed between the parties such as names of potential arbitrators that have been agreed as being conflicted.

Parties should not include any correspondence that may be deemed to be without prejudice..

4.2 Fees

Application fees for appointments by the President vary and the applying party should check the appropriate fee before making the application. The fee is payable, which may be done electronically, with the application. This should be borne in mind in the case of applications that are time limited.

4.3 Conflicts of interest and other challenges to an appointment

The overriding principle regarding conflicts of interest is that every arbitrator is expected to be, and be seen to be, impartial at the time of accepting an appointment and must remain so during the entire proceeding until the final decision has been delivered or the proceedings have otherwise terminated.

Accordingly, an arbitrator is expected to decline to accept an appointment or, if the reference has already been commenced, bring to the attention of the parties the circumstances, if he or she has any doubts as to their ability to be impartial. This overriding principle does not necessarily mean that an arbitrator cannot accept any appointment where there has been an involvement with one of the parties provided it is brought to the attention of the parties beforehand. The arbitrator should ensure that the parties are satisfied that there is no issue or, if there is, that it is addressed at the outset.

See also section 8.1.

Effect of failure to disclose an involvement with the parties

If a surveyor (arbitrator) wilfully fails to disclose an involvement, or accepts an appointment as arbitrator and subsequently purports to resign on the basis that instructions accepted after appointment give rise to a

conflict, the President may conclude that the surveyor is not suitable for future appointments.

Disclosure of a potential conflicts of interest after appointment

Ideally any conflicts of interest should be dealt with before appointment, but if this arises once an appointment has been made, the arbitrator may consider it appropriate to disclose any involvement to the parties, particularly with the parties themselves. The arbitrator should ask the parties to declare immediately if they consider any involvement gives rise to a conflict. The arbitrator should also request the parties and their representatives to share the responsibility of notifying him or her if they believe a conflict has arisen at any subsequent stage. Only the parties themselves by agreement, the arbitrator or the court can decide if a conflict has arisen such as to cause a resignation.

If the arbitrator becomes aware after his/her appointment of an involvement that may amount to a conflict, that should be disclosed immediately to the parties, without regard to the fact that the arbitration may by then have reached an advanced stage.

Objections to appointment and consequences/remedies

Objections to the appointment of an arbitrator post appointment made under s. 24 of the *Arbitration Act* fall into four categories:

- 1 jurisdiction
- 2 there are justifiable doubts as to his or her impartiality
- 3 he or she does not possess the necessary qualifications required by the arbitration agreement or
- 4 physical or mental incapacity.

Jurisdiction

If an objection to the appointment is to be made on the grounds that the arbitrator lacks substantive jurisdiction, i.e. as to:

- (a) whether there is a valid arbitration agreement or
- (b) whether the tribunal is properly constituted or
- (c) the matters that have been submitted to arbitration in accordance with the arbitration agreement

the objection should be made promptly after the arbitrator's appointment. Sections 31 and 73 of the Act require such an objection to be made no later than the time that party takes the first step in the proceedings to contest the merits of any matter in relation to which he or she challenges the arbitrator's jurisdiction.

Typically challenges on this basis will arise where:

- the original arbitration agreement is thought to be invalid for some reason
- there is an issue with the appointment process or
- there is a disagreement over the matters referred to arbitration.

Section 30 of the Act allows the arbitrator to determine his or her own jurisdiction.

Guidance on how an arbitrator should respond to a challenge to his/her jurisdiction is covered in more detail in part 2 of this document.

The other three categories of objection that may arise upon the appointment of the arbitrator (i.e. impartiality, lack of qualifications or fitness) are set out in section 24 (a), (b) and (c) of the 1996 Act, under which the parties can apply to the court to have the arbitrator removed.

Impartiality

Before considering a challenge to an arbitrator's impartiality, surveyors representing a party should consider the guidance on conflicts and involvements for surveyors acting as arbitrators and independent experts given in *Conflicts of interest*, 1st edition professional statement and the further guidance given in part 2 of this guidance note.

Lack of qualifications

It will usually be self-evident whether or not an arbitrator has sufficient qualifications and if he or she has followed the guidance set out in part 2, a challenge on these grounds is unlikely to succeed.

However, if upon reading the relevant arbitration clause a party has valid concerns as to the arbitrator's qualifications, the party should write initially to the arbitrator (as always copying the other side in) to ask for his or her views and justifications for accepting the appointment. If concerns still remain, legal advice should be sought by the parties as to whether an application to the court for the removal of the arbitrator under s. 24 is appropriate.

Challenges to jurisdiction on any of the above three grounds should only be made if a party has bona fide reasons to object and not as a way of frustrating the arbitral process

Physical or mental incapacity

In practice this is extremely rare and parties should just be aware of it as an option. It is beyond the scope of this guidance note to advise on the circumstances that that may justify such an application.

5 Action on appointment

Date of appointment

It may be important for an arbitrator and the parties to know how and when an appointment legally takes effect. Section 14 of the Act permits the parties to agree when arbitral proceedings have commenced but if there is no such agreement, subsections (3) to (5) will apply:

- Where the arbitrator is appointed by a third party, such as the President, proceedings commence when notice is given in writing to the third party requesting an appointment be made and so the appointment is made the date the application is received by such a body.
- If the parties themselves make the appointment, it takes effect either where the agreed appointee has told them he or she would be prepared to be appointed, or on the date of the appointment by the parties, or where there is no prior contact with the agreed appointee, on the date of the arbitrator's letter of acceptance to the parties.
- If the court itself makes the appointment, it takes effect when the court makes its Order.

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

Initial contact with the parties

Once appointed, the arbitrator will write to both parties as soon as possible. Points that will usually be covered in the letter accepting the appointment are set out in more detail in part 2.

Parties' actions

The arbitrator will request (and expect) that the parties respond to the opening letter within a reasonable timeframe. Surveyors acting for the parties should respect this request because it is incumbent on them to '... do all things necessary for the proper and expeditious conduct of arbitral proceedings' (s. 40).

When responding to the arbitrator's opening letter in a timely fashion, the parties should also supply any information and documents requested by him or her (such as the lease or contract subject to the dispute) as soon as reasonably possible.

Any challenges to the arbitrator's jurisdiction should be made at an early stage and in any event must be made '... as soon as possible after the matter alleged to be beyond (the arbitrator's) jurisdiction is raised' (section 31(2)).

5.1 Fees

The basis of charge

In fixing his or her remuneration (fees - usually an hourly rate), the arbitrator will 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.

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. These costs form part of the costs of the reference (i.e. the arbitration). Where such ancillary specialist costs seem likely to arise, the arbitrator should obtain the parties' agreement to their payment at the outset, before they are incurred.

Objections to fees/charges

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

Under the AA 1996 an arbitrator's fees need only be reasonable and, if they are, the courts are likely to uphold them.

The courts have held that it is improper for an arbitrator, after appointment, to make an agreement as to fees with one party if the other party objects.

Fee upon removal or resignation

If the arbitrator resigns or is removed, the arbitrator may be entitled to a reasonable fee that may either be agreed by the parties or determined by the court (see s. 24(4) and 25(3)(b) of the Act).

5.2 Powers and duties of the arbitrator and the parties

The powers and duties of the participants to an arbitration are clearly set out in the Act and the statute should always be the first point of reference if an issue arises. The Act imposes a general duty on all parties to an arbitration to do 'all things necessary for the proper and expeditious conduct of the arbitration' (s. 40). This includes complying with any order or directions of the arbitrator.

The arbitrator has a duty under section 33 of the Act to:

'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent' and to 'adopt procedures suitable to the circumstances of the particular case avoiding unnecessary delay or expense.'

Provided the arbitrator complies with these duties, his or her powers include the ability to:

- cap costs (section 65)
- proceed ex-parte (without one party taking part; section 41(4))
- issue a peremptory order (similar to an 'unless order' in civil litigation; section 41(5))
- strike out a claim (section 41)
- order disclosure of documents (section 34) and
- rule on his or her own jurisdiction (section 30).

Early issues

Common issues that arise early in the arbitral process include:

- one party's refusal to cooperate
- one party's refusal to acknowledge arbitrator's jurisdiction
- refusal to agree costs
- one or both parties' refusal to deal with matters in a timely manner or
- a legal or preliminary issue arises.

Part 2 of this guidance note gives an arbitrator further guidance on how to deal with such situations. Surveyors advising parties facing such circumstances should consider the guidance given in part 2 to assist the arbitrator in deliberations on how to proceed.

Resignation of the arbitrator

An arbitrator may resign, either voluntarily or because they feel the position has become untenable. The parties may also call for a resignation as a prelude to applying to the court for removal if they consider that sufficient grounds exist. Section 25 of the Act sets out the consequences of a resignation. The circumstances in which resignation may be reasonable are illness or incapacity; if 'without prejudice' correspondence has been shown to the arbitrator or if a conflict of interest is exposed.

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

Replacement of the arbitrator

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

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

6 Case management

6.1 Introduction

The Civil Procedure Rules (which apply in relation to court proceedings and provide a comprehensive code governing court procedure) use the term 'case management' to describe the means by which the overriding objective of enabling the court to deal with cases justly is to be achieved. It is appropriate to apply the same concept to arbitration, while recognising the differences that exist between arbitration and litigation. The objectives of case management are to ensure that the parties are dealt with on an even footing, to save expense and to deal with the matter proportionately and expeditiously.

The key sections of the Act that set out the manner in which the arbitration must be managed are:

- section 1 (General principles)
- section 33 (General duty of the tribunal) and
- section 40 (General duty of the parties).

Section 1 states:

'a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'.

Section 33:

'(1) The tribunal shall –

act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

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

Section 40:

'(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) This includes –

- (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and
- (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law.'

6.2 Preliminary matters

Jurisdiction has already been dealt with in some detail previously and should be addressed at the outset if one of the parties wishes to raise it as an issue. Assuming that the arbitrator's jurisdiction is agreed, and that the actions on appointment above have been followed, it is appropriate to either agree or establish an agreed procedure and timetable.

Although the arbitrator will already have written a preliminary letter to the parties (see previous), 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.

It is not always necessary to establish a timetable right through to the conclusion of matters and the issuing of an award, but it is important to at least agree it in stages. This can most usefully be done at a preliminary hearing, which is dealt with below.

A typical timetable will include deadlines for the following:

- (i) Claimant serving statement of case on the arbitrator and Respondent by <<<date>>>.
- (ii) Respondent to respond with statement of case to be served on the arbitrator and claimant by <<<date>>>.
- (iii) Claimant to be given a further opportunity to reply by <<<date>>>.
- (iv) Parties are to be given the opportunity to either agree or make representations to the arbitrator about the format of the hearing.
- (v) Both parties are then to be given until <<<date>>> to confirm and produce the evidence, documents and witness statements upon which they intend to rely.
- (vi) Further directions will be given regarding expert witnesses.
- (vii) A hearing will be held if agreed or if, on considering all matters, the arbitrator feels it is appropriate. Time and venue to be agreed.
- (viii) The arbitrator will issue an award save as to costs and invite the parties to either agree on costs within 14 days of the publication of the award, or alternatively seek directions on making submissions on costs following which he or she will make an award on costs.

Certain timings, such as meetings between experts, can be included from the outset or reserved depending on the circumstances.

Unrepresented parties

Unrepresented parties have no more or fewer rights than those represented at an arbitration, but in the interests of natural justice have to be handled with care. How an arbitrator can be expected to deal with an unrepresented party is dealt with in more detail in part 2.

