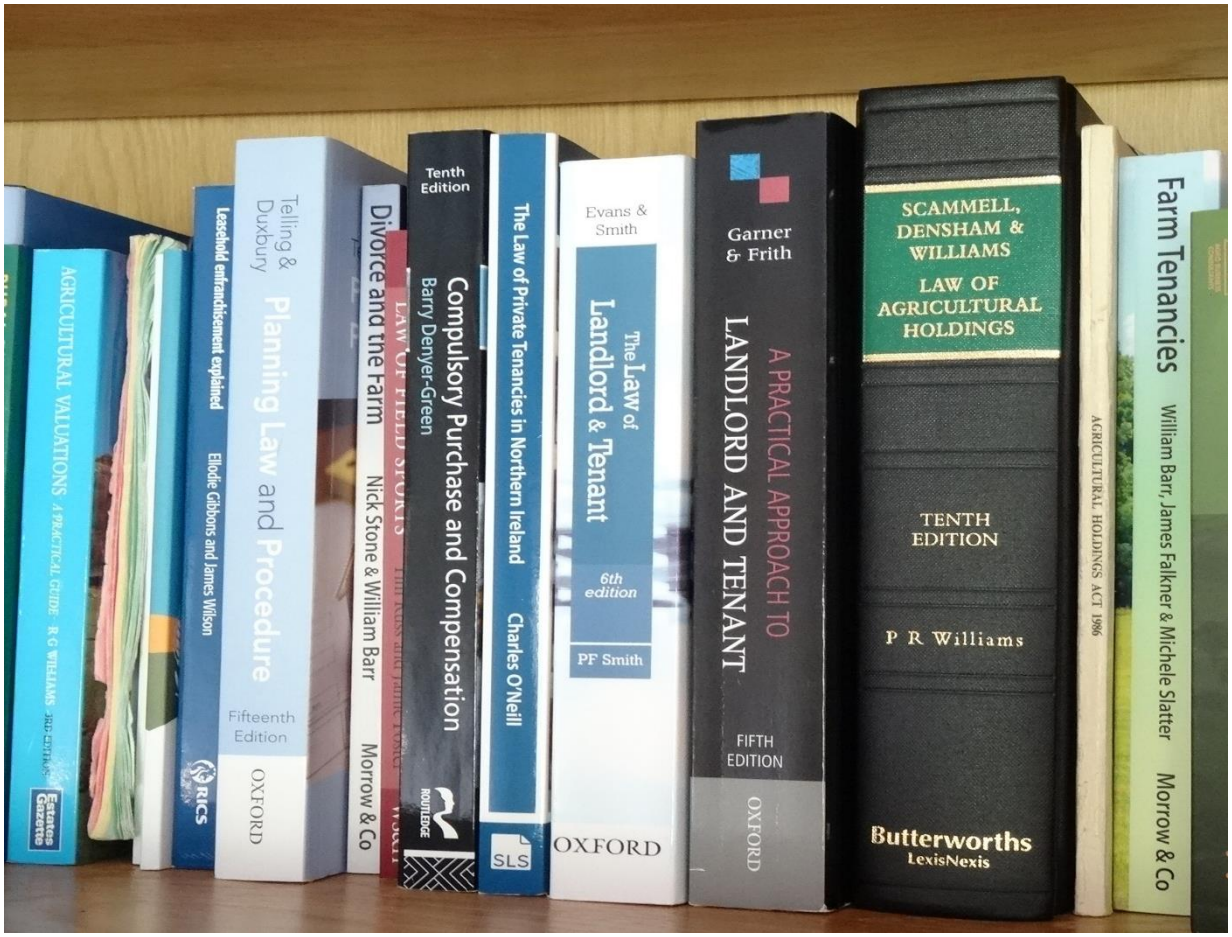
CAAV – FACILITATING DISPUTE RESOLUTION

APPROPRIATE ARBITRATION

For Arbitrators, Advocates, Expert Witnesses and Parties

*



A CAAV Position Paper July 2020

President's Foreword

The Agriculture Bill will, when enacted, bring many challenges and opportunities for CAAV members and their clients. In particular, it proposes that the President of the CAAV be a statutory appointer of arbitrators under both the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1985. The CAAV sees this as an honour, a duty and an opportunity.

