



# **THE CONSTRUCTION INDUSTRY MODEL ARBITRATION RULES (CIMAR)**

**1st Edition February 1998**

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## **Introduction**

1. In response to the Bill which was to become the Arbitration Act 1996, the Society of Construction Arbitrators (SCA) initiated the production of Model Arbitration Rules for adoption by all construction institutions and other bodies having interests in construction arbitration. A series of committees was established under the Chairmanship of Lord Justice Auld, including a plenary group, a steering group and a drafting sub-committee which adopted the acronym CIMAR.
2. In the course of its work, the CIMAR steering group published a framework document with suggested draft rules in September 1996. A full draft of the rules was issued in February 1997 and, after wide consultation, the Rules were published as consultation document in April 1997.
3. After further extensive consultation the Rules were recirculated in draft in October 1997 and offered for formal endorsement to all the relevant construction institutions and bodies. This resulted in requests for a number of additions and amendments, while many bodies were prepared to endorse the Rules as printed. This first edition of the Rules, printed in February 1998, lists the bodies who have endorsed the Rules.
4. The drafting and production of the first edition was been undertaken principally by John Uff, FEng QC, Peter Aeberli, RIBA barrister, and Christopher Dancaster, FRICS, the then Secretary, SCA. The Rules will be kept under review and further editions produced by a cross-industry review body which was established under the auspices of the SCA shortly after the publication of the first edition.

## Update January 2002

5. The Review Body was set up under the chairmanship of His Honour Judge Humphrey LLOYD QC. Feedback has been received from the bodies who endorsed the Rules and from users. There has been no evidence of particular problems with wording or content of the Rules themselves to justify any change but comment has been received as to the need for additional guidance in respect of certain of the Rules. This guidance has been incorporated within these updated Notes.

### Drafting

6. The Arbitration Act 1996 (the Act) dictates a radically different approach to arbitration Rules. While the 1950 Arbitration Act contained only general measures and required that Rules should be fully drafted, the 1996 Act contains extensive powers which, in most cases, require contracting in.

7. The drafting team had to decide between incorporation by reference and extensive repetition of sections of the Act within the Rules. The steering group was in favour of the former and decided that, in the interest of efficiency, sections of the Act of immediate relevance should be printed after the Rule in question, with other sections necessary to the working of the Rules being printed as an appendix. As at January 2002 the Act is no longer novel and this decision has been modified in the version of CIMAR included on the SCA web site (see note 10 below).

8. Apart from incorporating powers direct from the Act, the Rules have two other purposes:

- (1) to extend or amend the provisions of the Act where necessary; and
- (2) to add a general framework to the specific powers and duties in order to provide guidance to users as well as to arbitrators.

Objective (2) gives rise to the issue of “user friendliness” which has been much debated. One question was whether the Rules should set out extensive procedures or whether they should be as brief as was consistent with their overall purpose. The approach adopted is essentially one of brevity coupled with clarity, which has generally commanded wide support.

9. The Rules are divided into fourteen sections called Rules with numbering within each Rule running to one decimal place only. In addition, having considered various appendices which might be helpful, the choice has narrowed to two, namely definition of terms (Appendix I) and Sections of the Act referred to but not printed in the Rules (Appendix II).

10. In the year 2000 CIMAR was included on the SCA web site ([www.arbitrators-society.org](http://www.arbitrators-society.org)) in the same form as it appeared in print. It has become apparent in the course of use on the web that the Rules would be far more user friendly on the screen if the sections of the Act that are appended to each Rule were to be replaced with a link to the appropriate section of the Act as it appears in the Government web site ([www.open.gov](http://www.open.gov)). This has now been done. There is one small caveat to this decision and that relates to the occasional fragility of links on the web. If any difficulty is found with these links please inform the site webmaster as identified on the opening page of the SCA website.

## **Adoption of CIMAR**

11. The importance of having the same Rules adopted by all relevant construction institutions and bodies is generally accepted. A large proportion of construction work now spans more than one professional body and disputes necessarily do likewise. There is no good reason for different arbitration rules to exist within the same industry. Specifically, in the light of Section 86 of the 1996 Act not being brought into force, there is no longer an ability to bring Court proceedings in respect of multi-party disputes. If arbitration is to play a proper role in construction disputes, it is imperative that a workable system of joinder should be created. Common Rules are the only way to achieve this in practice (see Rule 3). There are many other aspects of the Rules where a common approach across the industry is highly desirable (for instance, orders for provisional relief, Rule 10).

12. Where any of the contract producing bodies within the industry considers that individual procedural Rules are required, the Rules make express provision for the incorporating of such Rules, for instance in the form of “advisory or model procedures” under Rule 6. There are other express provisions in CIMAR which invite additional Rules. Conversely, however, some Rules will operate only if they are incorporated as drafted by all the relevant institutions. This applies in the case of joinder under Rule 2, where appointment of a common arbitrator must be considered by the persons individually charged with making the appointment.

## **Notes on the Rules**

13. These Notes are based on the Notes that have accompanied CIMAR since publication which have been edited and updated to provide the guidance that has been identified as being necessary by the Review Body.

### **Rule 1**

14. This is largely declaratory, serving to recall the now express requirements as to the basic rules of arbitration.

15. It is in the nature of arbitration that the parties will wish to agree (to the extent that the law allows) how they wish their arbitration to be conducted and it has been suggested in relation to Rule 1.3 that the principle of party autonomy requires that the parties should be at liberty to alter the Rules. While this argument is recognised, the achievement of uniformity throughout the construction industry requires that general amendment of the Rules should be discouraged. Consequently, the Rule is drafted so as to prohibit amendment (save with the agreement of the arbitrator) after the arbitrator has been appointed.