Preliminary meetings

The expression 'preliminary meeting' (sometimes referred to as preliminary hearing) is used for convenience in this section to refer to the preliminary contact between the arbitrator and the parties, whether it be by way of conventional meeting or another form of communication such as telephone or video conference call or email, in order to commence the process of case management. The arbitrator will seek to establish:

- the statutory or contractual authority for the appointment
- the names and representatives of the parties
- the nature of the dispute
- whether the parties have agreed the arbitral procedure
- if there are points of law in dispute and, if so, whether they should be dealt with as preliminary points
- if the arbitrator is likely to need to appoint a legal assessor and, if so, who
- if the matter is to be dealt with by written representatives or at a hearing
- whether strict rules of evidence are to apply
- the number of expert witnesses to be called by each party and if they should be restricted
- agreement on the timetable
- arrangements for inspection if it is necessary
- whether the parties have agreed to cap costs and
- whether a reasoned award is required.

Communications protocols

These are discussed in more detail in part 2. Essentially, either the parties can agree on how communications should take place or, failing agreement between the parties, the arbitrator has the power to decide on and adopt appropriate procedures. Regard should be had at all times to what is reasonable and cost effective in the circumstances and modern technology will have a role to play such as agreeing to email communication in appropriate circumstances or holding meetings by video conferencing.

The arbitrator should have spelled out in his or her initial letter that all communications between him/her and any of the parties should be copied to the other party or parties. Further, no privileged communications between the parties should be sent to the arbitrator.

In the absence of an agreed email communications protocol, any notice or document may be served on a person by any effective means. A notice or document

addressed, pre-paid and delivered by post to the addressee's last known principal address, or to their registered or principal office, is treated as effectively served (s. 76 of the Act). The court's powers in relation to service of documents where service in the manner agreed is not reasonably practicable is covered by section 77.

Points of law

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

Bear in mind that section 45 of AA 1996, which deals with determination of a preliminary point of law, is limited to a point of law; hence arbitrators will often use legal assessors because of the need to look at points of law (not limited to a single point) in the context of the arbitrator hearing evidence and taking decisions with regard to the evidence.

This is discussed in more detail in part 2.

Referral to court

A preliminary point of law, if not determined by the arbitrator, may be decided by the court under s. 45 of the Act. This is only allowable if:

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

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

Proportionality

It is quite proper for the parties' representatives to encourage an arbitrator to address the issue of proportionality early on. This can be quite common in small scale farm rent reviews, in particular when the amounts at stake are perhaps only a few thousand pounds. While both parties to a dispute are entitled to have it decided by arbitration, arbitrators will be alert to well-funded parties using the threat of a costly arbitration as a way of forcing a settlement.

Section 65 of the Act enables the arbitrator to direct that the recoverable costs of the arbitration (defined in section 59 AA 1996) be limited to a specified amount and a party may make representations to the arbitrator if it is considered the matter is becoming disproportionately expensive.

While an arbitrator should not deny a party the right to be represented by whom they wish, the arbitrator may not be easily persuaded to award all of the party's costs whatever

the outcome if it is felt that a party is over represented in relation to the issue at stake. He may also disallow the costs of experts if he considers that their evidence was of little or no relevance to the determination.

Submissions

Submissions to the arbitrator deal with such matters as procedure, preliminary issues, statements of case, written submissions on the substantive issues (in the case of a hearing by written representations), opening and closing statements (in the case of an oral hearing) and submissions on costs.

While it is beyond the scope of this guidance note to cover every aspect of making submissions, if a surveyor is to make these submissions him or herself as opposed to being drafted by a solicitor or Counsel, they should be organised in the following way:

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

The arbitrator should establish the format in which they wish to receive submissions within the directions following the preliminary meeting. A submission should not contain inadmissible material and, if it is prepared by a surveyor, it should comply with the 2nd edition professional statement and 3rd edition guidance note *Surveyors acting as advocates*.

Expert witnesses

The role of an expert witness is to assist the arbitrator in an unbiased and independent manner irrespective of which party instructs or pays him. Surveyors acting as experts must comply with the practice statement and guidance note *Surveyors acting as expert witnesses*, 4th edition. The experts for opposing parties will be directed to meet to discuss and reach agreement on as many facts and issues as possible prior to the hearing or determination and to set out in a joint statement all the facts and issues that are agreed or not agreed. Such a joint statement should result in a significant narrowing of the issues and may give rise to a settlement of the case. A surveyor advising a party must not seek to influence an expert's views.

Evidence

Under s. 34 (1) of the Act, subject to the right of the parties to make their own agreement on such matters, it is for the arbitrator to decide what rules of evidence to apply as to admissibility, relevance or weight of evidence. The evidence should be sufficient for the parties to prove their assertions (whether as to fact or opinion) without undue formality.

Generally speaking, an agricultural arbitrator is not going to become overly excited about rules of evidence. An arbitrator will usually allow the parties to present all evidence (other than that which is privileged), and then decide what weight to give the evidence.

A detailed discussion about evidence can be found in part 2.

Expert evidence

The role of an expert witness is covered in the RICS practice statement and guidance note *Surveyors acting as expert witnesses*, 4th edition and it is the duty of all surveyors acting in this role to comply with the guidance.

Parties' representatives instructing expert witnesses should draw their attention to the document especially if the witnesses are surveyors. Even if they are not surveyors, the arbitrator will expect the expert to act properly.

An expert witness who does not comply with the rules and expectations governing expert witnesses risks severely damaging a client's case and (depending on how serious any breach of the protocols is) could be liable in negligence. A chartered surveyor who does not comply with the practice statement (which is mandatory) also risks disciplinary action from RICS.

It is also important to note that the law has now changed in regard to expert witnesses so that, whereas previously an expert witness was immune from prosecution for negligence, that is no longer the case.

The key points to remember are that:

- 1 an expert's primary duty is to the arbitrator
- 2 an expert's report should cover all points within his or her knowledge
- 3 an expert's report should be unbiased and should not favour the party appointing him/her
- 4 an expert should not be remunerated on a success fee basis and
- 5 an expert's report should include all of the necessary declarations and statements as set out in the practice statement and guidance note.

Dual role

It is not uncommon, particularly in small rural disputes, for a surveyor to act in a dual role as expert and advocate.

While not impossible, this task should be handled very carefully by both the expert/advocate and the arbitrator. The expert/advocate must ensure that compliance with the practice statement *Surveyors acting as expert witnesses*, 4th edition when undertaking that role.

The arbitrator should also be alert to the difficulties faced by an advocate/expert and should make it quite clear any discontent with the way the dual role is being handled. There is also an inherent risk that the expert/advocate may overstep the line and as a consequence damage a client's case.

It is also possible that an arbitrator will give more weight to the evidence given by an expert who is not taking a dual role; clients should be advised of this risk because it may be a false economy.

Disclosure

The arbitrator's power to order disclosure is conferred by s. 34(2) (d) 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 any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage'.

As in the case of disclosure in litigation, the arbitrator can order either standard or specific disclosure. Usually in a rural arbitration, particularly a rent review arbitration, an order for specific disclosure (i.e. requiring a party to disclose specified documents or classes of documents) will be appropriate if requested by one or other of the parties.

A discussion on how an arbitrator should deal with an application for disclosure can be found in part 2.

Arbitrator's own knowledge and experience

The role of an arbitrator is very different from that of an independent expert. While an arbitrator will be expected to have a good working knowledge of the subject of the dispute, unlike the expert it is not his or her role to use personal experience and evidence to resolve the dispute. If an arbitrator believes the parties have missed a crucial piece of evidence or have not referred to some established authorities, he or she can draw their attention to this and ask for their comments and submissions; he or she should not apply his or her own expertise in respect of such matters without giving the parties an opportunity to comment upon the matters which he or she wishes to see addressed.

Similarly, the parties should not expect an arbitrator is going to assume anything. The arbitrator may not draw upon experiences of a similar settlement when making a decision. The decision will be made on the facts and evidence presented by the parties.

An arbitrator can take their own initiative in ascertaining the facts and the law but must do so within their duties under the Act, which includes giving both parties the opportunity to address any such findings and make submissions on them.

6.3 Other procedural matters

Obtaining evidence from third parties

It is unusual (but not unheard of) for a situation to arise where evidence is required from a third party who may be reluctant to attend. Either party may, by agreement between themselves, or with the permission of the arbitrator, use the same procedures to secure the attendance of a witness and/or production of documents as would normally be available in legal proceedings (see s. 43 of the Act).

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

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

Party representation and duties

Although the parties should be allowed to choose their representatives, whether legally qualified, a surveyor, other professional or a lay person, particularly in relatively low value rural disputes, proportionality should be at the forefront of the minds of those advising the parties and the arbitrator.

While some disputes will involve complex legal matters and questions of security of tenure that are of utmost importance to the parties and may justify legal representation together with the instruction of Counsel, the level of representation in smaller disputes needs to reflect the issues at stake. Representatives should be cautious about incurring costs that might outweigh the benefits to their clients and arbitrators will be conscious of this as one of their duties under the Act. The arbitrator may refer to the right to cap costs under section 65 of the Act as a way of focussing the parties' minds on proportionality when dealing with relatively low value disputes.

Extensions of time

While an arbitrator should always have regard to his or her duties to allow each party the opportunity to promote their case, he or she also has to ensure that the arbitration is dealt with in a timely manner. If both parties request an extension of time to continue negotiations, this will generally be granted but if one party requests that the matter is moved on, the number of times an extension of time is granted will be limited. See a more detailed discussion in part 2.

Peremptory orders

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

- 1 It gives the party in default a second chance to comply.

- 2 It gives the arbitrator a range of additional remedies in the event that the order is not complied with. Section 41(6) accords special treatment to peremptory orders to provide security for costs (see below).

Parties' representatives should be aware of the peremptory order process as a legitimate way of speeding matters up if they are genuinely concerned that matters are not being dealt with in a timely fashion or attended to at all by the other party. If a party is faced with a peremptory order, the representatives should be aware of the potential gravity of the situation and the consequences of failing to comply.

Effect of failure to comply with a peremptory order

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

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

The arbitrator may select the appropriate further remedy in a manner that preserves the defaulting party's ability to make amends at a later stage, if that can be done in a way that will not be unjust to the complying party.

Enforcement of the arbitrator's peremptory order by the court under s. 42 may be done (unless both parties agree) upon application either by the arbitrator or by the other party (with the permission of the arbitrator). If satisfied that the party in default has failed to comply with the peremptory order within the time specified within the order, or otherwise within a reasonable time, the court may then order the defaulting party to comply with the arbitrator's peremptory order.

Procedures and timetables

It is an unusual aspect of rural arbitrations that, unlike those dealing with other property disputes, oral hearings are often more common than written submissions-only hearings. The arbitrator will use personal discretion, after hearing from the parties, to decide on which is the more appropriate for an individual case, but proceeding by written submissions is not always cheaper or more cost effective than a hearing, particularly if there is a lot of evidence that needs to be tested. It is often difficult for witnesses and evidence to be properly presented and examined by a written procedure and therefore an oral hearing may well be quicker and more cost effective.

The following procedure is normally followed, whether the matter is to be heard by written representations or an oral hearing. Part of the process is common to both:

- statements of case by each party
- meeting of experts and
- submission of joint statement of matters agreed and matters in dispute by experts.

