GUIDANCE NOTE

Conflicts of interest for members acting as dispute resolvers

UK

2nd edition, November 2020

RICS®

CONFLICTS OF INTEREST FOR MEMBERS ACTING AS DISPUTE RESOLVERS

Guidance note, UK

2nd edition, November 2020

Effective from 1 February 2021

Published by the Royal Institution of Chartered Surveyors (RICS)

Parliament Square

London

SW1P 3AD

www.rics.org

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ISBN 978 1 78321 405 1

Produced by the RICS Dispute resolution professional group board.

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Typeset using Typefi

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RICS professional standards and guidance

RICS guidance notes

Definition and scope

RICS guidance notes set out good practice for RICS members and for firms that are regulated by RICS. An RICS guidance note is a professional or personal standard for the purposes of *RICS Rules of Conduct*.

Guidance notes constitute areas of professional, behavioural competence and/or good practice. RICS recognises that there may be exceptional circumstances in which it is appropriate for a member to depart from these provisions – in such situations RICS may require the member to justify their decisions and actions.

Application of these provisions in legal or disciplinary proceedings

In regulatory or disciplinary proceedings, RICS will take account of relevant guidance notes in deciding whether a member acted professionally, appropriately and with reasonable competence. It is also likely that during any legal proceedings a judge, adjudicator or equivalent will take RICS guidance notes into account.

RICS recognises that there may be legislative requirements or regional, national or international standards that take precedence over an RICS guidance note.

Document status defined

The following table shows the categories of RICS professional content and their definitions.

Publications status

Type of document	Definition
RICS Rules of Conduct for Members and *RICS Rules of Conduct for Firms*	These Rules set out the standards of professional conduct and practice expected of members and firms registered for regulation by RICS.
International standard	High-level standard developed in collaboration with other relevant bodies.
RICS professional statement (PS)	Mandatory requirements for RICS members and RICS regulated firms.
RICS guidance note (GN)	A document that provides users with recommendations or an approach for accepted good practice as followed by competent and conscientious practitioners.
RICS code of practice (CoP)	A document developed in collaboration with other professional bodies and stakeholders that will have the status of a professional statement or guidance note.
RICS jurisdiction guide (JG)	This provides relevant local market information associated with an RICS international standard or RICS professional statement. This will include local legislation, associations and professional bodies as well as any other useful information that will help a user understand the local requirements connected with the standard or statement. This is not guidance or best practice material, but rather information to support adoption and implementation of the standard or statement locally.

Glossary

Apparent bias	A situation where the fair-minded and informed observer, having considered the facts, concludes that there is a real possibility that the dispute resolver is biased.
Appointing body	Any appointing body identified by their contract or statute to appoint a dispute resolver. This may include the President of RICS or Chairman of RICS Scotland or their appointed agents.
Bias	A situation where the dispute resolver has a direct (usually pecuniary) interest in the case, and would realistically be affected by its outcome.
Conflict of interest	An involvement between the dispute resolver and one of the parties, one of the parties' representatives or the subject matter of the dispute, or any other circumstances that raises justifiable doubts of bias or apparent bias.
Dispute Resolution Service (DRS)	The body within RICS responsible for conflict avoidance (CA) and dispute resolution (DR) appointments, and the qualification and management of the RICS President's Panel.
Dispute resolver	A surveyor appointed, either privately or by RICS, to resolve a dispute, whether as arbitrator, independent expert, mediator, adjudicator or in any other capacity.
Involvement	A connection between the dispute resolver and anyone on behalf of the parties, or the subject matter of the dispute.
Parties	Individuals or organisations engaged in a dispute. This may include a landlord, tenant, developer, owner, occupier, contractor, subcontractor, members of the professional team or other entity directly involved/named in the context of the dispute.
Party representatives	Individuals, companies or organisations employed by a party to the dispute in a professional capacity, including (but not exclusively) acting as an expert witness or to promote their case either as an advocate or assisting an advocate.

1 Introduction

1.1 Context

Surveyors may be appointed as dispute resolvers either by private agreement between the parties in dispute, or via RICS or other formal appointing parties, such as the Law Society or the Chartered Institute of Arbitrators (CIArb).

A dispute resolver will typically be chosen to resolve a dispute because of their expertise and experience in the relevant field.

This experience will have taken the form of numerous involvements and connections with other parties, properties and markets and may include experience gained from working in a specialised field, in which a relatively small pool of other professionals operate.

As a result, such involvements will often include regular contact with other surveyors, solicitors and professionals who may then appear in front of the dispute resolver as advocate, expert witness or in some other supporting role.

This additional experience plays a role in broadening and deepening the surveyor's experience and expertise, and in resolving the dispute satisfactorily.