The use of arbitration as a cost effective way of settling disputes has been in decline over many years, not because arbitration itself had become outdated, but the extent to which it has become and seen to become drawn out, over procedural and disproportionately expensive. The CAAV sees this as the moment to refresh arbitration as a useful tool for the agricultural and rural economy so that we ready for all the challenges of the post-Brexit world.

Inspired by the CAAV's proposed role, we have given much thought to both preventing and solving disputes, whether large or small, and how to provide appropriate, timely and cost effective methods to achieve results that allow the parties to move forward with their lives and businesses. As Caroline Hutton stressed in her Rowland Beaney Memorial Lecture, included as an Appendix, delay is the enemy of dispute resolution.

That has led to our Dispute Resolution Charter, setting out an approach that is:

- broader than arbitration, covering all forms of dispute resolution and negotiation
- broader than agricultural tenancies, covering all parts of the rural economy
- broader than England and Wales, covering the United Kingdom.

This paper specifically sets out the CAAV's approach to arbitrations and how the powers given to arbitrators by the Arbitration Act can be used positively. Emphasis is placed on the central concepts of the robust arbitration and the robust arbitrator, ensuring that the way in which the arbitration is handled for the parties is appropriate to the matter and the value in dispute.

The Paper is not a conclusion. It is an early part of a continuing process by the CAAV to refresh the way in which disputes are handled and to ensure that in the post-Brexit world that is now before us such matters can be dealt with as quickly, simply and cost effectively as possible to allow the Parties to get on with what should matter to them most, running the business.

David Brooks
President, Central Association of Agricultural Valuers **July 2020**

Central Association of Agricultural Valuers,
Harts Barn Farmhouse, Monmouth Road, Longhope, Gloucestershire. GL17 0QD

Contact: **Jeremy Moody, Secretary and Adviser** jeremy@caav.org.uk

CAAV - FACILITATING DISPUTE RESOLUTION

APPROPRIATE ARBITRATION

For Arbitrators, Advocates, Expert Witnesses and Parties

CONTENTS

Headlines: Refreshing Arbitration

1. **Introduction**
   - 1.1 The Agriculture Bill
   - 1.2 CAAV Work
   - 1.3 The Practical Need for Good Dispute Resolution
   - 1.4 Refreshing Arbitration
   - 1.5 The Need to Know the Arbitration Act
   - 1.6 Dispute Resolution More Broadly
2. **The CAAV's Objectives**
3. **The CAAV's Dispute Resolution Charter**
4. **The Refreshed Arbitration Approach**
5. **The Robust Arbitration and the Robust Arbitrator**
   - 5.1 The Robust Arbitration
   - 5.2 The Robust Arbitrator
   - 5.3 The Parties
   - 5.4 Appeals Against Awards
6. **Appropriate and Proportionate Procedure**
   - 6.1 Introduction
   - 6.2 Other Schemes
   - 6.3 Lessons Drawn
   - 6.4 Time Limits
   - 6.5 Limiting the Volume of Evidence
   - 6.6 Written Submissions or a Hearing?
   - 6.7 Arbitrator's Control of the Hearing
   - 6.8 Cost Control and Capping
   - 6.9 Giving Reasons?
   - 6.10 The Application of Technology
   - 6.11 Alternative Roles?
   - 6.12 Conclusion

APPENDIX

Caroline Hutton's Rowland Beaney Memorial Lecture: *Delay – The Enemy in Dispute Resolution: Is Arbitration under the Arbitration Act 1996 a Step Forward or Back?*

HEADLINES: REFRESHING ARBITRATION

Knowledge of the relevant Arbitration Act (1996 in England, Wales and Northern Ireland; 2010 in Scotland) is the key to successful arbitration not only by the arbitrator but also advocates and those advising the parties, getting to an effective answer practically.