Written representations

- Submissions.
- Counter submissions.
- Questions to experts.
- Inspection.
- Award.

Procedure and timetable (if oral hearing)

- Statement of agreed facts.
- Points of claim.
- Points of defence.
- Points of reply.
- Schedule of evidence.
- Identity and expertise of witnesses.
- Exchange of Proofs of Evidence.
- Meeting of experts.
- Submission of joint statement of matters agreed and matters in dispute by experts.
- Skeleton arguments.
- Hearing.
- Inspection.
- Award.

The hearing

The usual procedure at a hearing is:

- 1 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.
- 2 The claimant or their representative opens and presents their case. The claimant will then call the first witness and examines them upon the evidence given (examination in chief).
- 3 The respondent can then cross-examine the witness on the evidence given.
- 4 The claimant may then re-examine the witness by asking further questions, but only on matters arising out of the stages above.
- 5 The arbitrator is entitled to ask questions if necessary but must give each party the opportunity to ask questions arising out of the witness's answers to the arbitrator's questions.
- 6 These stages are repeated for each subsequent witness.

- 7 The respondent then outlines their case and calls the first witness and the above stages are repeated for this and for each subsequent witness called by the respondent.

Although there will usually be a break for lunch or a break in proceedings if the hearing lasts more than a day, the arbitrator will usually try to ensure that a witness is not left 'on the stand' over such a break in proceedings. If this does happen, the witness is required not to discuss evidence or communicate with his or her advisers as to the substance of the case in the witness box or any ongoing cross examination with anybody until the hearing has been concluded.

- 8 The respondent makes their final submissions and sums up their case.
- 9 The claimant then makes their final submissions and sums up their case.

It is often helpful to the arbitrator for the parties to have pre-prepared written opening statements and written closing submissions summarising the main points of the respective parties' case, although it is quite proper to add to this as further points and issues will almost certainly have arisen during the hearing from cross examination, etc.

The arbitrator will then close the hearing and make arrangements to make an inspection if necessary.

6.4 Inspections

In most rural disputes it is usual, although not always necessary, to inspect the property.

If there is any doubt as to whether an inspection is required, the arbitrator should canvas the views of the parties and then use discretion to decide. Where the arbitration is being conducted with a hearing, the arbitrator will usually find it advantageous to make a brief preliminary inspection before the hearing. If a tenant of the subject property is uncooperative and refuses access, the arbitrator has a general power under s. 38(4)(a) of the Act to give directions for inspection, which may then be enforced by the courts if necessary.

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.

Attendance at inspections

The arbitrator may often prefer and find it more convenient, with the agreement of the parties, to inspect unaccompanied. If not, the inspection should be conducted in the presence of both parties or their representatives unless either party indicates in advance that he or she has no wish to be present and no objection to the inspection taking place in the presence of the other party.

Dealing with oral evidence at inspections

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

Dealing with the evidence gained from inspections

The purpose of an inspection is to enable the arbitrator to form a view of the evidence already submitted, rather than to seek 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 the matter be raised with the parties and that they are given the opportunity to comment.

6.5 The award

The purpose of an arbitrator's award is to resolve all the issues in the dispute that have been referred to arbitration, 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 Act, common law and the agreement between the parties.

For a detailed discussion on the different types of award including consent awards, see part 2.

Time for making an award

An arbitrator must avoid unnecessary delays in publishing an award, although there are no specific time limits to adhere to.

Date and delivery of the award

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

The award must state the date on which it is made. This date is a matter of great consequence, because it triggers the 28-day period within which any errors may be raised for correction (see s. 57 AA 1996) and challenges may be made (see s. 70 of the Act). It is, therefore, of critical importance for the arbitrator, once the award has been signed and dated, to inform the parties both that the award is ready and how it may be obtained. The arbitrator should not act in a way that may reduce the effective time available to the parties.

The arbitrator is however entitled to require full payment for fees (including costs and VAT) before the award is released to the parties (see s. 56 of the Act). It is therefore quite proper for the arbitrator to inform the parties that the award will be available and signed within seven days, which will

allow them to arrange for the payment of fees. Alternatively the arbitrator might delay publishing, and therefore dating, the award until receipt of final payment, rather than before informing the parties that it is available. If one party pays the full amount of the arbitrator's fee the award should be issued to both parties at the same time.

6.6 Costs

The combined effect of ss. 61 and 63 of the Act is that, after making the award final on the substantive issue, the arbitrator may then have to deal first with the allocation of the responsibility for paying the costs and then with the recoverability of costs. Accordingly, the decision as to how the costs of the arbitration shall be allocated between the parties is usually reserved to a further award after receiving submissions on costs.

While in practice it is invariably the case that costs will be dealt with separately in a separate costs award, it should be noted that there is no requirement under the AA 1996 for that procedure to be adopted.

The principles by which the responsibility for costs is allocated between the parties are:

- the parties are free, once the dispute has arisen, to agree how cost should be allocated
- if the parties do not so agree, the allocation of costs is a matter for the arbitrator
- costs should usually follow the event
- costs may be awarded on an issue-by-issue basis
- although the arbitrator has a discretion as to costs that discretion should be exercised judicially and
- the award on costs should be reasoned.

Meaning of 'costs of the arbitration'

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

Usually, if a party has won the substantive issue, in applying the principle that costs follow the event the arbitrator has a duty to deal in the award on the allocation of costs with the costs incurred by a party in preparing and presenting their case, including the fees of expert witnesses, solicitors and counsel.

Agreements between the parties as to costs

Under s. 60 of the Act, any agreement entered into **before** a dispute has arisen to the effect that a party shall pay the whole or part of the costs of the arbitration is void, equally any provisions found in leases and other arbitration agreements stipulating an equal division between the parties of the costs of any arbitral proceedings, is also void.

The arbitrator must make an award on costs if not agreed

In the absence of the parties' agreement on the allocation of costs and, if relevant, the amount of them, the arbitrator has a duty to determine them by an award (save that under s. 63(4), the court may determine recoverable costs if the arbitrator declines to do so).

If the arbitrator has omitted to deal with costs, a more practical course is for either party to apply to the arbitrator to make an additional award to do so. This application should be made within 28 days of the publication of the award, and the arbitrator should make the additional award within 56 days of the date of the original award.

Parties should note that there is likely to be further costs incurred by the arbitrator.

The general principle: costs follow the event

It is the settled practice of the courts that, in the absence of special circumstances, costs should follow the event – that is to say the successful litigant should receive his/her costs. This principle is repeated for arbitrations under s. 61(2) of the Act, except where the arbitrator considers it inappropriate in relation to the whole or part of the costs. The arbitrator should in the 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
- (b) a party has made an offer to settle the dispute 'save as to costs' under the principle established in *Calderbank v Calderbank* [1975] 3 All ER 333
- (c) a party has behaved in an obstructive or uncooperative manner and has thereby increased the costs of the arbitration or
- (d) a party has produced an unnecessary volume of submissions or evidence or expert(s) having little or no bearing on the subject matter, or has unreasonably extended the work involved in the arbitration.

The exercise of the arbitrator's discretion as to costs

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

That means it must be exercised according to the rules of reason and justice, not the private opinion of the arbitrator. There are many factors affecting the exercise of the discretion as to costs.

An arbitrator should be aware of the possibility of dispute arising if they exercise discretion on costs. They may find the principles contained in the Civil Procedure Rules, particularly Part 44.3, useful when exercising discretion and the parties may also find them as a useful guideline, albeit that the CPR do not apply to arbitration.

Awards of costs must be reasoned

If the arbitrator has to give reasons for an award on costs, as will be the case unless the parties have agreed to dispense with reasons, it may be sufficient simply to state a finding of fact that one party has been substantially successful and that in applying the principle that costs follow the event, that party shall have the costs. In which case the losing party shall pay that party's costs and the other costs of the arbitration.

If the arbitrator departs from this simple allocation of costs by, for example, awarding that the winner is entitled to only a proportion of the costs or awarding that each party bears its own costs, full reasons for that departure must be provided.

Cost capping

Unless otherwise agreed, the arbitrator may limit the recoverable costs (i.e. the amount a party may recover from the other) under s. 65. The power to limit costs may be implemented at any time and more than once, under s. 65(2) such capping must be done before such costs are actually incurred. Section 65 should be used with caution and should not be used to limit the parties in their choice of representation.

The arbitrator may consider it appropriate to remind the parties of his/her power under s. 65 of the Act to cap recoverable costs to a specified amount, particularly if the parties are represented unequally.

The allocation of costs where there is no clear winner

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

It is however sometimes the case that neither party is wholly successful. In such a case it may be proper for the arbitrator to award that there should be 'no order as to the costs of the arbitration save that the arbitrator's fees and expenses shall be borne equally by the parties'.

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

It should be noted that the Civil Procedure Rules no longer acknowledge near misses.

Offers to settle

In some arbitrations (such as rent reviews) parties may seek to protect themselves against liability for costs by

making an unconditional written offer to settle on specified terms, expressly reserving the right to refer such an offer to the arbitrator after the award has been made as to all issues other than costs. Such an offer is commonly known as a 'Calderbank' offer. To be effective it should contain:

- (a) an unconditional written offer, capable of acceptance by the offeree, to settle the matter at a specified figure
- (b) a reasonable proposal regarding the parties' costs incurred up to the date of the offer. In rent review disputes it is usually appropriate to propose that each party bears its own costs plus one-half of the arbitrator's fees and
- (c) a statement that it is made 'without prejudice save as to costs'.

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

Effect of an offer to settle

If a party makes a 'Calderbank' offer (which is a commercial offer to minimise the risk of costs) and the other party does not, and the arbitrator determines a figure that beats the offer, then in the absence of special circumstances the arbitrator should award that the losing party pays the other parties' costs and the arbitrator's fees incurred after the date when the offer ought reasonably to have been accepted (not the date of the offer letter). The allocation of the costs of the arbitration prior to when the offer should have been accepted will usually follow the event as explained earlier.

If the figure determined does not beat a Calderbank offer, the decision on costs should be the same as it would have been had no offer been made.

Award final on all matters except costs

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 costs. After the issue of the award the party or parties may, if they cannot agree, request a further award allocating the costs of the arbitration, in the light of the 'Calderbank' offer or offers that are then submitted to the arbitrator.

7 Post award

Closing the case

With the exception of the matters discussed below, once the arbitrator has made the final award they have completed their task; they are *functus officio* (meaning 'no longer in office') 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 to deal with anything else.

Additional awards

There are some limited circumstances in which, notwithstanding the making of the final award, the arbitrator can nevertheless be prevailed upon to make a further award:

- Where both parties agree, the arbitrator can be asked to make any additional award (see s. 57(1) of the Act).
- Where the arbitrator has failed to make an award that should have been made, s. 57(3) of the Act gives the parties the means of compelling the arbitrator to make a further award. This can be used to procure an award on costs or interest or in respect of any other claim that was before the arbitrator but not dealt with in the award.
- Where a successful challenge is made to the award to the court, the arbitrator can be required to reconsider the award in the light of the court's order.

Correction of awards by agreement

Where it appears to the parties that the award contains an error of any kind (a typing error or mathematical error for example), the arbitrator is required to consider an agreed application by them to correct the award (see s. 57(1)).