The involvement may have a beneficial role to play even where the connection is with one of the parties to the dispute or with the subject matter of the dispute, as Chapter 4 explains. In some circumstances, however, the surveyor may be too closely connected with one of the parties to the dispute, or the subject matter of the dispute, bringing their ability to be impartial as a dispute resolver into question. In such circumstances, the surveyor may then be said to have a conflict of interest, which will prevent them from acting as dispute resolver unless the parties expressly agree they should do so.

This tension between the need for relevant experience, which is clearly beneficial, and the overriding obligation to avoid conflicts of interest, together with maintaining a clear transparent process, is the focus of this guidance note. While each case should be judged on its merits, this guidance note introduces a traffic light approach (Appendix A), providing examples to assist in the assessment of whether or not an involvement might constitute a conflict of interest. This assessment calls for rigour and flexibility, particularly where the pool of possible appointees is small, or where a party objects to an appointment on spurious grounds in order to gain tactical advantage.

1.2 Aims

The aim of this guidance note is to provide advice to surveyors who are appointed to resolve disputes dealing with possible conflicts of interest. It also aims to assist all those parties involved in a dispute to understand the main principles and considerations, and to be aware of when an involvement may develop into a conflict of interest.

RICS members and RICS-regulated firms are required to act with integrity and avoid conflicts of interest. This guidance note provides advice on best practice for dispute resolvers to meet this requirement.

Although this guidance note is aimed at surveyors acting as dispute resolvers, it also provides useful information for surveyors acting in other capacities.

Practitioners should also refer to the current edition of **Conflicts of interest**, RICS global professional statement and may also find it useful to refer to the **Code of Professional and Ethical Conduct for Members** (2009), Chartered Institute of Arbitrators (CIArb).

1.3 Scope

This guidance note is designed primarily to assist those who are appointed, selected or nominated either by the President of RICS or Chairman of RICS Scotland, or other formal appointing party or directly by the parties to a dispute, to act in any dispute resolution capacity. It is also intended to assist the parties themselves and those acting for them by making them aware of the procedures that should be followed.

This guidance note is based on the law and practice in England, Wales and Northern Ireland. It is, however, hoped that the approach adopted in this guidance note will provide a solid understanding of the broader subject of involvements and conflicts of interest which could be applied globally.

1.3.1 Scottish law

We have outlined the main distinction in Scots law in Chapter 3 but those involved in disputes to which Scots law applies should obtain specific Scottish legal advice. Similarly, the law and practice outside the United Kingdom will differ, and local precedent should be followed as appropriate.

1.4 Effective date

This GN is effective 3 months from publication.

2 The overriding principle

The overriding principle of this guidance note is that every dispute resolver should be, and should be seen to be, impartial at the time of accepting an appointment. The dispute resolver should remain impartial for the duration of proceedings until the final decision has been given or the proceedings have terminated.

It is a fundamental principle of justice that each of the parties is treated equally and fairly and that all parties perceive this to be the case. The authorities on the subject show that the courts regard two types of partiality (or bias) as obstructive to justice, because they create a possible conflict between the interest of the dispute resolver and the interest of the parties to the dispute. These two types of bias are:

- **Actual bias**. Where the dispute resolver would have a direct (usually pecuniary) interest in the case, which would realistically be affected by its outcome. In such a case the presence of bias is taken for granted and results in automatic disqualification. A minor pecuniary interest (for example, a negligible shareholding, or the fact that the dispute resolver belongs to a large firm which has on occasion carried out work for one of the parties) will not usually count.
- **Presumed or unconscious or apparent bias**. This arises from an involvement, and is found where the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the dispute resolver was biased.

If the parties agree that the involvement does not give rise to an actual bias, and the appointment is in the best interests of the parties, it may be possible for the dispute resolver to accept the appointment or continue to act even in a case of apparent bias.

3 Impartiality and independence

Dispute resolvers need to be aware that the requirement for them to be impartial requires them to consider whether their relationship with any party, their financial or commercial interests or anything else means that there are justifiable doubts as to their impartiality. Lack of independence, which gives rise to justifiable doubts about the impartiality of the dispute resolver, is an important consideration.

In England and Wales, the **Arbitration Act 1996** does not use the concept of independence, stating that 'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense'. The **Arbitration (Scotland) Act 2010** expresses the same principle in almost identical language: 'the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense'.

The absence of any reference to the additional requirement of independence was deliberate in the case of England and Wales. The Departmental Advisory Committee on Arbitration Law expressly considered in its **Official Report of the Committee on the Arbitration Bill** whether to include justifiable doubts as to the independence of an arbitrator as grounds for removal. It decided not to do so, because arbitration is consensual and 'lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance'. It added that there would be no point in providing for lack of independence as a separate ground, unless it could entitle the court to remove an arbitrator where the lack of independence did not give rise to justifiable doubts about the impartiality of the arbitrator. Therefore, lack of independence is only relevant if it gives rise to such doubts, in which case the arbitrator can be removed for lack of impartiality. Accordingly, to consider a lack of independence as a separate concept that might add to the concept of impartiality would be wrong.