16. Before the arbitrator is appointed, the parties are clearly free to amend CIMAR if they find that this is really necessary. The arbitrator appointed will be accepting to serve on the amended basis. After an arbitrator has been appointed, if the parties wish for some good reason to agree an amendment to the Rules or a procedure in conflict with them, they will have to gain the agreement also of the arbitrator (otherwise, as a worst case scenario, the arbitrator would be compelled to resign). Parties should therefore be careful to consult, together, with the arbitrator before seeking to agree such amendments or procedures. (See also Rule 5.1)

17. Rule 1.6 limits the application of these Rules to a single arbitrator and to arbitrations in England and Wales or Northern Ireland. Any wider applications could be the subject of special Rules issued by individual institutions (for instance the ICE has Rules for Scotland).

18. Rule 1.7 was added late in the drafting process at the request of the JCT whose Standard Form of Building Contract contains an agreement to the bringing of an appeal pursuant to Section 69 (2)(a) of the Act. The Rule is declaratory of what is otherwise the clear effect of CIMAR.

## Rule 2

19. This Rule sets out a uniform procedure for beginning arbitral proceedings for the purpose of the Limitation Acts. To the extent the standard forms differ, they should be brought into line with Rule 2.1. It is also provided that the arbitrator's appointment takes effect from his agreement to act or appointment, even if this is conditional upon acceptance of his terms.

20. The important question of appointing an arbitrator in two or more related disputes is dealt with under Rules 2.5 to 2.7. These impose duties on persons having the function of appointing arbitrators to give consideration to whether the same or a different arbitrator should be appointed. This will be a matter of considerable importance to the parties involved. It is questionable whether these Rules would be capable of enforcement against the person empowered to appoint. A powerful sanction exists, however, through possible challenge to an arbitrator who is appointed otherwise than in accordance with these Rules.

21. The term "related arbitral proceedings" in Rule 2.6 refers to those concerning disputes or differences that raise issues that are substantially the same as or connected with the issues that are already the subject of arbitral proceedings.

22. Rule 2.9 makes it clear that the provisions in Rules 2 and 3 concerning related disputes apply in addition to any contract provisions in this regard, which may exist in the Standard Forms.

## Rule 3

23. This Rule deals both with joinder of disputes and joinder of parties in related disputes. Rules 3.1 to 3.4 permit either party to raise disputes in addition to the initial dispute which is referred. This may be done as a matter of right by the respondent before an arbitrator is appointed.

24. After an arbitrator has been appointed, either party may give notice of another dispute. CIMAR do not preclude the parties from agreeing to consolidate a further dispute with existing arbitration proceedings. The arbitrator should be consulted before this is done. If the arbitrator's position were compromised or otherwise affected the parties should not insist on their right.

25. If one party does not agree that a further dispute should be consolidated with existing arbitration proceedings the arbitrator is empowered to decide whether or not this should be done. In such a situation the arbitrator should always obtain submissions from both parties before making his decision.

26. The arbitrator should not order consolidation of the two disputes if there is a likelihood that a party will be prejudiced as a result, for example by the hearing and the award in the first arbitration being delayed.

27. Consolidation should be ordered if the overall costs of resolving the two disputes will be reduced as a result without detriment to a party, for example by reducing the time needed for the hearing if the same witnesses are involved.

28. In the event that the arbitrator decides that the dispute should not be referred to the same arbitral proceedings, it continues as a separate dispute, there then being no agreement as to the appointment of an arbitrator for that dispute.

29. A party initiating arbitration must normally take into account any matter which is a condition precedent to arbitration. For example, it may be necessary first to refer the matter in question to the Engineer under the contract, and arbitral proceedings may not be available until this has been done. Rule 3.5 applies to a situation where the original notice of arbitration is validly given but a condition precedent potentially applies to the "other" dispute to be referred under Rules 3.2 or 3.3. If the condition precedent has to be satisfied, this may either hold up the proceedings or effectively prevent the other dispute from being joined. Rule 3.5, therefore, empowers the arbitrator to take whatever steps are necessary to resolve the matter, so that the other dispute may be joined (or the arbitrator may decide that it should not be joined on other grounds).

30. Rule 3.5 is expressed in wide terms so as to cover any foreseeable type of condition precedent. In the example of reference to the Engineer, the arbitrator is empowered under Rule 3.5(i) to "decide any matter which may be a condition precedent". Thus, if there is disagreement as to whether the matter in question has been referred to the Engineer, the arbitrator may decide whether or not it has been so referred.

31. Rule 3.5(ii) contains an even wider power to "abrogate any condition precedent". In the example in paragraph 29, the arbitrator could decide that the requirement for the dispute to be referred to the Engineer should no longer apply, if he has already decided that the matter in question had not been referred.

32. Another example of the application of Rule 3.5 is where the contract requires a dispute first to be the subject of mediation or conciliation proceedings within a fixed timescale. One party may allege that the condition precedent has not been satisfied. Sub-Rule (i) empowers the arbitrator to decide whether or not this is so, and, if not, Sub-Rule (ii) empowers him to abrogate the condition precedent. In either event, the arbitrator is empowered to allow the additional disputes to be brought within the arbitral proceedings without further delay

33. Clause 3.5 thus empowers the arbitrator to short-circuit what may otherwise become a time-consuming and unnecessary procedural argument, which may be unrelated to the true merits of the disputes.

34. Note that the definition of "dispute" in Appendix I to the Rules includes a difference which is subject to a condition precedent to arbitral proceedings being brought.

35. Some bodies commenting on the Rules have suggested that the arbitrator should be empowered to order consolidation of separate proceedings in which he is appointed. The consensus view was to the contrary, but any adopting body may itself include such a power by additional Rules.

## Rule 4

36. This Rule concerns the powers of the arbitrator to rule on jurisdiction (Section 30) and to appoint experts, advisers or assessors (Section 37); also the power to give directions in relation to property, examination of witnesses and preservation of evidence.

37. Where experts, advisers or assessors are appointed by the arbitrator the parties must be provided with full copies of any information, opinion or advice that is given so that they have the reasonable opportunity to comment set out in s37(1)(b) of the Act.

38. Specific power is given to order the preservation of work, goods or materials which form part of the ongoing construction work. The arbitrator is also given the power to order any test or experiment, which he may observe with or without the presence of the parties.