It is, however, essential that the parties agree. If they do not, the arbitrator's power to correct the award is very constrained. The fact the parties may have agreed the award contains an error that must be corrected does not mean the arbitrator is bound to accede to the application by the parties. The view may be taken that the parties themselves are mistaken, and the award needs no correction. Before making such a decision, however, the arbitrator would hear the submissions of the parties.

Correction of awards other than by agreement

Where the parties are not in agreement, s. 57 of the Act only allows the arbitrator (apart from the power to make an additional award described above), either on own initiative or on the application of a party, to:

- (a) correct a clerical mistake or error in the award arising from accidental slip or omission or

- (b) clarify or remove any ambiguity in the award.

It is important to appreciate the limitations of this s. 57 power to alter an 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 to the arbitrator to change the award in any other respect, even if there is a subsequent change of mind or one party wishes to adduce further evidence.

Once the arbitrator has made the award, their jurisdiction is at an end, and any further recourse is a matter for the court.

Timetable for correction of awards other than by agreement

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

- any application for the exercise of the s. 57 power must be made within 28 days of the award, or such longer period as the parties agree
- once the matter has been raised with the arbitrator, he or 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)
- any additional award must be made within 56 days of the original award (save in the case of agreement to some other effect) and
- where the matter has been raised by the arbitrator personally, he or 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.

Requests for further reasons

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

Where the parties do not agree to a request for further reasons, then the arbitrator has no power to provide them and must decline any request to do so, no matter how compelling the case might be.

Section 70(4) of the Act gives the court the power to require the arbitrator to supply further or better reasoning

if the court takes the view, in the course of a challenge to an award, that the award does not state the arbitrator's reasons or there is insufficient detail to enable the court properly to consider the challenge.

Legal challenges to the award

There are three distinct bases upon which a party may challenge an award by an application to the court. They are:

- an issue as to substantive jurisdiction
- a serious irregularity on the part of the arbitrator and
- an appeal in respect of a point of law.

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

- **under s. 67**, for a ruling upon the substantive jurisdiction of the arbitrator (see s. 30) or
- **under s. 68**, on the ground that there has been serious irregularity affecting the arbitration. Such an application may be made when substantial injustice has been done to the applicant due to the arbitrator acting unfairly or exceeding his or her powers, 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, the party may apply to the court under s. 68 when there is uncertainty or ambiguity as to the effect of the award or otherwise that the arbitrator has not acted according to law (which includes allegations of fraud) or failed to comply with the requirements as to the form of the award; or any irregularity in the conduct of the proceedings of the arbitration.

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

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

Revocation of appointment

Where an arbitration has been resolved without the need for a hearing, it is advisable for the arbitrator to ask for a

form of revocation. Completing such a form of revocation ensures that there is no possibility of one of the parties seeking to reopen the arbitration or claim that it has not been properly closed down.

Part 2: Mainly for arbitrators

8 Accepting an appointment

Before accepting an appointment from the President of RICS or other appointing body, an arbitrator should consider carefully the questions on the DRS' 'Invitation to Act'. In the case of a private appointment, the arbitrator should check that the parties' agreement is in writing and whether it contains any specific terms relating to the appointment. It is essential to ask for a copy of the agreement before accepting a private appointment. In the case of a Presidential appointment, ask for a copy of the lease or contract giving authority to act at the earliest opportunity following appointment. Careful thought should be given to the following before accepting an appointment:

- Does the appointing body have the authority to make the appointment?
- Does the arbitrator meet the criteria set out in any arbitration clause or agreement?
- Does the arbitrator have a sufficient knowledge of the practice, procedures and law of arbitration, as well as the subject matter of the dispute to be able to assess the relevance and quality of the evidence?

It is essential that the arbitrator has a good knowledge of the 1996 Act, and the relevant case law, to ensure they exercise the considerable powers vested in them appropriately.

It is also essential that an arbitrator has the personal qualities to be effective. They should be authoritative but not officious; expeditious but not over-zealous; user-friendly but not familiar. They must be attentive to detail but not pedantic; decisive but not impetuous. Some arbitrators may be 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 believe they may not be able to deal with the arbitration within a reasonable timeframe, including allowing sufficient time to be set aside to write up the award.

8.1 Conflicts of interest

It is beyond the scope of this guidance to cover conflicts of interest in any great depth but a surveyor considering an invitation to act as an arbitrator should make all appropriate enquiries within their own businesses as to whether any conflicts might arise in the event of accepting the appointment. Any potential conflicts of interest should be considered and dealt with in accordance with the RICS professional statement *Conflicts of interest*, 1st edition.

Invitation for appointment by the President of RICS

A person who is being considered for an appointment by the President of RICS receives a letter or email from the DRS asking for confirmation about a range of matters concerning his/her suitability for appointment, which are currently:

- (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 or involvements within the past five years that would give rise to a real or perceived conflict of interest?
- (v) Can you confirm that you are not currently acting as an arbitrator or independent expert in another matter that would conflict with this appointment?
- (vi) Do you comply with any special requirements (if stated) that may be listed in the case details?

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.

Professional indemnity insurance

While under s. 29 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.

However, an arbitrator may at some time face an application under section 24 of the Act to be removed, in which case the arbitrator may need to take legal advice to defend the position and such an eventuality is why an arbitrator needs professional indemnity insurance.

Conflicts distinguished from involvements

An involvement is simply any relationship between the arbitrator and one of the parties, or the property, while a conflict of interest is an involvement that raises justifiable doubts concerning the fair resolution of the dispute. Justifiable doubts would exist as to the arbitrator's impartiality if he or 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 the arbitrator might be influenced by factors other than the merits of the case in reaching a decision.

Mere involvement not a disqualification

It follows from the distinction drawn 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, particularly 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.

When deciding whether an involvement is reason enough for the prospective appointee to disqualify themselves or for the existence of the involvement to be disclosed, the prospective appointee must consider whether:

- the involvement is so trivial that it need not be disclosed
- there is uncertainty whether the involvement could lead to disqualification, in which case the prospective appointee should give the DRS full details, and say why he or she considers that there is no conflict or
- the involvement is such as to give rise to justifiable doubts as to the prospective appointee's impartiality, in which case it will be a conflict of interest with the result that the invitation must be declined.

Impartiality distinguished from independence

There is a critical difference between independence and impartiality. The parties rightly expect their arbitrator to understand the subject matter of the dispute, and often choose to have a dispute resolved by a surveyor rather than a court because they are looking for technical knowledge and experience to assist in the proper evaluation of their dispute. Surveyor arbitrators take evidence from the parties and are in a better position to assess the weight to be given to that evidence if they are experienced in the type of property (or type of dispute) in question.

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

Accordingly, while parties are usually concerned to ensure that their arbitrator is independent, they are not entitled to insist upon this unless their contract so provides because such concerns may lead to attempts to exclude from consideration a large number of prospective appointees on the grounds that they have, or in the past have had, some connection, no matter how remote, with one of the parties.

In some specialist fields it could be found that every specialist is requested to be disregarded.

The role of the President and the DRS

The role of the President of RICS in appointing an arbitrator is to select a member with the appropriate expertise who is not precluded from taking the appointment due to a lack of impartiality and who has had the relevant training. Ideally, therefore, the President should be entirely free to exercise his/her discretion as regards both the requirement of expertise and that of impartiality. However, the DRS, to whom this task is in practice delegated, has little information available to decide for itself whether a conflict of interest might exist. Instead, it relies upon prospective appointees to carry out their own conflict checks. The prospective appointee is specifically asked to disclose any involvement, in particular any involvement they or their firm has (or has had in the relevant past) with the property, a nearby property or a party to the dispute. If such an involvement exists, the prospective appointee is asked to state whether this involvement is believed to constitute a conflict of interest, or to give reasons why the involvement does not amount to a conflict.

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

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 to be questioned. That is not because the prospective appointee is liable for a conflict about which he or she knows nothing, rather if facts amounting to a conflict emerge at a later stage, the prospective appointee will rightly be criticised for the failure to make the enquiries that would have allowed the parties to seek alternative arrangements at an earlier, less costly, stage. A potential appointee is advised to ensure he or she is familiar with the RICS professional statement *Conflicts of interest*, 1st edition.

The potential appointee must therefore have an appropriate system for undertaking involvement checks within their firm that is reliable and efficient. The nature of this system will depend on the size and type of the practice. Although the DRS sets a five-year time limit for the scope of the investigation, this should not be treated as absolute: prospective appointees are expected to exercise discretion and caution with matters immediately outside the strict limit.

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.

Disclosure of an involvement

Disclosure of an involvement to the President does not mean that the surveyor will not be appointed. While it is inconceivable that the President would knowingly appoint a person with a real pecuniary or other interest in the outcome of the dispute, a very remote or indirect pecuniary interest would not however disqualify an appointee. The President would not appoint someone whose appointment would raise a real possibility of bias in the eyes of a reasonably minded person. The test is not what the party to the dispute or their representative believes. Once he or she has made themselves aware of all the relevant facts, the President must consider whether a reasonably minded person could perceive a real possibility of bias if the member in question were to be appointed.

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

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

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

Challenges to appointment

As detailed in part 1, challenges to an appointment will typically fall into three categories:

- 1 Jurisdiction.
- 2 There are justifiable doubts as to the appointee's impartiality.
- 3 The appointee does not possess the necessary qualifications required by the arbitration agreement.

A fourth category, that of the arbitrator not being physically or mentally capable, may in rare cases occur but, as mentioned in part 1, it is beyond the scope of this guidance note to advise on best practice in such circumstances as each case will be different and will be best dealt with by taking legal advice.

Jurisdiction

If an objection to jurisdiction is raised, the arbitrator should invite submissions and counter submissions from the parties within a reasonable timeframe or consider an oral hearing and then rule on his/her jurisdiction pursuant to s. 30 of the Act, unless the parties agree that it should be

settled by the court. If the matter appears complicated (and particularly if either party is legally represented in relation to the challenge), the arbitrator should consider taking legal advice. The arbitrator's ruling may be challenged by either party under s. 67 of the Act, but the arbitrator may continue the reference notwithstanding that an application to the court is pending.

Whether the arbitrator would be wise to continue the reference in any given case will depend upon a balance of considerations, such as the gravity and difficulty of the point raised, the urgency of the arbitration, the speed with which the point might be determined by the court and the likely effect on costs of proceeding in advance of the determination of the point. 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.

Impartiality – s. 24 (1)(a)

If the arbitrator has made the investigations set out above and carefully considered the RICS professional statement *Conflicts of interest*, 1st edition, they should be confident that an application to the court for removal under section 24 (1)(a) is unlikely to succeed.

The arbitrator may continue with the arbitration and make an award while an application to the court under s. 24 is pending. As with applications under s. 31, whether this would be a prudent course for the arbitrator to adopt will depend on the facts and issues surrounding each individual case, but in all circumstances the arbitrator should primarily consider his or her duties under section 33 and the fundamental principles set out in part 1. 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.

Lack of qualifications – s. 24 (1)(b)

Provided an arbitrator ensures from the outset that they fulfil the criteria set out in the application or proposed appointment, there should not be an application to the court for removal under section 24 (1)(b).

An arbitrator should read carefully any relevant documents relating to the dispute, in particular the lease or contract that contains the arbitration clause or agreement. If, when receiving an Invitation to Act from DRS, it appears to the prospective arbitrator that they do not qualify, they should advise the DRS who will in turn consider whether it is then appropriate to proceed with the appointment and/or consult with the parties before an appointment is made. As is the case under s. 24 (1)(a), the arbitrator may continue with the arbitration and make an award while an application to the court is pending.