The **Scottish Arbitration Rules**, which appear in Schedule 1 to the **Arbitration (Scotland) Act 2010,** make this point expressly. In Rule 24, there is a requirement for the tribunal to be impartial and independent, but Rule 77 then defines independence in these terms:

> 'For the purposes of these rules, an arbitrator is not independent in relation to an arbitration if (a) the arbitrator's relationship with any party, (b) the arbitrator's financial or other commercial interests, or (c) anything else, gives rise to justifiable doubts as to the arbitrator's impartiality.'

Accordingly, when reference is made in Rule 24 to the general duty of the tribunal to be 'impartial and independent', there appears to be no difference in approach between the position in England and Wales and the position in Scotland: it is likely to be the case that if an arbitrator is lacking in independence, this may give rise to justifiable doubts about the arbitrator's impartiality.

Appendix A bears the concepts of impartiality and independence in mind and uses the International Bar Association's traffic light system as a readily understandable approach to guide users through an analysis of when an involvement should be disclosed and may amount to a conflict of interest. It utilises the following colour code system:

- **red** – situations where it would be inappropriate for the dispute resolver to accept an appointment because of a clear conflict of interest

- **orange** – situations where there is an involvement that might amount to a conflict of interest, where the decision whether or not to accept the appointment should be taken with caution and
- **green** – situations where it would be appropriate to accept, because there can be no possible conflict.

4 Close involvements

As Section 1.1 notes, the potential for conflicts may be greater where the market (and therefore the number of professionals operating within it) is small.

In such cases it is not uncommon for a dispute resolver to have a current or recent professional or personal relationship with one or both of the parties' representatives. This in itself will not necessarily bar acceptance of an appointment. Dispute resolvers should be able to make their own judgement on whether such a relationship gives rise to bias or apparent bias and excludes them from accepting an appointment, or whether it is a matter that should be disclosed to the parties and their representatives but is not a conflict of interest.

It is also not unusual for a surveyor to be acting as a dispute resolver one day, only to find themselves appearing as advocate or expert witness in front of one or other of the same party representatives on an unrelated matter in the future.

These situations do not necessarily create a conflict of interest but, depending on the frequency, timing or other relevant factors, they may give rise to a concern about apparent bias, which should be disclosed to the parties.

Dispute resolvers bear an important duty to be transparent and, in doing so, generating and maintaining as much confidence in the dispute resolution and appointment process as possible.

For example, where the dispute resolver is aware of particular sensitivities in the field in which they operate, either by sector or geographically, or concerning the individuals involved (especially where only one party is aware of the situation) and the dispute resolver anticipates that this may cause concerns, the dispute resolver should disclose the circumstances to the appointing body and to the parties concerned. This will demonstrate complete transparency, yet will not stop the appointing body appointing them – even if challenged – and they would be entitled to proceed with the dispute resolution process.

Under these circumstances, so long as the parties are made aware of the situation and the dispute resolver is comfortable that no bias or apparent bias exists, there is no reason not to accept the appointment. Such disclosure should respect the dispute resolver's duty of confidentiality while striving to be as generic as possible. There are no easy answers to how these conflicting duties can best be resolved. It would be acceptable, for example, for the discloser to say ''You should know that I/my firm are involved in the determination of a rent for a similar property in [town]'.

These instances are to be distinguished from situations where there are substantive involvements that fall within the normal categories of conflict dealt with in this guidance note. For example, the fact that an associate of the dispute resolver acts for one of the parties but works in a different office as part of a large organisation, and is not a substantial contributor to the turnover of the organisation, may not lead to bias or apparent bias. If, by contrast, the associate in question is a partner of the dispute resolver, working out of the same office in a small organisation and/or the party does make a substantial contribution to the turnover of the organisation, then a conflict of interest is likely.

Ultimately, if one of the parties is not happy with the appointment of the dispute resolver, they will still have their own remedies, such as applying to the court under Section 24 of the **Arbitration Act 1996** (and rule 12 of the **Scottish Arbitration Rules**) in the case of arbitration.

If a dispute resolver decides that there is no conflict of interest, it may still be wise to disclose the situation to the parties and their representatives at the outset. Often, what really causes an issue is when things start to go wrong, and the parties discover the dispute resolver is aware of an involvement that was not disclosed earlier. In such circumstances, the parties might seek to blame the dispute resolver.

The traffic light system referred to in Appendix A should therefore only be used as general guidance on whether or not to disclose a relationship – it is not meant to be prescriptive. Often, it is a case of 'knowing it when you see it'. Where there is sufficient doubt raised in relation to the principles in this guidance (see also commentary in Chapter 3), the best course of action is usually to disclose.

5 Disclosure to the appointing body

Dispute resolvers should fully review the proposed appointment before acceptance and should carefully consider who the parties and parties' representatives are, to ensure they will be able to act transparently and impartially (see Chapter 3).