> Arbitration is "to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" (s.1(a), Arbitration Act 1996).
>
> The arbitrator is to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent" (s.33(1)(a), Arbitration Act 1996).
>
> The arbitrator is to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined" (s.33(1)(b), Arbitration Act 1996).
>
> "The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This includes complying without delay with any determination of the [arbitrator] as to procedural or evidential matters …" (s.40, Arbitration Act 1996)

As that shows and subject only to where the parties are agreed otherwise, the arbitrator has the powers to conduct an arbitration by:

- choosing the procedure
- managing it with an eye to effectiveness, costs and timeliness

It is not sufficient that one party wants to delay matters or invoke a disproportionate procedure. The arbitrator can consider the reasons advanced for that but can nonetheless proceed in the way thought best to achieve the outcome unless both parties combine to insist on imposing a more onerous or costly approach.

With the aim of achieving effective outcomes and refreshing rural arbitration through the CAAV Panel of Arbitrators, this paper, to be read alongside the CAAV's *Rural Arbitration in the United Kingdom*, sets out:

- the CAAV's objectives (and its Dispute Resolution Charter) in refreshing arbitration to be more useful as a means of rural dispute resolution
- the key concepts in that of the robust arbitration and the robust arbitrator
- the key tools available to the arbitrator, including:
    - time limits and managing evidence
    - a more active role for the arbitrator in the process
    - choices in the way the process is conducted and control of costs

Confidence in the competent use of the Arbitration Act opens these doors, whether the dispute is under agricultural holdings law or a partnership agreement, a sale contract or a compulsory purchase claim. The underlying skills inform the generality of professional work.

1. INTRODUCTION

"When will mankind be convinced and agree to settle their difficulties by arbitration?"

Benjamin Franklin: Letter to Joseph Banks (July 27, 1783)
The Private Correspondence of Benjamin Franklin

1.1 The Agriculture Bill

The Agriculture Bill marks a watershed moment for British agriculture. It also marks a step change for the CAAV with the proposal for statutory recognition of the President of the CAAV as a "professional authority" able to appoint arbitrators to disputes on the unilateral application of a party to a tenancy under the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995. While the President has long been used to appoint arbitrators and experts under dispute clauses in contracts, this statutory recognition is accepted as an honour, a duty and an opportunity.

1.2 CAAV Work

1.2.1 The CAAV recognises that the responses of representative industry bodies to the DEFRA and Welsh Government consultations of spring 2019 have placed faith in it to achieve improvements in dispute resolution. DEFRA summarised this in its March 2020 response to the consultation:

> "Most respondents who provided comments to this open question held the view that other organisations should be able to provide an appointments service if they had suitable professional accreditations and experience. Many commented that opening the service to other organisations could help to widen the pool of skilled arbitrators making the process more effective for tenants and landlords. Many respondents suggested it would be appropriate to enable the Central Association of Agricultural Valuers (CAAV) and the Agricultural Law Association (ALA) to provide an appointments service alongside RICS."

1.2.2 Since the Agriculture Bill was published in January 2020, the topic of the CAAV's approach to dispute resolution in general and, proximately, to arbitration has been the subject of extended work under the Executive:

- first, Charles Meynell, Simon Alden, David Brooks, Andrew Coney, Nick Millard and Andrew Thomas, then joined by Julie Liddle and Ben Sharples, developing the approach to be taken and
- then, after consultation with Council members, by the Pilot Working Group formed to develop the way in which that approach would be implemented, with Charles Meynell, Matt Anwyl, Andrew Coney, Mark Fogden, Alison Ginn, Rebecca Horne, Shaun Irvine, Julie Liddle, Ben Sharples and Ian Thornton-Kemsley, together providing representation from all parts of the United Kingdom and a range of professional skills and experiences.

We have also appreciated close informal contact with Rural Arbrix officers and others as this process has developed.