8.2 Procedure after appointment

Once RICS has confirmed the appointment or a private appointment has been accepted, the arbitrator should:

Check the appointment documents

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

At this stage, it might become clear that the lease or contract 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 document will be extracted or summarised on the application form by the applicant. Nevertheless, it is incumbent upon the arbitrator to carry out his or her own careful checks as soon as the lease or contract is received. If those checks reveal that there is a problem, 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. A further option that the arbitrator may consider would be to take legal advice at the parties' expense

Write to the parties

The opening letter to the parties should as a minimum include the following:

- ask if more time is required for negotiation before taking substantive action
- ask if there are any points of law and (if so) how they want them to be dealt with
- request confirmation that the parties' representatives are authorised to represent the principals
- set out the duties of the parties (s. 1 principles and s. 40 duties)
- set out the duties of the arbitrator under s. 33
- ask if a procedure and timetable have been agreed (this may be in the arbitration clause/agreement)
- require all correspondence with the arbitrator (including attached documents) to be copied to the other side
- remind the parties that they should not send privileged correspondence (i.e. that written on a without-prejudice basis) to the arbitrator
- set out his or her proposed fees and charges and
- explain that arbitration is a confidential process: this is often an issue in rural rent arbitrations, not least because of the need for comparable evidence for rent review purposes. Other arbitration awards are therefore often used. Strictly speaking, that is a breach of confidentiality. Further, arbitration awards cannot be used as authorities binding upon another arbitrator.

Fees

The following points should be noted in relation to the arbitrator's fee proposal:

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

It is therefore suggested that when setting fees, the arbitrator should:

- (a) start with the hourly or daily rate that he or she would charge for other professional work undertaken of average complexity and
- (b) adjust this rate having regard to the points above.

Recording time spent

An arbitrator charging on a time basis should, from appointment onwards, keep a full log of the time spent and disbursements made in order to justify the fees if either party challenges them.

Increases in fee rates

It is not unknown for arbitrations to continue for considerable periods of time. It is therefore prudent for the arbitrator to inform the parties at the outset that they reserve the right to increase the charging rate periodically.

8.3 Early issues that may arise

One party refuses to cooperate

The arbitrator may consider issuing a directions order followed by a peremptory order (see further guidance on peremptory orders in section 8.12) or in what should be exceptional circumstances, can dismiss the claim. This should be exercised with caution.

Less draconian remedies include disallowing (or threatening to disallow) the party who has failed to

cooperate the right to subsequently make submissions or rely on evidence or witnesses not initially produced.

In some circumstances, it is not unreasonable to write to the parties directly if it is thought that the representatives are failing to comply with their duties, provided that the representative is copied in to any such correspondence.

The arbitrator can also continue *ex parte* (i.e. without the participation of the defaulting party), but should ensure that every opportunity is given to that party to participate (including ensuring that correspondence is sent recorded delivery or perhaps even hand delivered if practical). In most instances, the mere threat to proceed in such a way is usually enough to resolve the problem.

The arbitrator also has considerable discretion on costs under s. 61 and may use this to persuade a defaulting party to comply with orders or directions inasmuch that parties can be reminded of the discretion particularly where one party has acted unreasonably or caused unnecessary delay or expense. However, at all times the arbitrator must have regard to their duties under section 33 of the Act to act fairly and impartially as between the parties.

Refusal to acknowledge jurisdiction

There is an important difference between a party that refuses to acknowledge the arbitrator's authority and a party that wishes to challenge an arbitrator's jurisdiction. The former is best dealt with as in above with warnings that the arbitrator will proceed *ex parte* or issue a peremptory order. The latter is a formal challenge and should be dealt with by the arbitrator, directing that they will decide on their own jurisdiction under section 30 or refer the matter to the court if appropriate.

If such an objection is raised, the arbitrator should rule on it pursuant to s. 30 of the AA 1996, unless the parties agree that it should be settled by the court.

If the matter appears complicated (and particularly if either party is legally represented in relation to the challenge), the arbitrator should consider taking legal advice.

The arbitrator's ruling may be challenged by either party under s. 67 of AA 1996, but the arbitrator may continue the reference notwithstanding that an application to the court is pending.

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

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

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.

Refusal to agree costs

Under s. 64 an arbitrator is entitled to reasonable fees and expenses and both parties are jointly and severally liable under s. 28. There is, therefore, no need for the parties to have agreed to the arbitrator's costs in advance although it is good practice for them to do so unless they are manifestly unreasonable.

Both parties' refusal to deal with matters in a timely manner

While it is relatively easy to deal with if it is only one party that is refusing or failing to deal with matters in a timely manner, it can be more problematic if both parties are refusing to deal with the matter or to move it on.

This is quite common in rural arbitrations, especially rent reviews, because time (for the application for an arbitrator) is very much of the essence such that a party will have to apply for an arbitrator to protect their position by the review date, but may not have made any serious attempts at negotiating the rent up to that point or any attempts may have simply been ignored by the other party.

In such circumstances, the arbitrator's options are limited because it is very much the parties' arbitration. An arbitrator will usually seek to keep in constant contact with the parties (with an eye on costs – so a brief email once every month or so should be sufficient) and should remind them of their duties under the Act. If it becomes apparent that nothing is going to happen, an arbitrator can consider resigning (although may be at the mercy of the courts if wanting to recover any costs according to s. 25).

Alternatively, if the claimant does not pursue the case and there is a substantial risk that it is not possible for the issues to be resolved fairly, or there is or may be serious prejudice to the respondent, the arbitrator can consider dismissing the case under s. 41(3).

A legal or preliminary issue arises

If a preliminary issue arises that is also a point of law the arbitrator will usually seek to establish if the parties are happy for him or her to deal with it personally or whether the assistance of a legal assessor is required. Ultimately this is a decision for the arbitrator to make unless agreed otherwise by the parties (section 37). Dealing with a legal issue is addressed in more detail in section 8.6.

If, however, the preliminary issue raised is not a legal matter, the arbitrator will need to consider whether it is in the best interests of the parties to take the preliminary issue separately or as part of the main hearing. Before determining this, he or she should give the parties an opportunity to make submissions.

8.4 Subsequent inability to act

Once the President has made an appointment, their jurisdiction is at an end unless the lease itself (or, in a relatively few cases, statute) provides to the contrary. If, therefore, after the appointment of the arbitrator a party raises a matter alleging that it is wrong for said arbitrator

to continue with the arbitration (in practice, this might be a 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 as to whether the right to object has been waived)
- (d) apply the overriding principle (see section 8.1) to decide whether there is a conflict of interest that would require the appointment to be terminated
- (e) if there is, seek the agreement of the parties to an orderly resignation and replacement by the President of RICS, unless both parties agree in writing that he or she should continue (and the arbitrator feels that he or she can do so) or
- (f) if the answer is that there is no conflict that would require the appointment to be terminated, the arbitrator should continue.

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

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

If subsequent to an appointment 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 should disclose it immediately to the parties and then proceed as in section 8.1. 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 should not take into account whether the proceedings are at the beginning or at a later stage. It is 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 or 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.

8.5 Resignation

Some of the aforementioned circumstances may lead an arbitrator to consider resigning. Although the Act does not provide expressly that an arbitrator may resign it is implicit from s. 25 that they may do so if there is reasonable cause. Circumstances in which this may be reasonable are illness or incapacity, if 'without prejudice' correspondence is shown to the arbitrator or if a conflict of interest is exposed.

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

8.6 Case management

In all instances when considering how to manage an arbitration or how to respond to a situation that may arise, it is important for an arbitrator to refer in the first instance to the Act. The overriding objective is spelled out in s. 33 of the Act ('General duty of the tribunal') in these terms:

'(1) The tribunal shall –

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

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

The arbitrator should comply with their general duties in conducting the arbitration. This will include decisions on matters of procedure and evidence and in exercising all of the other powers conferred by the Act. It is emphasised that the arbitrator is there for the parties, not the other way around. This section of the guidance is concerned with the manner in which the arbitrator should comply with the general duties set out in sections 1 and 33 of the Act.

Unrepresented parties

In some cases, the arbitrator will be dealing with parties who are represented by surveyors or lawyers, who comply readily with directions. In other cases, the arbitrator will have to deal with parties that are unrepresented, or uncooperative, or whose identities change during the proceedings. Guidance concerning dealing with uncooperative parties is set out in section 8.3, but an unrepresented party who is willing to cooperate although simply unsure of the procedures has to be treated carefully to ensure that he or she is given every reasonable opportunity to promote their case and to understand the case against them.

This reflects the general duty of the arbitrator in section 33. It is sometimes difficult to balance the duty to assist an unrepresented party with the duty to act fairly and impartially at all times. The arbitrator should only advise the parties on procedural matters and always resist the temptation to advise an unrepresented party (or indeed a poorly represented party) on how to run their case.

The arbitrator is quite at liberty to advise on (for example) the meaning of without prejudice correspondence if asked,

but should not advise as to whether a party should engage in such discussions or correspondence.

Similarly, it may be appropriate to advise either party (if asked) on the pros and cons of an oral hearing (cost, efficiency, ability to cross examine witnesses etc.) but they should not make recommendations either way. They may ultimately make the decision as to whether to call for an oral hearing, but this should follow submissions from both parties based on their own decisions of what is preferable to them.

Preliminary meetings

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

Preliminary meetings are now commonly held by way of telephone conference with a typical agenda as follows. It is to be emphasised that this is not an exhaustive checklist of matters for the arbitrator to raise with the parties, but a reminder for the arbitrator of matters that in some cases should, but in others may, be raised:

- 1 The parties
 - Confirmation of identity
 - Claimant/respondent
 - Parties representatives
- 2 Documentation
 - For example, verification of lease
- 3 Issues in dispute
 - Legal/evidential
 - Valuation
- 4 Conduct of proceedings
 - Documents only/oral hearing
 - Solicitors/counsel briefed
 - Expert witnesses
 - RICS practice statement and guidance note *Surveyors acting as expert witnesses*, 4th edition
- 5 Procedure & timetable (if documents only)
 - Statements of case
 - Statement of agreed facts for property
 - Submissions
 - Counter submissions
- 6 Procedure and timetable (if oral hearing)
 - Statement of agreed facts
 - Points of claim
 - Points of defence

- Points of reply
- Schedule of Evidence
- Identity and expertise of witnesses
- Exchange of Proofs of Evidence
- Skeleton arguments
- Date of hearing
- 7 Evidence
 - Rules to be applied
 - Disclosure
- 8 Award
 - Simple/reasoned
 - Partial/final
- 9 Inspection arrangements
 - Subject premises
- 10 Communications
 - With arbitrator
 - Between the parties
- 11 Any other business

The preliminary meeting should be an opportunity to deal with all of the early issues and matters in dispute and should be followed up by a comprehensive directions order setting down a procedure to reach agreement or establish a mutual understanding of the points raised at the preliminary meeting. In particular, such directions should be used as a way of clearly establishing the issues in dispute either by the agreement of the parties or via a meeting between experts. Similarly, agreement can and should be sought on facts and points of relevant law.

It is equally useful to establish matters that cannot be agreed as this helps focus the parties on what is really in dispute, especially if they are encouraged to give some reasoning and justification for their relative stances. Further guidance on the role of the experts in these matters can be found below.