39. When operating Rule 4.4 the arbitrator should be careful to avoid unnecessary delay to the progress of the work on site resulting from an order for the preservation of work. Such an order will generally result from a need to take evidence that would otherwise disappear and such evidence should be taken at the earliest opportunity in order that the contract works may proceed without delay. The arbitrator should also bear in mind any provisions in the contract for the continuation of work when quality disputes arise.

40. The circumstances in which the arbitrator is empowered to make an order for security for costs (Section 38) are set out in Rule 4.6. The question whether the arbitrator should give reasons for his order has given rise to a range of views. Rule 4.7 represents a compromise which may be amended by the parties subject to Rule 1.3. The Review Body has prepared detailed guidance on the question of security for costs and this is included as Appendix 1 to these Notes.

41. Although Rule 4.7 is conditioned on a request by a party, an arbitrator is always entitled to give reasons for any decision. Compliance with the general duties in section 33 of the Act may require reasons to be given on any application. An application for security is mentioned in Rule 5.7 as a type of application where the evidence may need to be on affidavit. An arbitrator, before dealing with an application for security for costs, ought to ask if reasons are required. The consequences of non-compliance with an order for security can be severe - see Rule 4.9. If reasons are given the Parties will know that the decision does not go beyond the recorded evidence and was made on the right basis. In addition, as set out above, where a sealed or other offer has been made, the arbitrator may need to demonstrate how the application has been decided. Confidence in the arbitral process is served by openness, so that parties should have no doubt that the arbitrator has acted fairly and impartially, even if the decision may not be that which a party wishes.

42. The arbitrator would be entitled to decline to give reasons if a request for reasons for a decision was made after the decision was given unless there was good reason for the request not having been made beforehand

43. Under Rule 4.8: 1) the arbitrator may agree terms with the parties to the effect that he will receive security from both of them and 2) a Respondent is a Claimant as far as a Counter-Claim is concerned (*see the definitions in Appendix 1 to the Rules*).

## Rule 5

44. This Rule incorporates the powers provided under Section 34, ensuring that the arbitrator has full discretion as to the adoption of rules of evidence, disclosure of documents and the conducting of oral proceedings.

45. Rule 5.1 is intended to make clear the right of the parties to agree any procedural and evidential matter that is not already addressed in the Rules. (If it is in the Rules then Rule 1.3 governs their amendment.) Subject to that party autonomy, the arbitrator also has to decide procedural and evidential matters to the extent that they are not already set forth in the Rules.

46. Some have suggested that by reading Rules 1.3 and 5.1 together it could be argued that CIMAR requires that the parties' autonomy has to yield to the arbitrator's ultimate control. Such an interpretation is not intended. For the reasons set out above, Rule 1.3 requires the agreement of the arbitrator after appointment. So, a solution for any parties concerned by such an argument may be to consider (before appointing the arbitrator) the deletion of the opening phrase "Subject to these Rules" in Rule 5.1 or substituting it with "To the extent that such matters are not already set out in these Rules". It may be appropriate for parties when agreeing a consensual appointment to raise these matters with the arbitrator beforehand or at the preliminary meeting.

47. The power to grant permission to amend in Rule 5.1(c) should be exercised unless there is such injustice to one party that cannot be dealt with by the award of costs. There are three different categories of written statement in an arbitration:

Written Statements of Case: Amendment should always be allowed save where the prejudice to the other party will not be remedied by an award of costs.

Written statements by Counsel: Can be amended at any time as may be required by the handling of the case.

Written witness statements of fact or opinion: If the witness finds that he is not telling the truth in an original written statement he must be allowed to amend or possibly he will be considered to have committed perjury. Where the amendment arises for reasons other than an original genuine mistake the credibility of the witness may come into question as a result.

48. Any order for disclosure of documents should relate to those that are relevant to the issues before the arbitrator. Disclosure may usefully be limited by identifying specific issues that are to be put to the arbitrator beforehand. There is merit in staged disclosure, *e.g.* a party first discloses the documents upon which it principally relies. Preliminary disclosure by lists of files often saves time and cost (provided that the contents are properly identified to avoid dispute about the contents). Inspection follows.

49. Once a party has made all the disclosure that it intends to give without prompting, the other party can then make requests for any documents or classes of documents that have not been disclosed. If they are not disclosed voluntarily the arbitrator may order their disclosure but should only do so if persuaded of the reasonableness and justification of the request.

50. Rule 5.4 is formulated to give the arbitrator discretion as to the way in which he will deal with evidence. He must however ensure that the parties are not taken by surprise by the way in which he administers this rule. He ought therefore at the outset of the proceedings to invite the parties to consider and to agree (and if necessary to decide) whether and to what extent rules of evidence are or are not to be followed. The arbitrator may, for example, decide to accept hearsay evidence without requiring that prior notice is given. In that event he must ensure that the parties are aware that he will be doing this so that no disadvantage is caused to a party who might otherwise expect hearsay evidence adduced without notice to be excluded. If subsequently he were to decide to admit apparently irrelevant or hearsay evidence he must ensure that the parties are aware that he will do so and allow them the opportunity to make submissions as to the weight (if any) that he should give to that evidence.

51. In considering whether to admit evidence that a party submits is irrelevant the arbitrator should be aware that he may run the risk of a challenge under s 68 should he admit truly irrelevant evidence.

52. Whatever rules are adopted as to evidence for the purpose of the hearing, Rule 5.7 requires formal evidence in relation to particular matters, including an application for provisional relief. The reason for this provision is that construction arbitration has become increasingly informal. While in general this is to be encouraged, the matters listed are considered to require at least a degree of evidential formality, so that a party may know the basis on which an order has been made against him. "Some other formal record" will include a written statement of the evidence attested by the witness before the arbitrator or an agreed written record of any evidence taken orally in the presence of the arbitrator, e.g. by a transcript or electronic record. The arbitrator must be prepared to make his own record available to the parties, provided that this is agreed beforehand. A party may well make its own record but must, of course, not give it to the arbitrator without giving a copy to the other party.

53. It is generally appropriate for the arbitrator to require that pleadings or statements of case are verified by the party in person, or, in the case of a Company, by a director or manager with knowledge of the facts.