1.3 The Practical Need for Good Dispute Resolution

1.3.1 A fundamental basis for this work is that businesses and individuals with disputes that need resolving have the practical need for that to be done fairly, effectively, in good time and with proportionate cost. Once that final and binding answer is given, whether favourable or adverse, normal commercial and personal life can continue with the certainty of that outcome. That means that effective dispute resolution is a service to the sector, to the businesses and people in the sector and so to the members serving those clients.

1.3.2 It is an old saying that "Justice delayed is justice denied" and Magna Carta promised "to no one will we refuse or delay, right or justice". As the Chief Justice of the United States pointed out:

> "A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; …" (Warren Burger, address to the American Bar Association, 1970)

1.3.3 People and businesses have lives and activity that need to continue and should not be held in limbo by protracted, exhausting, distracting and financially draining disputes. Arbitration needs to be seen to be as a positive answer to this, with procedures proportionate to the case.

1.4 Refreshing Arbitration

1.4.1 While rural arbitration has been in long decline, the CAAV sees the President's prospective power and duty as an occasion to change perceptions with the need for arbitration to be refreshed and to be seen to be refreshed. The aim is that it be and be seen to be attractive and effective for those in dispute, with procedures and costs proportionate to the issue, deploying the practicality and breadth of professional experience of CAAV members.

1.4.2 The CAAV's approach to that is founded on the twin concepts of the robust arbitration and the robust arbitrator using the powers given by the arbitration statutes to arbitrators to act impartially and, subject to the joint direction of the parties, use those powers to adopt procedures to deliver the objectives of a timely, cost effective and practical answer for the parties that is then final and binding. The arbitrator has a statutory duty to:

> "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined." (s.33 Arbitration Act 1996)

1.4.3 Approaches to achieve that are explored in this paper, supporting the competence and confidence not only of those who are resolving disputes but also of those acting for clients in disputes as advocates, expert witnesses and advisers so that arbitration and set of tools is used well and robustly in ways that are appropriate and proportionate to each case to achieve a conclusion in a timely, cost effective and fair way.

1.4.4 We are pleased to include as an Appendix the first Rowland Beaney Memorial Lecture by Caroline Hutton, then of Enterprise Chambers and an experienced barrister in property law

and disputes. This is not only because Caroline Hutton is an Honorary Member of the CAAV but because Rowland Beaney was a nationally respected arbitrator, a President of the CAAV and a long-term secretary of Rural Arbrix. That the CAAV should now be so involved in arbitration work is fitting memorial to him. The lecture's topic that delay is an enemy of good dispute resolution informs much of this paper.

1.4.5 The present work builds on the work started by Stuart Wroe, as President, on the work of the expert witness with an accompanying publication, stressing what is expected of an expert by the courts, arbitrators and other forums. That was developed by Rowland Beaney with the Disputes Days developing the skills of members acting for clients in disputes, whether in arbitrations or any other forum.

1.4.6 Since then, the CAAV published *Means of Dispute Resolution* following the Deregulation Act 2015 opening the door to third party and expert determination under the 1986 Act. The CAAV's work on dispute resolution continued with the publication of *Mediation* in June 2019, recognising the expectations of courts that litigation should be avoided while mediation can resolve more fundamental or elusive issues than those that can be referred to determination whether under statute (as with tenancies) or otherwise.

1.4.7 The importance of the 2006 repeal of the 1986 Act's Schedule 11 for tenancy arbitrations in England and Wales was noted in the CAAV publication *Agricultural Tenancies: The 2006 Reforms and Update*. This publication and its sister paper, *Rural Arbitrations in the United Kingdom,* offering a professional review of the law, procedures and practice of arbitration, now bring it home that the legislation for agricultural tenancy arbitration in England and Wales is the Arbitration Act 1996, as it is for all other arbitration in England, Wales and Northern Ireland.