Communications protocols

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

Email

Communication by email is common and needs to be embraced by all those involved in arbitration because it is quick and cost effective. There is, however, a risk that an email is not received or read and hence it is good practice to insist that important documents such as statements of case, witness statements, etc. are sent by post (although there is no reason why email cannot be used as well to

comply with any deadlines as long as a hard copy follows by post).

In the absence of an agreed email communications protocol, any notice or document may be served on a person by any effective means. A notice or document addressed, pre-paid and delivered by post to the addressee's last known principal address, or to their registered or principal office, is treated as effectively served according to s. 76. If this is not reasonably practical the court procedure is available, as set out in s. 77. The arbitrator should establish the 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. Alternatively representations may be 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 they will examine any, 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 the responsibility for producing identical documents is in the hands of their author.

Telephone

The arbitrator should make it clear that any contact by telephone should be with a member of their staff and not the arbitrator directly if the other party is not present by way of telephone conference. It is not uncommon (especially when unrepresented parties are involved) for them to try and telephone the arbitrator direct, especially when he or she receives the initial letter. It can be difficult if not impossible to avoid answering a call from an unknown number only to find it is one of the parties (usually innocently) calling to ask some questions.

In those circumstances an arbitrator should politely bring the call to an end as soon as possible and ask the caller to put any questions in writing or call their secretary. It is usual to inform the other party of the call as a matter of courtesy and to avoid any problems if the call is mentioned at a later stage.

Points of law

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. According to s. 37(1)(b) the arbitrator is required to disclose any legal advice obtained and allow the parties a reasonable opportunity to comment upon it.

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

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

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

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

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

Under section 45 of the Act, a preliminary point of law can be determined by the court on application by either party, but this must either be with the agreement of all the other parties (s. 45(2)) or with the permission of the arbitrator and subject to the court being satisfied as to certain conditions set out in s. 45(2)(b) of the Act.

8.7 Encouraging compromise

At all times, the arbitrator should be seen to encourage compromise. A full arbitration hearing with all the associated costs, delay in resolving the matter, stress to the parties and damage to the relationship between the parties is of no benefit to anyone if a compromise can be found.

The arbitrator should seek to use every opportunity to remind the parties of the benefits of settling the matter without the need for a hearing and those advising the parties should also make it clear to their clients (preferably in writing) at the outset and ideally remind them at least once during the interlocutory process that seeking a compromise should be carefully considered. The parties should be warned that if the matter does proceed to a hearing and (as is inevitable) one of the parties loses that party may end up bearing significant costs.

Other forms of dispute resolution may be mentioned during the course of an arbitration such as mediation. There is a plethora of case law where judges have heavily criticised parties in court for not mediating and there are often heavy cost penalties for parties that refuse to mediate.

While arbitration is different from the courts inasmuch that it is a form of Alternative Dispute Resolution in its own right, requests to mediate should be considered carefully by those advising the parties and if they agree that they wish some or all of the issues to be mediated, the arbitrator should accede to their wishes as long as they remain satisfied that they can continue to comply with duties under the Act, particularly with regards to costs and delays.

Refusal to mediate by one of the parties may be grounds for the arbitrator to use his or her discretion when considering the question of costs as this is something the courts are quick to penalise and, depending on the circumstances, the arbitrator may consider it appropriate.

8.8 Proportionality

An arbitrator, especially where the amounts in dispute are relatively small, should be alert to the issue of proportionality and if necessary should set out ground rules from the start if they feel the costs of the dispute may outweigh any benefits to the parties. An arbitrator can, for example, warn the parties that they will not tolerate having to deal with unnecessary paperwork and will take this into account if asked to consider the question of costs.

Similarly, while the parties are entitled to choose who they want to represent them, the arbitrator has discretion on awarding costs and if they feel one or both parties are incurring unnecessary costs by having too many representatives or being over represented. The arbitrator should raise this as early as possible and while they cannot prejudge the matter, they are entitled to point out any concerns and remind the parties that they have discretion on costs, particularly those that they think have been unnecessarily incurred.

See also discussion in chapter 6 on section 65.

8.9 Establishing facts and issues agreed and not agreed

As has been mentioned above, the arbitrator can use interlocutory procedures such as preliminary meetings and subsequent directions to try to narrow the issues in front of them (and thereby reduce the cost). Very often a number of facts and documents can be agreed in this way such as agreeing the lease or contract, the extent of the subject property, the parties, the validity of various notices, etc. That will have the effect of reducing the number of facts and issues that remain in dispute.

Submissions

At different stages, it will be necessary for those advising a party to an arbitration to make submissions to the arbitrator. This can include everything from initial submissions on procedure, submissions on preliminary issues, statements of case, written submissions on the substantive issues (in the case of a hearing by written representations), opening and closing statements (in the case of an oral hearing) and submissions on costs.

It will usually be for the arbitrator to specify how and when submissions are made unless the parties have already agreed it between themselves.

The best forum to discuss the extent, format and timing of submissions is at the preliminary meeting, often by telephone conference (see section 8.6 for guidance on preliminary meetings).

Subsequent and late submissions

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 make subsequent submissions and late submissions. Nevertheless, parties may sometimes deliberately use the opportunity to make subsequent or late submissions to ambush their opponents by including fresh material. The arbitrator should in such an event proceed with caution because s. 33 states that one of the main principles of arbitration is to allow a party a reasonable opportunity of putting a case and so refusing to allow a party to introduce further evidence or submissions should be seen as a last resort.

Instead, in such circumstances, the arbitrator should be prepared to allow the party taken by surprise an opportunity for further submissions, should that be requested. They can also consider such behaviour when it comes to awarding costs (if it is felt that costs have been incurred as a result). 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 submissions. Here too the arbitrator may consider it appropriate to allow further submissions to deal with that fresh evidence.

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

- (a) the subsequent submissions are to be used for points of rebuttal only
- (b) if fresh evidence is adduced in submissions an opportunity for further submissions may be afforded to the other party and
- (c) any increased costs incurred as a result of the breach of the directions may be awarded against the transgressing party (possibly regardless of the overall result).

Directions and directions orders

Section 34(1) empowers the arbitrator to decide all 'procedural and evidential matters' and those matters are listed in s. 34(2), subject to the right of the parties to agree any matter.

Accordingly, the arbitrator should establish at the earliest 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 s. 34, having regard to their duty under s. 33.

The arbitrator should enlist the parties' cooperation in reaching agreement on directions, reminding them where necessary of their duty under s. 40 to do all things necessary for the proper and expeditious conduct of the proceedings.

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

- (a) any requirements of the arbitration agreement
- (b) the relevant communications protocol
- (c) the documents to be agreed and put before the arbitrator
- (d) the date for service of a statement of agreed facts
- (e) confirmation that, in advance of service of representations, any comparables intended to be relied upon by a party shall be disclosed to the other party
- (f) a reminder that any 'without prejudice' negotiations or offers or other privileged material, whether oral or contained in correspondence, shall not be referred to in representations
- (g) if either party wishes to raise any point of law affecting the dispute, how the point is to be resolved. As to disputes involving issues of law, see section 6.2
- (h) the timetable and mechanism for service upon the arbitrator and each party of the representations and cross-representations
- (i) what rules of evidence are to apply
- (j) whether awards and expert determinations will be admissible
- (k) a reminder concerning the duties of surveyors acting as expert witnesses and/or as advocates
- (l) the arbitrator's requirements for inspecting the subject property and comparables if appropriate
- (m) unless otherwise agreed the arbitrator's right to call for a hearing if at any time considered necessary
- (n) whether the award will be a final award dealing with all matters in issue, including the costs of the arbitration, or an award with the costs of the arbitration reserved if not agreed but otherwise final on the substantive issue(s) in the award and
- (o) the right for the arbitrator to issue such further directions as deemed necessary, together with liberty for the parties to apply for variations or further directions.

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 or she is informed to the contrary, the directions reflect the scope of matters agreed.

Evidence

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
- the 'strict rules of evidence'
- the rule concerning the burden of proof
- the treatment of post-review date evidence (in the case of a rent review)
- the rules concerning the admissibility of arbitrator's awards or independent experts' determinations and
- the rules regarding disclosure and privilege.

In practice, requiring that all facts should be properly proved or that the so-called 'strict rules of evidence' derived from the *Civil Evidence Act 1995* should apply is probably unduly technical in rural arbitrations, particularly rent review arbitrations, and may prove difficult to apply in practice where parties' representatives are not legally qualified or experienced in such matters.

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. This is particularly important in non-rent review arbitrations, which might involve a notice to quit with someone's security of tenure at stake. In most circumstances, therefore, the arbitrator may wish to direct (and ask the parties consent to) that he or she admits non-privileged evidence, but if a party wishes to challenge admissibility, they can do so.

Generally the arbitrator should deal with such issues by giving such weight to the evidence as he or she thinks appropriate.

In all circumstance, the arbitrator should be mindful of their duties under the Act and for example, if it is clear the primary dispute will revolve around the exact factual circumstances of a particular event or transaction that are hotly disputed, it may be appropriate to direct that the facts

should be strictly proven, even if this would be exceptional in other circumstances.

The parties' representatives should be alert to the key issues and ensure their clients are given the best opportunity to either present their own evidence or have the right to properly challenge the evidence of their opponents while at the same time being mindful of their duties under the Act. In all cases, key points for the parties and the arbitrator to consider are how to treat:

1 Hearsay evidence

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

2 Strict rules of evidence

As mentioned above, the strict rules of evidence may not be appropriate for many rural arbitrations and hence the parties and the arbitrator may avoid engaging in discussions as to whether or not they apply and instead consider precisely how information may be rendered admissible, and how it is to be treated.

3 The burden of proof

As with most litigation, it 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 arbitration, the tenant contends that certain parts of the farm were improved by him and should therefore be disregarded for the purpose of assessing the rent, the burden of proving the fact of the improvement falls upon the tenant, whereas the burden of proof of a proposed increase in the rent would typically fall on the landlord.

Generally the burden of proof provides that, if there is no satisfactory evidence which enables the arbitrator to determine the dispute on the balance of probabilities, then the party who bears the burden of proof will be unsuccessful. The burden of proof is irrelevant where there is sufficient evidence to decide the dispute on the balance of probabilities.

4 Other arbitrator's awards

Whereas in commercial arbitrations arbitrator's awards and independent expert determinations may be said to be inadmissible because they are of insufficient relevance to the issue in the present arbitration, the situation is different under the AHA 1986 because schedule 2(1)(3) specifically allows for rents fixed by arbitration to be taken into account, although the arbitrator will have to be satisfied the confidentiality of the awards of those arbitrations is respected before referring to it specifically in the award. The arbitrator will also need to be aware that section 38 of the Act does not give any powers of entry on a property that is not the subject of the arbitration.

If the parties to the other arbitration(s) do not give consent and/or the arbitrator is not given access to inspect, reference to such evidence by one of the experts or

advocates may be little more than 'tone of the list' or hearsay and the arbitrator will have to decide how much weight to give to such evidence.

The situation is different under the ATA 1995 because there is no equivalent provision in section 13. It may be that parties agree to allow such evidence to be put before the arbitrator, but whether or not they should do (and the authorities for doing so) is beyond the scope of this guidance note. Where awards or expert determinations are agreed as being admissible, it is still for the arbitrator to decide upon the weight that will be given to that evidence.

5 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 one of the parties (perhaps a recent rent settlement), 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 approach should generally be that if the evidence is relevant 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 ought to be compensated for any additional costs that it may have had to incur as a result of the failure to adduce the evidence at an earlier stage.