## Rule 6

54. This Rule deals with the initial stages in the arbitration where the form of procedure must be determined. The parties are required initially to submit information relevant to the choice of procedure.

55. Rule 6.2 has been found to be a valuable initial step in the arbitration. It is for the parties to comply with this Rule without prompting by the arbitrator. In practice this seldom happens and the arbitrator should remind the parties of this requirement immediately on appointment.

56. The arbitrator will normally convene a procedural meeting at which the decision as to procedure will be made and other appropriate directions given. A meeting is to be held unless the parties and the arbitrator consider it unnecessary. An arbitrator who considers that his obligations under Section 33 would be best served by issuing procedural directions without incurring the cost of a preliminary meeting should not be dissuaded by this Rule from making such a suggestion to the parties.



57. A preliminary meeting held with the parties themselves present can often however create a climate encouraging the settlement of the dispute. A preliminary meeting can also be of significant assistance to the arbitrator in understanding the dispute and determining the appropriate procedure.

58. In appropriate circumstances a preliminary meeting or any other procedural meeting can be held by telephone or video conference call.

59. Subject to the parties' right to agree procedural matters (see Rule 5.1), the arbitrator is given wide powers by Rule 6.3, including adopting procedures that may curtail oral hearings. For the reasons in the note to Rule 9.6, an arbitrator must exercise such powers with great care and only after considering the parties' submissions (and hopefully their agreement to the procedure).

60. Rule 6.5 provides that, in giving directions, the arbitrator is to have regard to "any advisory procedure and give effect to any supplementary procedure issued for use under any contract to which the dispute relates". This allows any body responsible for issuing forms of contract to draw up its own special procedure containing requirements for particular types of dispute. A similar provision is contained in Rule 13.5 in relation to costs.

## Rule 7

61. It may on occasion be appropriate for the arbitrator to utilise elements of Rules 7, 8 and 9 in a single arbitration.

62. Rule 7 is a procedure designed for use where there is to be a hearing of short duration with the arbitrator inspecting the relevant work, materials, etc. The parties exchange Statements of Case either at the same time or sequentially as the arbitrator may order. This is followed by a hearing normally of one day's duration. The inspection may be combined with the hearing

63. Under this Rule the parties are discouraged from adducing expert evidence, which will normally be at their own cost. It is of the essence of the procedure that the arbitrator forms his own opinion and Rule 7.4 provides that he is not bound to communicate this to the parties, reversing the effect of Fox v PG Wellfair (1982) 19 BLR 52.

## Rule 8

64. This is an alternative short procedure involving documents only where the parties are required, either at the same time or sequentially as the arbitrator may direct, to submit full written statements of their case.

65. The arbitrator should always carefully consider whether a documents only procedure is appropriate. He should in all normal circumstances accede to any request that he operates Rule 8.4 in terms of further written statements and/or there be a hearing of not more than one day in duration.

66. Where statements of witnesses are submitted it is important for the arbitrator to know that they contain the words of the witness and not some other person who may have composed the statement. Rule 8.2(b) therefore allows for statements to be signed or otherwise confirmed, for instance by a letter to this effect. The arbitrator retains the right to put either written questions to the parties or to direct a short hearing.

## Rule 9

67. This sets out a full procedure where there is a need for the parties to exchange pleadings (the term is not used as such in the Rules). Rule 9.2 sets out guidelines intended to facilitate an efficient exchange of the parties' respective cases.

68. A statement of defence which does not include the following will not comply with Rule 9.2:

- which of the allegations in the statement of claim are denied
- which allegations the respondent is for good reason unable to deny or to admit but which he requires the claimant to prove
- which allegations are admitted

Where a respondent denies or does not admit an allegation

- he must state his reasons for doing so
- if he intends to put forward a different version of events from that given by the claimant, he must state his own version.

69. These requirements apply equally to the defence of a counter-claim (see the definitions) and to any reply or other answer which the claimant may submit to the defence. If these requirements are not satisfied the arbitrator should issue an order requiring compliance at an early juncture. Failure to comply with such an order may result in the making of a peremptory order under Section 41(5) in the same terms and, if this is not complied with, the operation of the sanctions in Section 41(7).

70. The existence of the provisions for amendment of a statement of claim or defence, disclosure and the like is not a reason for non-compliance with Rule 9.2.

71. Rule 9.6 is included to encourage the reduction of unnecessary and costly oral proceedings. The arbitrator should, however, carefully consider the ramifications of precluding oral submissions or speeches by an advocate before deciding to do so unless this has been agreed by both parties. In any event if written opening or closing submissions are ordered in writing the advocates should be offered the opportunity to make brief oral submissions in clarification.

72. The arbitrator should always bear in mind that Rule 9 gives the parties the right to a hearing and he should not deprive a party of this right without submissions from the parties first.

73. The arbitrator is required to give detailed directions for the preparation and conduct of a hearing, for which he must also fix the overall length and times available to each party. In fixing the length of any hearing or the time available to the parties he should always take into account the interests of the parties. The arbitrator is empowered to require any matters to be submitted in writing.

## Rule 10

74. A principal intention of this section is to preserve the claimant's cash flow in proceedings which he is bound to win but in which the amount of his entitlement has not been ascertained at the stage of the proceedings at which the provisional relief is considered and/or granted.

75. The side note to Section 39 of the Act is wrong and does not form a part of the section. In the absence of specific agreement there is no power to make a provisional *award*. The arbitrator's power is limited to the making of an order for provisional *relief*. The arbitrator is given this power by Rule 10.

76. An order for provisional relief may be made on application from a party and after hearing any objections from the other party.

77. The arbitrator may decide that his obligations under Sections 1 and 33 suggest that an order for provisional relief is appropriate. He should in this event give notice that he intends to make such an order and he must allow the parties to make such submissions as they desire before he does so.

78. An order for provisional relief must be based upon formal evidence in accordance with Rule 5.7. In making such an order the arbitrator should note the provisions of Rule 10.3 regarding the giving of reasons. The arbitrator should remember that compliance with the general duties in section 33 of the Act may require reasons to be given. An arbitrator, before making an order for provisional relief ought to ask if reasons are required. If reasons are given the Parties will know that the decision was made on the right basis. (See also paragraph 40 above).