If the dispute resolver considers that there is an involvement not amounting to a conflict of interest, but in the interests of transparency should be disclosed to the parties, then the dispute resolver should also disclose the matter to the appointing body before accepting the appointment.

6 Routes to appointment

The President of RICS or Chairman of RICS Scotland are frequently called on to appoint dispute resolvers. The greatest number of applications for such appointments relate to the periodic review of rents paid under leases of commercial property. Other important areas are the nomination of adjudicators for disputes under construction contracts, and the appointment of rural practice arbitrators under statute.

Surveyors may also be appointed as dispute resolvers either by private agreement between the parties in dispute, or via other formal appointing parties (such as the Law Society or the CIArb). In these cases, there may be other systems in place to detect whether there is any conflict of interest, which should be followed. Where there is no such system, the surveyor dispute resolver is advised to follow the guidance set out in this guidance note, including Appendix B, which relates to the procedure applicable to an appointment by the President of RICS or Chairman of RICS Scotland.

7 After the appointment

Once the appointing body has appointed a dispute resolver, it has no further jurisdiction unless the contract (or, in relatively few cases, statute) otherwise provides. If an actual or possible conflict then arises, it should be dealt with by the dispute resolver, whose duty continues after appointment.

Such actual or possible conflicts may arise because of a change in circumstances (for example, where a property has been sold to another party, or the dispute resolver's firm has merged with another). Sometimes, even if there has been no such change, the dispute resolver or a party may discover an existing state of affairs that creates a conflict.

In such circumstances, the dispute resolver should apply the overriding principle (see Chapter 2) to decide whether the matter gives rise to actual bias. In such a case, the dispute resolver should resign.

If the matter is less obvious, the dispute resolver should consider whether it should be disclosed to the parties. Any doubt should be resolved in favour of disclosure, regardless of the stage of the proceedings.

If the decision is to disclose, the parties and their representatives should be notified in writing immediately, with an invitation for the parties to comment. The dispute resolver can then decide how to proceed in the light of any comments.

The dispute resolver should continue to act if both parties agree in writing that it is in their best interests to do so, unless the dispute resolver has reasons to the contrary. If there is no agreement, the dispute resolver should consider taking legal advice on the best way forward, in terms of costs and time.

The dispute resolver and the parties' representatives should be alert to deliberate attempts to manipulate the appointment process or to undermine the appointment of a dispute resolver at any stage of the process.

8 Practical application of the guidance

This guidance note adopts the International Bar Association's traffic light system (red, orange, green) as a readily understandable approach to guide users through an analysis of when an involvement should be disclosed and may amount to a conflict of interest.

Appendix A lists a number of practical examples, categorised in order of severity, of situations that may or may not constitute conflicts of interest, based on situations taken from the commercial, construction and rural sectors. These lists are not exhaustive and do not cover every situation but should provide assistance in assessing whether a conflict of interest may exist, as opposed to an acceptable involvement (albeit one that may require a disclosure to be made).

The red list offers situations that give rise to justifiable doubts as to the dispute resolver's impartiality, i.e. in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts. The red list also includes situations deriving from the overriding principle that no person can be a judge in his or her own cause. In some cases, parties may agree to waive red list conflicts, but extreme caution should be exercised by all concerned in such circumstances and written consent from both parties should always be obtained.

The red list issues under the traffic light system may be relaxed by agreement as long as there is no actual bias, although parties who are public companies or in the public sector, or who operate within the confines of the public interest, may wish to exercise extra caution in relaxing the provisions of this guidance note. Surveyors should exercise caution before proceeding (or continuing to proceed) in such circumstances.

Some items in the red list will be a question of degree and it will ultimately be for the dispute resolver to decide whether or not to proceed with an appointment.

For example, a dispute resolver having a financial interest in the outcome (see A1.3 and A1.5) would almost always be seen as actual bias and unless the financial interest is relatively insignificant, the dispute resolver would be expected to decline or refuse to continue to act.

In the first edition of this guidance note, the red list was divided into two parts, with the first including conflicts that could not be waived, and the second consisting of those that could be waived. However, even in a supposedly non-waivable case, there is nothing preventing appropriately advised parties agreeing to waive a conflict and appoint a conflicted dispute resolver. Accordingly, the situations that were previously included in the waivable red list have now been distributed between the red and orange lists depending on their weight.

The orange list sets out some specific involvements that, depending on the facts of a given case, may give rise to justifiable doubt as to the dispute resolver's impartiality, but where this is not the only overriding factor for consideration. The dispute resolver has a duty to disclose such situations and the parties then have an opportunity to either object or not. They will be deemed to have accepted if, after disclosure, no objection is made within a reasonable time.

The dominant principle here is that of informed consent and the dispute resolver bears the responsibility for ensuring that the parties are properly informed of the situation.