6 Evidence of fact

Evidence of fact in rural arbitrations will usually be given by one of the parties themselves (for example the tenant or landlord). When helping a client prepare a witness statement of fact, representatives should keep their client focussed on relaying facts only and not straying into opinions. This can be a fine line, e.g. 'the farm is a wet farm with heavy soils' can be both fact and opinion but would usually be admissible from a factual witness whereas 'the farm is one of the wettest in the county' is less likely to be.

From an arbitrator's perspective, when factual evidence is in dispute, it is a matter of weighing up the balance of probabilities. This can be approached in a number of ways including the credibility of the witness and how he or she comes across on the witness stand. Other anecdotal evidence supporting facts given in evidence will also help an arbitrator to decide which evidence on balance is preferred.

8.10 Disclosure

If a party requests disclosure of a document the arbitrator should ask the party to identify the document or documents they require and the reasons for wanting 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. 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.

Privilege

A document is privileged if it falls within one of the recognised classes of privilege, of which the most relevant to arbitrations are legal professional privilege and 'without prejudice' privilege. The topic of privilege is a very complex subject and anything more than a general discussion is beyond the scope of this guidance note. Arbitrators and surveyors acting for parties involved in arbitrations are referred to the RICS article *Do you have the privilege?* (RICS *Property journal*, July/August 2014, p.14).

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.

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 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 may not be privileged.

(b) Litigation/arbitration communications:

If litigation or arbitration is in progress or is contemplated, 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.

Without prejudice privilege

Correspondence or discussions between the parties relating to an arbitration that is ongoing or 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.

'Without prejudice' privilege may only be lifted with the consent of both parties.

Some correspondence may be without prejudice except as to costs, which – under what is known as the Calderbank case (hence Calderbank offers) – can be presented to

an arbitrator after he or she has made a main award, but before making a decision on costs

Enforcing disclosure

If, without showing sufficient cause, a party fails to comply with the arbitrator's order or direction for disclosure, the arbitrator may make a peremptory order under s. 41(5) to the same effect, with such time limits as considered appropriate. If the party still fails to comply, the arbitrator may exercise powers under s. 41(7) to direct either that the defaulting party may not rely upon any allegation that was the subject matter of the order, draw adverse inference from the non-compliance, proceed on the basis of materials properly provided or make an order for costs incurred as a consequence of non-compliance.

The threat of these powers will often be sufficient to ensure compliance. If, however, the matter is of sufficient importance the party seeking disclosure (with the consent of the arbitrator) or the arbitrator may apply to the court under s. 42(2) for an order directing the other party to comply with the peremptory order made by the arbitrator.

8.11 Evaluating the evidence

One of the main reasons for the parties choosing to have their dispute determined by a chartered surveyor as arbitrator is the knowledge that they will have appropriate expertise and experience to weigh the evidence properly. The exercise of this power is however subject to a number of limitations:

- (a) The arbitrator should not rely upon evidence that neither party has introduced without giving the parties an opportunity to be heard.
- (b) In a dispute involving valuation, the arbitrator should not select a method of valuation that neither party has contended without giving the parties an opportunity to be heard and he should not arrive at a figure outside of the parties' contentions.

The arbitrator can make their own enquiries and has the power to decide whether and to what extent they should take the initiative in ascertaining the facts and the law according to s. 34(2)(g). However, this power must be exercised with discretion, balancing the need to be aware of relevant evidence with the need to avoid unnecessary delays or expense.

The arbitrator must also avoid giving an aggrieved party the opportunity to allege partiality by the arbitrator in advancing the case for the other party. It is not the function of the arbitrator, within the context of s. 34, to become a third expert in the arbitration and so the introduction of new evidence by the arbitrator should be restricted to direct evidence rather than hearsay, avoiding the prospect of the arbitrator being subjected to cross-examination.

The arbitrator is also under a duty in s. 33 to act fairly and impartially between the parties and to provide each party with a reasonable opportunity of putting their case and dealing with that of their opponent. The arbitrator must therefore ensure that any information obtained is placed

before the parties and they are given a reasonable period in which to make representations.

Because the arbitrator has been selected on the grounds of special expertise and experience, they will possess knowledge that may have been gleaned from involvement in the rural sector or 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 but it is quite another to deploy a piece of evidence or valuation method drawn from experience that neither party has had an opportunity to address.

If there are specific facts within the arbitrator's own knowledge that cannot be ignored when 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 that has been based upon own specific knowledge would not comply with the general duty of the tribunal to 'give each party a reasonable opportunity of putting his case and dealing with that of his opponent', and could constitute a serious irregularity.

Provided however 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 knowledge to be excluded if the arbitrator believes it to be of relevance.

8.12 Extensions of time and parties in default

If a request for an extension of time is reasonable, such a request should usually be granted, but if the request is one of a series of requests and no real reason is given for them, the arbitrator should consider using the powers under the Act to move things on in the interests of the parties involved and the arbitration process itself.

Parties in default

Section 40 of the Act imposes a duty on the parties to do all that is necessary for the proper and expeditious conduct of the proceedings. This includes 'complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal'.

Where one of the parties fails to comply with this duty, the arbitrator has power to apply a range of sanctions, which are below and analysed in the remainder of this section.

Examples of **default** would be:

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

Remedies

Section 41 of the Act is labelled 'Powers of the tribunal in case of party's default' and gives the arbitrator a range of powers to use against the party in default. In increasing order of severity, the arbitrator may:

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

These powers are potentially draconian and no arbitrator will wish to be put in the position of having to resort to their use. An arbitrator will accordingly take such steps as are open to ensure that the arbitration is run in a specific way.

- 1 The arbitrator may, on occasion, find it helpful to remind the parties of their general duty under s. 40 of the Act to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
- 2 If a case of possible default does arise, before using powers under s. 41, the arbitrator should make sure the party that is seemingly in default is actually in default. That will mean checking the party:
 - received notice of the obligation in question and
 - has no adequate excuse for the failure to comply with that obligation.
- 3 The arbitrator should ensure the parties' principals receive copies of correspondence in the event that the lack of cooperation appears to be attributable to an expert witness or the advocate rather than the party itself.
- 4 The arbitrator should remind the uncooperative party of the arbitrator's duty to avoid unnecessary delay (s. 33) and the mandatory duty of the parties to cooperate with the arbitrator (s. 40).
- 5 The arbitrator should consider giving the party in default notice in accordance with the provisions of s. 76 of the Act that he or she intends 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, perhaps by prepaid recorded delivery. The arbitrator should keep a good record of how service was affected, and may 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 record that the defaulting party has had the notification.

- 7 If there is any doubt about notification or the existence of sufficient cause, it would be wise to adjourn the event (e.g. meeting, hearing, delivery of documents) to a later date. If a party 'shows sufficient cause' (i.e. provides a satisfactory explanation for defaulting), the arbitrator cannot proceed, since s. 41(4) is only applicable if sufficient cause is not shown.

These steps are particularly important if the party in default is not professionally represented.

8.13 Peremptory orders

Further to the general discussion in Part 1 about peremptory orders, an arbitrator may face a situation whereby they are either asked to make a peremptory order or is considering making one of his/her own volition. If the arbitrator is satisfied that a party is in default notwithstanding the taking of the steps suggested above, the next step for the arbitrator is to consider whether:

- (a) to proceed according to s. 41(4) in the absence of the party (in practice without its attendance at an oral hearing, or without any or all of its written material if the arbitration is being conducted on the basis of written representations) or
- (b) to make a peremptory order under s. 41(5).

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

Making a peremptory order

If the arbitrator decides that it would be appropriate to make a peremptory order under s. 41(5) of the Act, they will normally give a further warning to the party in default, indicating that the matter is serious and that he or she is about to consider exercising his/her power to make a peremptory order. In the absence of any response, the arbitrator should then make the order. This should spell out clearly:

- (a) that the order is a peremptory order made pursuant to s. 41(5) of the Act
- (b) what direction the party in default has failed to comply with
- (c) the nature of the non-compliance
- (d) what the party in default is required to do in order now to comply

- (e) a reasonable time for the party in default now to comply
- (f) the penalties attached to further noncompliance, such as if the uncooperative party fails to comply with the order then the arbitrator may exercise any of the powers conferred on him by s. 41(7) and
- (g) a warning regarding the arbitrator's ability to have peremptory orders enforced by the court under s. 42.

8.14 Security for costs: s. 41(6)

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

8.15 Where neither party wishes to cooperate

If neither party wishes the arbitrator to proceed with the arbitration there is, on the face of it, a conflict between s. 40 which requires the parties to do all things necessary for the proper and expeditious conduct of the proceedings, and party autonomy. On the one hand, it could be said that the arbitrator cannot simply condone an ongoing breach of s. 40. On the other hand it would be contradictory for the arbitrator to insist upon formal compliance when this would be contrary to the parties' wishes. It would therefore be impractical for the arbitrator to attempt to override the parties' joint agreement. Moreover, if the parties have agreed to limit the arbitrator's powers pursuant to s. 41(1), the arbitrator is powerless to take any action in any event and should be content with regular communications with the parties to remind them of the outstanding arbitration.

It may be possible to bring matters to a conclusion if neither party shows any inclination to proceed by referring the claimant to section 41(3) of the Act, which empowers the arbitrator to dismiss the claim if there has been inordinate and inexcusable delay by the claimant. However, there would have to be good grounds to show that it is not going to be possible to resolve the issues fairly because of the delays (perhaps for example, because evidence will be hard to obtain in a dispute that has been ongoing for so long) or there is or is likely to be serious prejudice to the respondent. It would be unusual for the arbitrator to proceed in this way because an application under this subsection would usually come from the respondent. The arbitrator may need to do no more than refer to the subsection and simply ask the parties to consider their positions. In an extreme case, the arbitrator could consider informing the parties that he or she will resign if there is no foreseeable progress.

8.16 Types of award

A rural arbitration may only deal with one issue, or alternatively there may be several. In the latter case, the parties may want the arbitrator to decide all such issues together and produce one award. Alternatively, it may be appropriate (particularly where the determination of one issue will affect the approach to another) for the arbitrator to deal with the issues sequentially, by making a series of awards. Section 47 of the 1996 Act gives the arbitrator the flexibility to do this, unless the parties agree otherwise.

There is no universally accepted name for the series of preliminary awards an arbitrator may make. The pre-1996 Act term 'Interim Award' is discouraged, better practice now is to call such awards 'Award No 1', 'Award No 2', and so on; or 'First Award', 'Second Award', etc.; or 'Award No 1 (Jurisdiction)', 'Award No 2 (Legal issue)', 'Award No 3 (Rent)', 'Award No 4 (Determination of Costs)', and so on.

In some cases it may be appropriate and cost-effective to deal with all issues (including costs) in one award, which will usually be entitled 'Final Award'. Even in a straightforward case, however, it will generally be preferable to deal with the question of costs once the parties have had time to consider the arbitrator's decision on the substantive issues and to make further submissions on costs in the light of that decision. In such a case, the arbitrator will normally make an award that deals with everything except costs and label the substantive award 'Final Award save as to Costs', followed by an award dealing with, or including, costs.