79. An order for provisional relief is subject to the final adjudication either of the arbitrator who makes it or of any other arbitrator who may have jurisdiction over the dispute to which the order relates.

80. There is an alternative to an order for provisional relief. If it is self evident, having taken into account any defence, set-off or counterclaim, that sums are unquestionably due from one party to the other the arbitrator should, on application, order payment in an award under Section 47 rather than as provisional relief. The arbitrator must however be absolutely certain that he is not deciding something prematurely in doing this.

## Rule 11

81. This Rule incorporates powers under Section 41 to dismiss a claim on the ground of inordinate and inexcusable delay or to proceed with the arbitration where one party is in default.

82. The power to make a peremptory order is given under Rule 11.4, where a failure to comply allows the arbitrator to debar the party in default, draw adverse inferences and proceed on the basis of the materials properly provided. A peremptory order may be made only after a party has failed without sufficient cause to comply with an earlier order to the same effect (Section 41(5)).

83. Alternatively, Rule 11.3 empowers the arbitrator to achieve the effect of a peremptory order directly through a single order, providing that a party will be debarred or adverse inferences drawn in the event of non-compliance with the original order. This Rule reflects the present practice of many arbitrators.

84. The final sentence of Rule 11.6 makes clear that an award dismissing a claim for inordinate and inexcusable delay will bar the claim from being re-arbitrated. So, by agreement (unless the parties provide otherwise: see note to Rule 1.3), the parties are here removing the doubt in law whether such an arbitral award which has not addressed the merits of the claim would preclude the claimant from re-commencing proceedings. However, preventing a party from re-commencing while the applicable limitation period has not expired would seem to conflict with the statutory policy allowing the period of limitation in which to pursue one's rights: *Lazenby (James) & Co v McNicholas Construction Co Ltd* [1995] 3 All ER 820. Therefore, it is suggested that a claim should not be dismissed for delay within the limitation period for that claim.

## Rule 12

85. This Rule deals with a variety of matters leading to the award. While the term "interim award" has been dropped from the legislation, Rule 12.1 incorporates the powers under Section 47 to make awards on different issues. It is the practice of many arbitrators to enumerate their awards in the same arbitration sequentially, identifying the matter(s) dealt with in each award as is required by Section 47(3).

86. For the purpose of a hearing on part of the dispute, the arbitrator is specifically empowered to decide what issues are to be determined. Where there is a hearing on part of the dispute, the arbitrator retains the discretion not to give an award or alternatively to make an order for provisional relief under Rule 10.

87. The arbitrator has the widest discretion as to the remedies he may order. Where this includes an order that a party should do some act, the arbitrator has power to supervise or if he thinks fit, appoint some other person to supervise the performance.

88. As a general rule the arbitrator should avoid making an award of specific performance of construction works. An award in damages is normally an alternative. It is far less likely to cause subsequent problems regarding the adequacy of the performance of those works if the cost is ascertained and a money award made, even if this means that the arbitrator has to base his award on an estimate rather than the actual cost of carrying out the work. Some detailed considerations concerning the award of specific performance if both parties are agreed that such an award is appropriate are included in Appendix 2 to these Notes.

89. The powers under Section 49 to award simple or compound interest, and under Section 57 to correct an accidental slip or ambiguity, are incorporated. Rule 12.10 gives the arbitrator the power to notify an award or part as a draft or proposal. Such a notification should be clearly identified as being a draft or a proposal as it may be phrased in such a way that could otherwise create the inference that it should be binding. There is no obligation to do so, but the practice of issuing parts of an award in draft is not uncommon. Issuing an award in draft may lead to the proffering of additional evidence and submissions, as to which the arbitrator is given express powers.

90. The arbitrator should, before making his award on the substantive issues, indicate to the parties that it is his intention, unless the parties agree to the contrary, to reserve his award of costs to be dealt with in a later award and after the parties have been given the opportunity to address him orally or in writing upon his award of costs.

91. The award of interest is at the arbitrator's discretion. He should not make such an award without allowing the parties to make submissions beforehand. He should always tell the parties if he is considering the award of compound interest so that they may make submissions on this point.

92. The arbitrator should ensure that every conclusion that he reaches is supported by and follows logically from the reasons that he gives. Reasons should be given in respect of all matters that are put to the arbitrator for his decision. The award must not deal with any matters that the parties have not asked the arbitrator to decide.

93. Rule 12.11 gives the arbitrator a discretion to deal with a monetary award where there remains outstanding a cross-claim by the other party which may have the effect of reducing or extinguishing the award in question. In such circumstances, and in order to pre-empt a costly dispute as to enforcement, the arbitrator may order payment of the whole or part of the amount of the award to a stakeholder on terms. The arbitrator may thus seek to achieve summary and substantial justice as between the parties pending his decision on the cross-claim. This should be reflected in the terms upon which the money is ordered to be paid. The arbitrator is not bound to exercise this power and would normally encourage the parties to seek agreement.

## Rule 13

94. The general principles to be adopted in regard to the apportionment of costs are set out in Rules 13.1 to 13.3, while preserving the widest discretion to the arbitrator. Rule 13.1 adopts the more direct wording of the UNCITRAL Rules, rather than of Section 61 (costs to follow the event). More detailed guidance on the apportionment of costs is included in Appendix 3 to these Notes.

95. The power to impose a limit on recoverable costs of the arbitration (Section 65) is dealt with the Rules 13.4 to 13.8. The complexity of the dispute should always be considered in addition to the amount in dispute. "Recoverable Costs" includes the arbitrator's fees (Section 59). An order under Section 65 limits what may be recovered from the other party and has no effect on liability to pay fees incurred. More detailed guidance on the limitation of recoverable costs is included in Appendix 4 to these Notes.