In summary, in orange list situations, the dispute resolver may proceed unless both parties object or unless one party objects and – on reflection – the dispute resolver agrees with that party.

In all cases, if consent is obtained from one or both parties, a written audit trail of the consent along with discussions with clients/colleagues and the rationale used in deciding to proceed should be retained for reference.

The green list contains some specific involvements where no appearance of, and no actual, conflict of interest exists from an objective point of view. The dispute resolver is not normally required to disclose this involvement to the appointing body or the relevant parties.

In some instances, the dispute resolver will conclude that a particular involvement does not give rise to a conflict. However, in the interests of transparency, it would be best practice for a disclosure to be made. A disclosure is not necessarily recognition of an actual conflict and should not prevent the dispute resolver from proceeding in the event that one party then objects. Once any comments have been received from the parties it is the responsibility of the dispute resolver to decide whether or not they should proceed.

The borderline between these categories is often narrow and will depend on the individual circumstances of the case and the particular market sector in which they fall, and/or the specific requirements of the dispute resolution clause.

Appendix A Hierarchy of conflicts with examples

This appendix bears the concepts of impartiality and independence in mind and uses the International Bar Association's traffic light system as a readily understandable approach to guide users through an analysis of when an involvement should be disclosed and may amount to a conflict of interest. It utilises the following colour code system:

- **red** – situations where it would be inappropriate for the dispute resolver to accept an appointment because of a clear conflict of interest
- **orange** – situations where there is an involvement that might amount to a conflict of interest, where the decision whether or not to accept the appointment should be taken with caution and
- **green** – situations where it would be appropriate to accept, because there can be no possible conflict.

This appendix is intended to provide assistance to dispute resolvers on the circumstances when an involvement may need to be disclosed, and when an involvement may give rise to either bias or apparent bias. The examples listed below are neither exhaustive nor prescriptive.

A1 The red list

1. The dispute resolver is a representative of a party in the dispute or there is some other direct relationship.
2. The dispute resolver has a controlling influence over one of the parties.
3. The dispute resolver has a financial interest in one of the parties or the outcome of the case.
4. The dispute resolver has given advice or provided an expert opinion on the dispute to a party or an associate of one of the parties.
5. A close family member of the dispute resolver has a financial interest in the outcome of the dispute.
6. The dispute resolver or a close family member of the dispute resolver has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.
7. The dispute resolver has a close family relationship with one of the parties, or with a member or any person having a similar controlling influence over one of the parties, or an associate of one of the parties or with an advisor representing a party.
8. The dispute resolver has a controlling influence over an associate of one the parties, if the associate is directly involved in the matters in dispute.
9. A close family member of the dispute resolver has a significant financial or controlling interest in one of the parties or an associate of one of the parties.
10. The dispute resolver regularly acts for one of the parties in the dispute.

11 The dispute resolver is a member of the same firm as the representative of one of the parties, and the size of the firm and/or the relationship between the dispute resolver and the representative is such that a suspicion of bias is likely to arise.

Equally, where a dispute resolver has changed firms, and is aware that their previous firm is involved with one of the parties, then this too is something they should consider disclosing.

12 The dispute resolver's firm currently has, or has had, a significant commercial relationship with one of the parties or an associate of one of the parties.

13 The dispute resolver is already appointed as an independent expert and is then invited to become an arbitrator on a case that is linked to or is subject to the arbitrator's decision on the other case when they are acting as the independent expert.

A2 The orange list

1 The dispute concerns a rental valuation, and the dispute resolver, or their firm, is acting on a rental valuation on a comparable property that they know is likely to be taken up as evidence on the subject property.

2 The dispute concerns a rental valuation, and the dispute resolver, or their firm, has an interest in a comparable property that may be taken up as evidence on the subject property or stands to benefit from the outcome of the dispute.

3 The dispute concerns a rental valuation, and the dispute resolver is invited to act in a capacity that would conflict with an existing appointment, such as where an arbitrator or independent expert is appointed elsewhere as an advisor to one of the parties and where the resolution of the subject dispute would be perceived as materially affecting those other appointments.

4 A member of the dispute resolver's firm (but not the dispute resolver themselves) represents a party or an associate to the arbitration on a regular basis but is not involved in the current dispute, and that member is reasonably removed (geographically and/or personally) from the current dispute.

5 The dispute resolver is a member of the same firm as the representative of one of the parties, but the size of the firm and/or the relationship between the dispute resolver and the representative is such that a suspicion of lack of impartiality is unlikely to arise.

6 The dispute resolver holds significant shares, directly or indirectly, in one of the parties or an associate of one of the parties that is privately held.

7 A close personal friendship exists between a dispute resolver and an advisor of one party, as demonstrated by the fact that the dispute resolver and the advisor regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organisations.