Agreed or consent 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 should be made. 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 or consent award. Before signing a consent award drafted by the parties, an arbitrator will want to ensure that it complies with the Act in the usual way and all parties should consider the following points:

- (a) The arbitrator should only proceed to make such an award if the parties agree in writing that he or she should.
- (b) The arbitrator will 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 or she should do so and supply the draft to the parties for their approval.
- (d) If the parties have provided a draft award, the arbitrator will check it carefully, revise as necessary, and submit the revised draft to the parties for their agreement. The arbitrator may object to making the award (see s. 51 of the Act) if the draft award or the agreement leading to it is in an unacceptable form.

- (e) The agreed award must state that it is an award of the arbitrator and that it thus has the same status and effect as any other award on the merits of the case.
- (f) Save that it need not state reasons (see s. 52(4) of the Act), an agreed award should be set out in the same form as any other award, following the requirements of the parties or s. 52 as appropriate.
- (g) If the agreed award does not deal with the payment of the costs of the arbitration, the authority of the arbitrator continues to run in relation to those costs.
- (h) If the parties settle their dispute, but do not agree that there should be an agreed award, the arbitrator should terminate the substantive proceedings, since there will be nothing further to be decided.

Essentials of a valid award

The following points should be considered:

- (a) The parties are free to agree the form of the award. An award will be defective if it does not comply with the parties' requirements according to s. 68(2) (h). It is good practice to ask the parties if they have any particular requirements in relation to the form of the award. If they do not, the arbitrator is bound by the common law and *Arbitration Act* requirements detailed below. Each of these requirements should however be read as if prefaced by the words 'unless the parties otherwise agree'.
- (b) The award must be in writing (see s. 52(3)).
- (c) The award must contain reasons (see s. 52(4)).
- (d) The award must be certain and unambiguous. The arbitrator must make it clear exactly how he or she has decided the dispute. A good rule of thumb is to remember that (within reason) the winner will be less concerned about why they have won than the loser will be about why they have lost and so the award should be written in such a way as to make it clear to the losing party why they have lost.
- (e) The award must be complete. If the award fails to determine all the disputes submitted for the decision of the arbitrator, it may be vulnerable to a challenge based on serious irregularity under s. 68(2)(d) of the Act.
- (f) 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 may be set aside because the arbitrator has exceeded their powers according to s. 68(2)(b).
- (g) The award must be final. The arbitrator may be asked to determine a matter in the alternative but she or he must also decide which of those alternatives is correct, without which the award will not be final.
- (h) The award must state the seat of the arbitration – usually England and Wales.
- (i) The award must be signed by the arbitrator.
- (j) The award must state the date on which it is made.

- (k) The award must be enforceable. This is rarely a problem or issue in rural arbitrations.

8.17 Suggested contents of an award

Heading

The heading should set out the details of the Act(s) under which the arbitration is held (including the 1996 Act), the names of the parties and the details of the property (if relevant) involved. This information can usually be set out as a cover page.

Title

Whether it is a final award, costs award, award except as to costs, etc.

Introduction

The introduction (or preliminaries) 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.

The introduction can include:

- a description of the lease or other relevant contracts or documents and the relevant arbitration clause or statutory provision
- a brief description of the dispute that has arisen
- 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 of acceptance
- details of any written agreements by the parties that affect the arbitrator's powers or jurisdiction
- details of any correspondence that might have a bearing on the matters the arbitrator has to decide or the procedure to be adopted
- a description of any preliminary meeting held, with date, location and representatives attending
- a summary of any directions given (brief details only unless there is some important matter such as specific disclosure, jurisdiction, etc.)
- the date of receipt of any statement of agreed facts
- the date of receipt of any written submissions/expert reports, counter submissions/replies or witness statements
- if the arbitration involved any hearings, details of venue, dates, and what happened, including:
 - who represented each party
 - which factual witnesses gave evidence for each party, and their position in the organisation they work for and

- which experts gave evidence, their respective disciplines and on which party's behalf they appeared.
- if an inspection of the subject matter of the dispute was carried out, when and where and who else was present at the inspection
- if an inspection of any comparables was carried out, when and where and who else was present at the inspection and
- to what extent the arbitrator has taken the initiative in ascertaining the facts and the law.

There is no reason why the arbitrator cannot send a draft of the introduction to the parties to agree, particularly when it comes to checking that certain dates, etc. are agreed. Everything in the introduction will be factual and non-contentious and capable of being agreed between the parties.

Arbitration provision

Whether contractual or statutory, the provisions for arbitration should be identified and any relevant clauses in the lease or contract set out.

The issues

Having explained what the dispute is and how it came about, the relevant issues that the arbitrator must decide in order to make an award must be identified. Correctly identifying the issues is one of the most important tasks of an arbitrator. These will or may include issues of fact, issues of law and issues of expert opinion.

The arbitrator will need to resolve each of these and to give reasons for doing so. 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. This approach helps the arbitrator with the process of coming to a decision because thoughts and conclusions may evolve as they are set out and considered in turn.

The reasons

The statutory duty to give reasons has two underlying purposes. The first is that it is a requirement of common fairness that the losing party should know why they have lost. The giving of proper and intelligible reasons may go a long way toward preventing any feeling of injustice. The second purpose behind the giving of reasons is for the benefit of the arbitrator. They are compelled to consider and articulate why they have decided the issues in the way they have and that process may uncover faulty reasoning or inconsistencies of approach. Arbitrators should take care to express themselves in a professional and temperate manner, not expressing personal sentiments or sympathy for a losing party.

The following pointers may help the arbitrator to shape an award that will enable the parties to understand how and why they came to a 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 making a finding of the necessary facts. Sometimes this process will involve the arbitrator saying why they preferred the evidence of one witness to that of another or 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 given by each party. Where these are long and complex 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 can be the most difficult part of the award because it is often easier for the arbitrator to arrive at a decision than it is to articulate reasons for doing so.

The arbitrator may simply find the analysis of one party's surveyor more convincing than that of the other, but she or he owes it to the parties to explain why. It may be helpful to set down the decision on each of the separate issues, and then state the facts and reasons for that decision. Arbitrators should aim for a proper balance between recitals and findings/reasons, with the latter taking up most of the award. The thought process that led to the decision must be clearly set out.

The decision

This important section will usually be headed 'AWARD'. It sets out the arbitrator's decision on the dispute. It is essential that the arbitrator makes an unequivocal and final decision on the issues in dispute and such other issues as may be included in the arbitration. The wording of the findings and award and the directions as to costs should therefore be clear and unambiguous.

8.18 Closing formalities

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

8.19 Costs

It is quite common for an arbitrator in rural arbitrations to be asked to make an award on costs and then subsequently to assess the costs. A full discussion on making an award on costs can be found in part 1.

How to allocate and assess costs

Generally, if the arbitrator is asked to deal with costs, he or she will be only asked in the first instance to allocate of the costs of the arbitration (i.e. who should pay whom), leaving the assessment of the actual amount of the costs until later. Indeed, the arbitrator should encourage the parties to agree the recoverable costs between themselves. It is best to deal with the parties' own legal and other costs, and the arbitrator's fees and expenses, separately.

In dealing with the allocation of costs, the arbitrator will need to state the basis upon which the amount of the costs is to be assessed and how, when and by whom the assessment is to be carried out. If the parties are unable to agree on the assessment the arbitrator must do so (see s. 63(3)). The arbitrator should consider providing for the determination of recoverable costs in one of the following ways:

- (a) if no lawyer is involved in the case, the arbitrator should determine costs personally because they are likely to be fully conversant with the costs of the surveyor experts employed by the parties. The usual basis of determination is set out in s. 63(5)
- (b) if lawyers are involved the arbitrator should give the parties a choice of determination by him or herself, either alone or with the assistance of a costs assessor, or alternatively by the court or
- (c) if the arbitrator does not determine the costs, a party may apply to the court for its determination.

Awards sometimes contain a direction that costs are to be determined on the 'standard basis' or on the 'indemnity basis'. Those terms are not defined in the Act and are best avoided. It is better to make a direction for assessment referring to the default basis of assessment set out in s. 63(5) of the Act, which limits the recoverable costs to a reasonable amount that 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 the costs.

An awareness of the formal procedures is important if lawyers are involved because they will be familiar with and expect such procedures to apply. However, there may be circumstances when an arbitrator should not seek to carry out the determination of costs in accordance with the court's procedures if to do so would incur unnecessary delay and expense contrary to s. 33.

The arbitrator should ask to see the relevant fee accounts and/or letters of engagement relating to the actual costs incurred. A surveyor's recoverable costs claimed on a time basis should not be allowed if the actual remuneration was on some other basis. The arbitrator will also consider whether the costs incurred were reasonable, and should not without good reason allow high hourly rates and travelling expenses in a relatively low value rural arbitration if satisfactory representation could have been obtained less expensively.

If the arbitrator is satisfied with the costs that the winning party has reasonably incurred (and this can be

demonstrated with paid invoices), there should be no need to reduce the costs awarded.

Interest

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

When dealing with interest an arbitrator might want to refer to the fact that the judgment rate is determined by the *Senior Courts Act 1981* and at the time of publication is currently 8%.

8.20 Post award

As discussed in part 1, it may be that the award is challenged by one of the parties. The grounds for challenging an award are discussed in more detail in part 1.

Reaction to legal challenge to the award

It follows from the discussion in part 1 that the arbitrator has little role to play in any legal challenge to the award, unless the parties jointly request assistance under s. 57 (which is very unlikely given that the challenge is a hostile procedure).

Otherwise the arbitrator may be required by the court to provide reasons or they might wish to exercise the opportunity afforded by CPR62 either to apply to be joined as defendant, to file representations, or to file a witness statement explaining some matter (which would generally be inadvisable as the arbitrator then becomes a party to the proceedings and could be responsible for some costs).

In cases falling outside these limited circumstances, the arbitrator should resist the temptation to explain further any reasons for making the award. 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.

Remission of award to the arbitrator

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

A challenge under section 67 will only arise if the arbitrator has determined his or her own jurisdiction under section 30 of the Act and a party has either not appeared in the arbitration or has raised a prompt objection that has not been resolved by the arbitrator by an interim award.

A party may lose the right to object if it is not done within certain time restrictions as set out in section 73 of the Act.

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

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

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

Order setting aside award

When the arbitrator's award has been set aside in its entirety the arbitrator will have no jurisdiction to consider the matter further (in contrast to cases where the award is remitted to the arbitrator). The Act does not expressly provide for what, if anything, is to happen to the costs that have been incurred in relation to the set aside award, let alone in relation to the arbitrator's costs. In an extreme case it might be possible for one of the parties to invoke the court's powers under s. 24(4) of the Act.

Enforcement of the award

Section 66 of the Act provides that an award is enforceable, by leave of the court, in the same manner as a judgment or order of the court. This provision does not however extend to ordering the payment by one party to the other of a sum of money in a rent review arbitration because in such an arbitration the arbitrator's powers extend only to determining the amount of the rent payable under the lease. The provisions of s. 66 to enforce the award do, however, apply to costs when determined and quantified.

Appendix A Further reading

Harris, B., Planterose, R. & Tecks, J., *The Arbitration Act 1996: A Commentary* Publisher: Wiley-Blackwell; 5th revised edition (May 2014) ISBN-13: 978-0470673980.

Scammell, Densham & William's *Law of Agricultural Holdings*, Butterworths Law; 10th revised edition (22 July 2015), ISBN-13: 978-1405789301.

Tackaberry, J. & Marriott, A., *Bernstein's Handbook of Arbitration Practice*, Sweet & Maxwell; 4th edition (2003), ISBN-13: 978-0421757608.



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