96. Earlier drafts of CIMAR incorporated fixed limits on recoverable costs of 25% of the amount in dispute, and 10% in the case of an arbitration adopting the Short Hearing or Documents Only procedures. While these limits were not in themselves contentious, the general view was that they were insufficiently flexible for the wide range of disputes which might be covered by CIMAR. The Rules, accordingly, empower the arbitrator to fix any limit, having regard to any model procedure issued under the relevant contract (see also notes to Rule 6 above).

97. The effect of an "offer of settlement" is expressly provided for under Rule 13.9, in accordance with established practice. The determinations of recoverable costs by the arbitrator himself is dealt with in Rule 13.10.

## Rule 14

98. This Rule incorporates provisions dealing with representation (Section 36), notifications (Section 76) and reckoning of time (Section 78). The parties are required promptly to inform the arbitrator of any settlement or application to the Court.

## Appendix 1 Guidance on Security for costs

Rule 4.6 does not follow either section 726(1) of the Companies Act 1985 (see now Rules 25.12 and 25.13 of the CPR), or the former Order 23 of the Rules of the Supreme Court. It applies to any claimant and not just a company. It will apply to a counter-claimant (see the definitions in Appendix 1 to the Act). Section 38(3) of the Act provides no positive guidance as to the way in which the arbitrator should deal with an application that security for costs is ordered but in most cases the principles developed by the courts on applications under the Companies Act should be followed. Thus the arbitrator should split the application into two stages. The first will be addressed to the question: is the claimant unlikely to be able to pay? If that is answered: Yes, then the next stage will concern the questions: should security be ordered and in what amount? If the arbitrator is satisfied that the claimant is likely to be able to pay the costs, the application ought to be dismissed without starting on the second stage. (Note – the Companies Act is however predicated upon the requirement that the tribunal is satisfied that the claimant **will** be unable to pay which is not the position in CIMAR which sets the test at the level of **being unlikely to** be able to pay).

Stage 1 requires the arbitrator to assume that the defence will be successful and an award will be made in favour of the applicant. (This assumption may be reviewed, if required by the claimant, but only under the second stage.) An application may be made before the applicant has set out its defence. In such circumstances the arbitrator should require evidence on affidavit of the defence, as provided by Rule 5.7, in order to ensure the bona fides of the applicant. Where the applicant has a counterclaim which raises the same issues as the claim (e.g. where the defence is that the work is defective or that delay makes the claimant liable to the defendant), then the applicant must at the outset agree not to pursue the counterclaim if security is ordered and not provided, so that the claim is stayed. Otherwise no practical purpose will be served by an order for security since the arbitration will continue on the counterclaim (see BJ Crabtree (Insulation) Ltd v GPT Communication Systems Ltd (1990) 59 BLR 43).

Stage 1 will however require the arbitrator to establish the probable amount of costs for which the claimant might be liable, were the claim unsuccessful. The arbitrator has also to take into account any orders for costs that have already been made and not satisfied, since costs which the applicant would not be able to recover must be excluded. The arbitrator may also have to consider whether Rule 13 might be exercised (this gives the arbitrator latitude to depart from the ordinary rule that the loser should pay) if identifiable circumstances exist which make it probable that the claimant would not be required to pay all the applicant's costs. Under Stage 2, the arbitrator may fix a lower amount (the courts frequently do so - see later) so there need be no concern that the costs assessed or assumed for the purposes of Stage 1 will be those for which security is ordered under Stage 2. Under the first stage the arbitrator has to make a common sense forecast about ability to pay at the time when the award might have to be honoured. (If the claimant is insolvent no forecast is needed.) The question is not whether the claimant might be unable to pay the costs, but whether the claimant is unlikely to be able to pay them, which is a higher degree of probability.

If the claimant is a company then the applicant's evidence will usually be the latest accounts filed at Companies House. They are rarely up to date and may either not be representative of the present position of the company or be uninformative. A pragmatic approach is justified e.g. if a reputable claimant has always paid its debts then it may be likely to meet its obligations under the award, especially if the alternative is to go out of business. If accounts have not been filed by the date required then some very good reason should be provided, a company ought to be able to file accounts within the time limit required. Companies that do not comply with their statutory obligations may have a reason not to do so, especially if the default is not corrected once the

application is made. A company that wishes to rely upon management accounts to dispel the inferences to be drawn from the filed accounts (or the absence of such accounts) will usually need to have such accounts vouched for by the company's auditors or some other reputable source, as they may contain unjustifiable assumptions, e.g. in the treatment of sales or in the valuation of assets.

If the claimant is likely to be able to pay the costs and if the application is dismissed, the arbitrator may leave open the possibility of a further application, should the claimant's circumstances change. In such event the arbitrator should make it clear that the applicant cannot rely upon evidence which was or ought to have been available at the time of the original application which was dismissed.

The second stage requires two fundamental questions to be answered: is the application being made genuinely to protect the interest of the applicant, or is it being made for an ulterior purpose, namely to oppress the claimant and to stifle the claimant's claim? Useful guidance is given in Keary Developments Ltd v. Tarmac Construction Ltd [1995] 3 All ER 534. Although Rule 4.6 gives the arbitrator a wide discretion to take all circumstances into account the policy of CIMAR must be observed. A claimant who has agreed to arbitrate under CIMAR must be taken to have accepted the risk of the application of Rule 4.6 and its consequence, namely that security for costs will be ordered if actual or probable inability to pay the costs is established. A defence that the applicant has not shown that the claimant **will** not be able to pay is insufficient. If, therefore, the conditions are satisfied, an arbitrator must protect the interests of the applicant.

If the claimant argues the claim will be successful in whole or in part, the arbitrator is not required to decide on the likely outcome and ought only to take account of the claim as it is presented. The arbitrator should not pre-empt the decision on the merits. Normally, the arbitrator ought not to consider evidence that might support or undermine either the claim or the defence unless it is incontrovertible, such as plain admissions in documents. Some claims or defences may need to be examined sceptically, e.g. where the claim has not been properly quantified. A defendant should not have to incur costs in dealing with an ill-thought out claim. An applicant who has not completely revealed its defence to an apparently good claim is at risk in having its bona fides doubted, especially where the application is made early in the proceedings. The inclusion of a reference to the strength or weakness of a party's case emphasises that the arbitrator must consider whether to order security is going to be oppressive to the claimant or whether it is reasonably necessary to protect the applicant since the pursuit of a claim by a claimant which will not be able to honour its obligations (if unsuccessful) is also oppressive to an applicant.