8 The dispute resolver has within the relevant past served as an advisor for one of the parties or an associate of one of the parties, or has previously advised or been consulted by the party or an associate of the party making the appointment in an unrelated matter, but the dispute resolver and the party or the associate of the party have no ongoing relationship.

9 The dispute resolver or their firm has been regularly instructed in the relevant past by one of the parties or their representatives to advise or appear as expert witness.

10 The dispute resolver's firm has within the relevant past acted for one of the parties or an associate of one of the parties in an unrelated matter without the involvement of the dispute resolver.

11 The dispute resolver's firm is currently rendering services to one of the parties or to an associate of one of the parties without creating a significant commercial relationship and without the involvement of the dispute resolver.

12 A firm that shares revenues or fees with the dispute resolver's firm renders services to one of the parties or an associate of one of the parties before the dispute resolver.

13 The dispute resolver and any person having a controlling influence over one of the parties or an associate of one of the parties, have worked together as advisors or in another professional capacity, including as dispute resolvers in the same case.

14 The dispute resolver currently serves, or has served within the relevant past, as dispute resolver in another dispute on a related issue involving one of the parties or an associate of one of the parties.

15 The dispute resolver is asked to act as arbitrator where they have acted as independent expert in the relevant past on a related dispute.

16 The dispute resolver is acting as a representative in an unrelated case where roles are reversed and a party representative in the subject dispute is the dispute resolver in the unrelated case.

A3 The green list

1 The dispute resolver has previously published a general opinion (such as in a law review article or public lecture) concerning an issue that also arises in the dispute (but this opinion is not focused on the case that is being determined).

2 The dispute resolver's firm has acted against one of the parties or an associate of one of the parties in an unrelated matter without the involvement of the dispute resolver.

3 A firm in association or in alliance with the dispute resolver's firm, but which does not share fees or other revenues with the dispute resolver's firm, renders services to one of the parties or an associate of one of the parties in an unrelated matter.

4 The dispute resolver has a relationship with another dispute resolver or with the advisor or one of the parties through membership of the same professional association or social organisation.

5 The dispute resolver has been considered for private appointment on the subject dispute, but this was not taken up.

6 The dispute resolver holds an insignificant amount of shares in one of the parties or an associate of one of the parties, which is publicly listed.

7 The dispute resolver has, in the past, served as advisor against one of the parties or an associate of one of the parties in an unrelated matter.

8 An advisor in the dispute resolver's firm is a dispute resolver in another dispute involving the same party or parties, or an associate of one of the parties.

9 The dispute resolver's firm is currently acting against one of the parties or an associate of one of the parties in other areas.

Appendix C includes a flowchart for easy reference to the application of the lists. However, it should be stressed that this is only a schematic reflection of the very complex reality. The specific circumstances of the case should always prevail.

Appendix B RICS appointment procedure

B1 Application

A party applying to the President of RICS or the Chairman of RICS Scotland (referred to as President or Chairman) for the appointment of a dispute resolver is required to complete a form obtainable on application to the DRS. The details to be inserted into the form include:

- the name and address of the property
- the identities of the parties
- relevant information on the enabling contract and
- any special requirements concerning the dispute resolver that the dispute resolution agreement specifies.

It is in the interests of expediency and cost efficiency that the parties and their representatives provide as much information as is relevant and necessary in assessing the potential for a conflict of interest, such as the identity of related parties and other relationships, which may not be capable of identification by a simple reference to the names of the parties to the dispute and the address of the property. It should be stressed that where a party deliberately or inadvertently makes misleading or inaccurate representations to support its case on appointment, RICS may exclude that material altogether.

The President's or Chairman's role in appointing a dispute resolver is, on the face of it, straightforward: to select a member with the appropriate expertise who is not precluded from taking the appointment due to a lack of impartiality. It is not uncommon for a dispute resolution clause to identify a period during which the parties attempt to agree on the identity of a dispute resolver but if this fails, they delegate the task to the President or Chairman. Ideally, the President or Chairman should be entirely free to exercise their discretion as regards both the requirement of expertise and that of impartiality in the appointment. Other appointing parties may have different procedures.

In recent years, there has been an increased tendency for the parties to attempt to influence the President's or Chairman's decision by stating that specified surveyors or all surveyors from specified firms would not be acceptable, sometimes without stating reasons for the objection. Delays and difficulties are being caused because the system is being misused in some cases, whether through ignorance of the proper principles to be applied, failure to complete the application form fully and accurately, or for tactical reasons. None of these outcomes are acceptable and applicants and respondents are required to make detailed and carefully considered representations with all the relevant information.

Any unsupported statements or representations are unlikely to be considered. Blanket objections or lists of dispute resolvers to be excluded without suitable and sufficient information and reasoning are also unlikely to be considered. This could amount to unprofessional conduct or even vitiate an appointment if a court concluded it amounted to an attempt to manipulate the appointment process.

B2 Approach to the prospective appointee

Once the application form has been received and the appointment fee paid, DRS will select a suitably qualified surveyor (based on the information provided) and will write to inform the prospective appointee accordingly.

The DRS has little information available to decide for itself whether a conflict of interest may exist and relies on appointees carrying out their own investigations.

The prospective dispute resolver is supplied by the DRS with details of the dispute, including the names and addresses of the parties and their representatives and the details of the property involved where relevant. The prospective dispute resolver is requested to disclose to the President or Chairman matters that may be relevant in deciding whether the appointment should be made. More specifically, the prospective appointee is asked to disclose any involvement, in particular any involvement they or their firm has (or has had in the past) with the property, a nearby property or a party to the dispute. If an involvement exists, the prospective appointee is asked to state whether this involvement is believed to constitute a conflict of interest.

The 'relevant past' will vary depending on the circumstances of the case. Five years may be considered appropriate, but a longer or shorter period may also be relevant.

The process of disclosure of involvements and possible conflicts of interest is, therefore, a critically important part of the application process. This is dealt with in Section B4.

B3 Checks by the prospective appointee

A dispute resolver should make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause their impartiality to be questioned on the basis of the information provided. If the information is insufficient then, if appropriate, additional information should be requested. It is important that these initial checks are carried out to avoid a situation where time and cost are wasted because of inadequate checks being undertaken at the outset.

The investigations should include:

- current and historic relationships between the prospective appointee, the subject matter of the dispute and/or the property
- where the dispute concerns value, whether the dispute resolver has instructions regarding a comparable property that would conflict with the proposed appointment
- whether the capacity in which the dispute resolver is invited to act conflicts with an existing appointment, e.g. where a dispute resolver is invited to act as arbitrator on a rent review and the dispute resolver already holds an existing appointment as independent expert. This may lead to a situation where the independent expert's determination is considered in detail in the arbitration dispute
- current and historic relationships between the prospective appointee and the parties to the dispute
- current and historic relationships between the prospective appointee and the named representatives
- more remote relationships, such as those involving the prospective appointee's employer or partners, or organisations associated with the parties and

- other involvements that may either influence or be influenced by the result of the dispute resolver's decision.

The mere fact that such relationships (or involvements) may exist does not necessarily constitute a conflict of interest. However, they may still constitute matters that should be disclosed to the parties and their representatives. The prospective appointee should then apply the overriding principle (see Chapter 2) and consider whether the involvement gives rise to justifiable doubts concerning the dispute resolver's impartiality.

It is important to note that for these purposes an involvement of a partner or member of staff (depending on other factors, such as the size of the organisation) should be regarded as just as important as involvements of the potential appointee themselves. A potential appointee should, therefore, have an appropriate system for undertaking reliable and efficient checks in their organisation. The nature of this system will depend on the size and type of the practice. It is also important to have a system to prevent conflicts of interest arising subsequently by partners or other members of staff accepting instructions from parties, or in connection with nearby properties that could impact on the impartiality of the dispute resolver.

B4 Disclosure by the prospective appointee

The authorities show that most of the alleged problems that arise (particularly in arbitration) do so because of a failure to disclose something that may have appeared to be trivial to the prospective appointee. Once an undisclosed matter is discovered, however, the failure to disclose may itself be regarded as evidence of a lack of impartiality. This could compound and worsen what might originally have been regarded as insignificant had it been disclosed in the first place.

The prospective appointee should therefore disclose involvements or other relevant matters to the President or Chairman after making the checks described in B3. The definition of involvement is wide ranging and is not restricted to matters that may give rise to a conflict of interest – many involvements are not conflicts of interest. The decision as to whether an involvement is impartial or will affect the potential appointment is a matter for the President or Chairman. Under no circumstances should the prospective appointee make any contact with the parties or their representatives at this stage.

Disclosure of an involvement to the President or Chairman does not mean the surveyor will not be appointed, but consideration will be given to the likelihood of such an involvement giving rise to a perceived lack of impartiality. Where a surveyor wilfully or deliberately fails to disclose an involvement, or accepts an appointment and subsequently resigns due to a conflict of interest that should have been apparent to them on the basis of information available, the President or Chairman may conclude that the surveyor is not suitable for future appointments.

B5 Review by the President or Chairman

Once the details are received from the prospective appointee, the President or Chairman will have regard to the overriding principle set out in Chapter 2. The President or Chairman will not appoint someone whose appointment would raise a real possibility of bias and partiality in the eyes of a reasonably minded person. Once the President or Chairman has made themselves aware of all the relevant facts, the test they should apply is not what the party to the dispute or their representative believes, but whether a reasonably minded person could perceive a possibility of bias if the member in question were to be

appointed. If the factors are evenly balanced, it is likely that the President or Chairman will err on the side of caution in deciding whether to appoint.

If the President or Chairman takes the view that the member concerned could not be seen to be impartial, based on the information supplied by the prospective appointee, they will seek another prospective appointee.