An application for security may require an assessment of the cases of each party. Since the arbitrator will ultimately have to decide the case on its merits, an arbitrator ought to be very careful about investigating the supposed merits of any case and, preferably, ought only to do so with the open and informed consent of the parties, for they may not want the arbitrator to delve into the case, as the views then formed may not be reversed later. If the application does require a decision on the merits it is strongly recommended that reasons are given for the decision, whether or not a request is made under Rule 4.7. The parties can then be sure that the arbitrator is not prejudging the ultimate case.

Sealed offers (variously calderbank or without prejudice offers) may cause difficulties for the parties where an application for security is made. A claimant may wish to reveal the existence of a sealed offer made by the respondent in support of the merit of its case but the respondent does not want the offer made known to the arbitrator as it considers that it may be prejudiced as a result. This point was considered by the DAC (Departmental Advisory Committee on Arbitration Law) and its conclusions were set out in paragraph 196 of its Report on the Arbitration Bill dated

February 1996. Paragraph 196 reads “*We are not disturbed by this. (the disclosure of an offer) It seems to us that a tribunal, properly performing its duties under Clause (Section) 33 could and should not be influenced by such matters if the case proceeds to a hearing on the merits, nor do we accept that the disclosure of such information could somehow disqualify the tribunal from acting.*” The arbitrator should not therefore be concerned that an application for his removal might be successful if he is made aware of an offer that a party considers is privileged and alleges bias as a result. Arbitrators will in any event be aware that offers to settle made by respondents are very often set at a figure that is in excess of that which the respondent considers to be the entitlement of the claimant on a commercial basis in an endeavour to obtain a settlement.

If an arbitrator considers the claimant's impecuniosity has been caused by the conduct of the applicant then the application may be oppressive and security ought not to be ordered. Such assertions about the conduct of the applicant must however be supported by evidence.

The stage at which the application is made may be another symptom of oppression. A party that is legally represented will almost always have carried out a search at Companies House as soon as the arbitration has started. Late applications tend to be made to fend off the inevitability that a claim is likely to succeed unless it is stopped dead in its tracks. It can be unfair to defer an application since a claimant may reasonably believe that its available resources can be used to prosecute the claim. If the arbitrator considers that the application could and should have been made earlier, then a lower amount of security or even a relatively nominal order might be appropriate.

Amount of Security: In order not to stifle a bona fide claim that might be settled it is customary to require security to be provided in stages. For example, the first order might be up to and including disclosure of documents, the next might be up to and including the exchange of experts' reports or up to and including the pre-hearing review, i.e. any crucial stage which might lead to a resolution of the case. The order should cover both the costs already incurred and those to be incurred. An order up to a given stage must clearly define that stage. An order that does not refer to a stage may be taken to be for the whole proceedings up to award. The amount is in the discretion of the arbitrator but the overall objective of arbitration must always be observed, namely to try to resolve the dispute, if at all possible without a hearing. To require a claimant to provide a substantial amount of security for costs may defeat those ends and bring about an injustice.

The applicant ought to present the arbitral tribunal with a clear, detailed (but without revealing privileged matters) and apparently justified statement of the amount of costs that have been incurred, so that they may be seen to be both tangible and justifiable, and the costs that will be incurred, in each case, making a clear difference between the types of cost, e.g. those of lawyers, experts etc. A legally represented party may retain a costs draftsman to prepare a model bill of costs but it is not necessary to do so, provided it is clear what has been or will be incurred, when, by whom and for what purpose. Arbitrators should view statements of costs with some care as they are not likely to be understated. Although the costs of lawyers and experts can be high it does not follow that they or the hours envisaged will actually be incurred. The amount of security ordered should not be used as an instrument of oppression, although it must give the applicant reasonable protection. It should be the arbitrator's conservative estimate of the minimum costs which the defendant is likely to incur and to recover. An order for security is not in the nature of an indemnity.



It is sometimes said that a claimant cannot possibly meet the amount that ought to be provided, so its bona fide claim will be not heard. However, if the company cannot provide the amount itself, it may be provided by the shareholders or other backers of a company or the claimant, but at the price of fettering the working capital of the claimant. In turn, it raises the question whether as a result the claimant will have the ability to pay the costs at the end of the day. A balance will therefore have to be struck by the arbitrator. An arbitrator may wish to be persuaded by the claimant that a company or an individual claimant (e.g. the claimant's family) has no assets before tempering the order that should be made.

A sealed offer is material and may affect the outcome of an application. (See earlier discussion on revealing such offers). The arbitrator must decide whether it may be admitted in evidence, having regard to its terms. If it is admissible an arbitrator should give reasons for the decision so as to ensure that neither party has any reason to question his overall independence and impartiality. The arbitrator may take the view that the amount offered was sensible and that the claimant will be unlikely to receive an award for more and, taking into account Rule 13.9, will thereby be exposed to an award for costs in favour of the applicant. On the other hand, the arbitrator may take the view that the claimant will do better than the amount of the offer, and that the application for security is being made in order to stifle a claim, the merits of which are undoubted, so that in reality the only question is the amount to which the claimant is entitled.

If security is required, the usual order is that the claimant must provide the security within 21 days, failing which the claim is stayed. Security can be in any form satisfactory to the applicant or, in default, to the arbitrator (and the order should say so). Thus it need not be by way of payment to a stakeholder but might be by the provision of a guarantee or bond from a reputable source. If the arbitrator has to decide then he or she will wish to be sure that the security will be immediately enforceable. If the security is not given in the form ordered it is for the respondent to seek a peremptory order under s41(5). (See Rule 4.9). If the security is still not given it is then for the respondent to decide whether an application to dismiss under s41(6) is appropriate. (See Rule 11.6)

## Appendix 2 Specific Performance

If both parties are agreed that an award of specific performance is appropriate or if the arbitrator is for some reason unable to ascertain the cost, such an award should never be a final award. Performance of the award may itself be the subject of dispute between the parties and the arbitrator should not disqualify himself from dealing with those disputes.