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

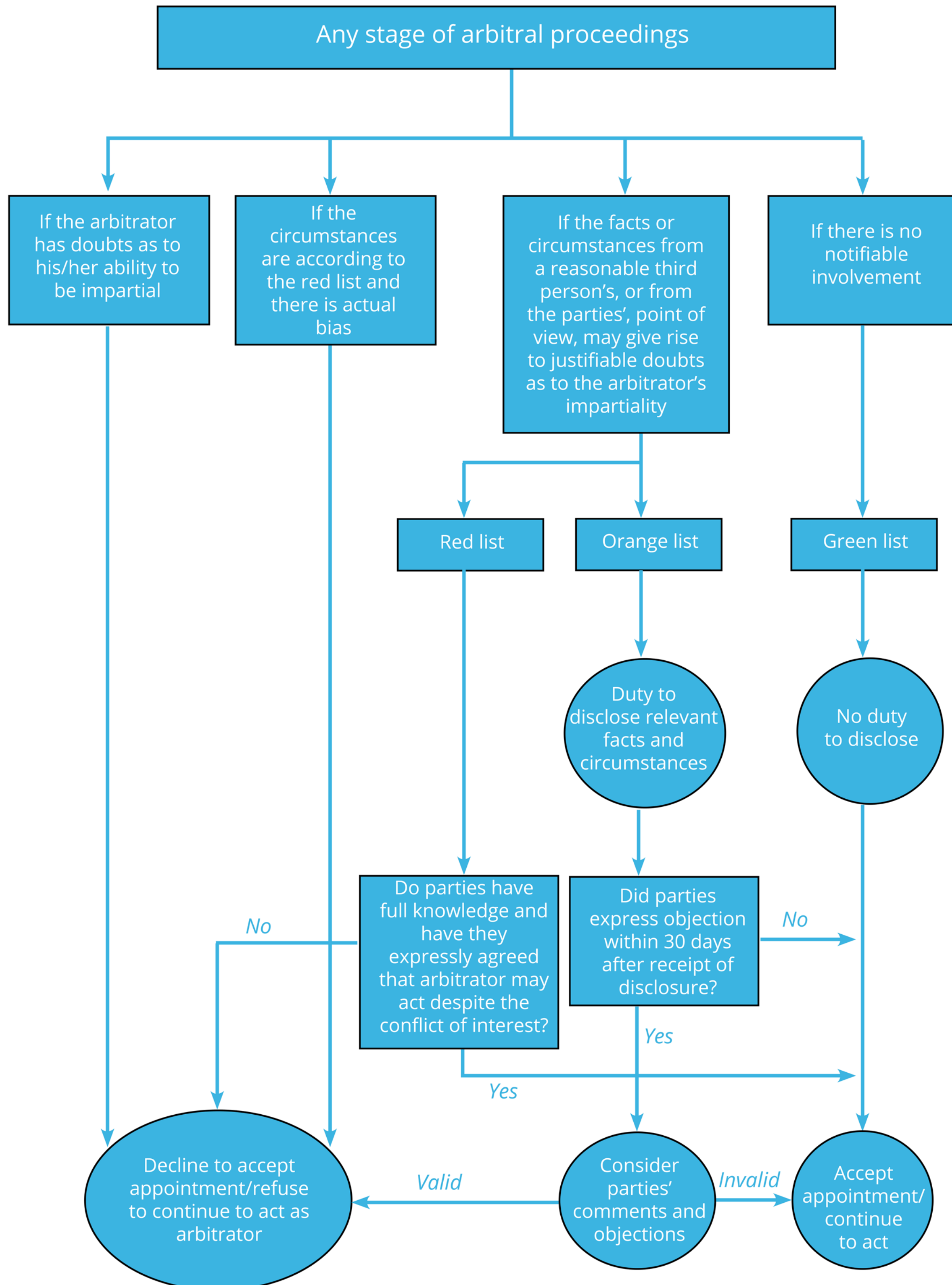
Another scenario could be that the President or Chairman passes on the prospective appointee's disclosure to the parties or their representatives, inviting comments within a reasonable period of time. At that stage the President or Chairman will consider any objections but will not be bound by them, and the final decision as to the appointment will be theirs alone.

B6 Appointment

Once appointed, in the interest of best practice, the appointee may consider it appropriate to again disclose all involvements to the parties. However, the appointee should not allow a party to use this information in an attempt to persuade them to resign. At this stage, the President or Chairman (assuming they have all the facts) will have been satisfied that the appointee is suitable. Only the parties by agreement, the appointee or the courts can decide otherwise.

Nevertheless, such a procedure can be useful as a final check to ensure nothing has been overlooked and anything amiss can be put right early to avoid a more unsatisfactory and expensive problem arising later in the dispute resolution process.

Appendix C Conflict considerations



Delivering confidence

We are RICS. Everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

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