The award should deal with the way in which the work is to be supervised. The arbitrator may supervise the work himself but if he does so should ensure that his position as arbitrator is in no way compromised thereby.

An independent supervisor may be appropriate but the method of appointment of this individual must be resolved beforehand. Is it to be an appointment by the arbitrator or a joint appointment by the parties? The terms of reference, fees and the method of payment of the supervisor must also be decided beforehand. The arbitrator must make clear his own overall function with regard to the work as it is always possible that one party may take issue with a decision of the supervisor.

When making an award of specific performance the arbitrator should always endeavour to include an alternative award in damages if the award of specific performance is not honoured by a specific date. Similar considerations apply to an award for the specific delivery or handing over of goods, when the arbitrator must be very careful about the rights to the property or to use the property.

It is not normally considered that the completion of construction works is an appropriate subject for an award of specific performance.

### Appendix 3 The allocation of costs

Rules 13.1 and 13.2 entitle an arbitrator to allocate the costs of issues and evidence. It is not necessary to await the overall result of the arbitration and then to award costs to follow the ultimate event, i.e. to the "winner", although in complex cases this may still be fair. An issue that is heard separately may decide the outcome of a dispute or claim, e.g. on jurisdiction, limitation, or the admissibility of a contractual claim. An issue may be one which clears the ground (e.g. on the effect of exclusion clause) and avoids other costs being incurred (e.g. issues of liability alone). An issue may however simply be about part of a case. Before an issue is ordered or accepted on the proposal of the parties the arbitrator should be satisfied that it will be or is likely to be cost-effective. The arbitrator may wish to know the amount of the costs likely to be affected. Seemingly attractive proposals can save relatively small amounts. The arbitrator may also wish to ask a party suggesting or opposing a course whether it accepts liability for the costs of the issue of the arbitration (where the issue is pivotal). In these ways later argument about liability for the costs may be avoided.

Generally a party who proposes an issue of any kind but is unsuccessful on it is liable to bear the costs (as provided by section 61). Similarly a party who tenders evidence or makes a submission that takes up a significant amount of resources and time but which is not accepted (e.g. about a specific head of loss) may be deprived of the costs involved and may be required to meet the costs of the other party, even if otherwise successful. The possibility of such a costs sanction helps to decide whether a part of a claim or a defence is really essential.

Before making an order which applies the general principle to an issue or to part of a case an arbitrator will need to be satisfied both of the amount of costs at stake and that they can be relatively easily assessed.

Summary Assessment: An arbitrator may adopt the modern practice of the courts. Where a hearing of an application or an issue does not last more than a day and the outcome is that a party must pay the costs in any event the amount of those costs can be assessed immediately by the tribunal. However section 63(3) of the Act requires costs to be dealt with by an award so, unless the parties have agreed to a special procedure for the summary assessment of costs, it is thought that a summary assessment following an application will not be effective since the subject-matter of applications are not usually dealt with by an award (i.e. they do not fall within section 47 of the Act). A summary assessment following the hearing of an issue may be the subject of an award.

If the arbitrator intends to make summary assessments then it is essential that a suitable procedure is adopted at the outset of the proceedings [see section 33(1)(b)]. It should not be introduced thereafter without the consent of the parties. The procedure should follow the model used by the courts, e.g. it should provide for a party only to be able to obtain a summary assessment if a properly verified statement of the costs claimed is served on the other party and on the arbitrator not less than 24 hours before the hearing.

In making a summary assessment the arbitrator should receive submissions from every party. The principles are set out in section 63(5). Section 63(3) must be observed (unless otherwise agreed by the parties). In general it is convenient to inquire first whether the rates claimed are or are not agreed. In many cases the rates are not disputed (especially where the paying party submitted a statement with comparable rates). Guideline rates for lawyers are published by the Senior Costs Judge and by TecSA ([www.tecsa.org](http://www.tecsa.org)) and TECBAR. The inquiry may then turn to the time spent and work done. The arbitrator should not need to spend much time for otherwise it will not be a summary assessment.

## Appendix 4 The limitation of recoverable costs

The arbitrator may limit recoverable costs in respect of a part or the whole of the reference. He may set a limit on the application of a party or by his own motion. If by his own motion he must allow the parties to make submissions to him before making the order.

The arbitrator may set the limit at the outset of the proceedings or at any stage of the arbitration. If he limits recoverable costs during the course of the proceedings he may only do so in respect of costs not yet incurred. It cannot be done retrospectively.

When a limit is set the arbitrator must have regard primarily to the amount in dispute but must always remember that “Proportionality” does not relate just to money. The matters in dispute may involve complex issues of law the resolution of which may be of such importance to the parties that it may be inappropriate to relate the costs of resolution to the amount of money at stake.

The dispute may not involve any money at all, a declaration may be all that is sought. In that event any limit that is set to costs has to relate to what would be a reasonable sum for resolving the matter.

If the arbitrator has set a limit to recoverable costs it is vital that any award of costs specifically refers to the limit that has been set. It is insufficient for the arbitrator to award, for example, “75% of the Claimant’s costs to be paid by the Respondent” in a situation where a limit has been set without stating that it is 75% of the costs up to the limit or that it is 75% of the limit.

Where a limit of recoverable costs has been set the arbitrator must also be very careful in framing his award of costs to consider the application of a subsequent determination of the quantum of recoverable costs under s 63. The successful party may have incurred costs in excess of the limit. The maximum costs that he is entitled to recover is set at the limit but the amount of the costs he is entitled to recover under s 63(5) may actually be less than the limit.

A suitable form of words in this situation would be:

“The Respondent shall pay the Claimant’s costs up to (the limit). Where the paying party considers that (the limit) exceeds the amount that should properly be paid in accordance with s 63(5), those costs shall [be determined by award by me under the provisions of s 63.3] or [ be determined by the court under s 63(4)]”