1.5 The Need to Know the Arbitration Act

1.5.1 Thus, it is the Arbitration Act that is the Act that has to be known with the powers that it gives to the robust arbitrator to find the appropriate route to give a timely, cost effective and practical answer to a dispute or difference.

1.5.2 In Scotland, the equivalent statute is the Arbitration (Scotland) Act 2010, written in essentially similar terms. There, the CAAV member association, the Scottish Agricultural Arbiters and Valuers Association (SAAVA) is a statutorily recognised Arbitral Appointments Referee. While agricultural tenancy arbitrations, diminished by the Agricultural Holdings (Scotland) Act 2003, remain outside the 2010 Act, the principles of impartial, effective dispute resolution apply across the board. All other rural arbitrations are handled under the 2010 Act, making it an Act that has to be known.

1.6 Dispute Resolution More Broadly

1.6.1 The CAAV sees that dispute resolution is an under-appreciated area of professional work but one that is of necessary importance to business life in providing answers for businesses and people to be able to move on. It should be an area of work in which more members see providing a good service as rewarding and feel confident in coming forward to be arbitrators or other dispute resolvers or to act in disputes for clients.

1.6.2 While arbitration is often seen in the rural world as synonymous with agricultural tenancy disputes, the CAAV is looking at this moment as an opportunity not only to deliver the proposed statutory obligation but to develop an approach to dispute resolution in its broadest sense. While this text focusses on the immediate work of reviving arbitration and the response to the Agriculture Bill, the CAAV is developing a comprehensive approach to serve the rural sector that is:

- broader than arbitration, covering all approaches to dispute resolution
- broader than tenancies, covering all rural property and business
- broader than England and Wales, covering the whole United Kingdom.

This includes means for parties to resolve a difference without necessarily having recourse to formal dispute resolution, whether through proper negotiation or by non-binding review of an issue (early neutral evaluation) or with mediation.

1.6.3 The various dispute resolution approaches, from early neutral evaluation to arbitration, expert determination and mediation and the various blends of these such as med-arb, offer a tool box of wider application. That larger canvas would then help sustain the Government's desire to see a wider choice of agricultural arbitrators.

1.6.4 Consideration of the arbitration provision in the Agriculture Bill has precipitated early and broad action by the CAAV to take this wider agenda forward. The CAAV intends to offer a range of tools that will be attractive to parties, their advisers and those who might be appointed to resolve disputes, by providing the opportunity for cost-effective and time-effective resolution mechanisms to the benefit of the rural economy.

2. THE CAAV'S OBJECTIVES

THE CAAV'S OBJECTIVES

With that background, the CAAV has the three objectives of:

(i) undertaking the appointment function properly, with a refreshed and robust style that responds to the challenges made by those who have supported the CAAV being given this role who may be seen to want more than an alternative provider of the same service

(ii) offering a wider dispute resolution service for rural business and property disputes, including:

- tenancies – agricultural, commercial, residential
- property contracts – for sale, etc
- business and commercial contracts
- compulsory purchase
- utilities and other services
- boundaries
- partnerships.

(iii) promoting the professional standing and expertise of the Association's members.

These are developed further in the **CAAV's Dispute Resolution Charter**.

3. THE CAAV'S DISPUTE RESOLUTION CHARTER

The CAAV sees effective and appropriate dispute resolution as a fundamental and necessary part of business and social life, so that businesses and individuals can have issues resolved in a practical way that enables them to continue their affairs and preserve any continuing relationships between parties. The right approach will vary with the case and many disputes may be avoided by effective early action and negotiation. Where there is a dispute, delay, unnecessary cost, indecision and poor decision making are the enemies of resolution.

The CAAV Service - On that basis, the CAAV is now providing access to professional dispute resolution:

- across the United Kingdom
- for all forms of dispute concerning rural property and business, including but not limited to agricultural issues, other commercial and business activity and contracts, compulsory purchase and utilities work, and development contracts and projects
- using the full range of dispute resolution methods, short of the courts, from early neutral evaluation to expert determination and arbitration, together with mediation

with the object of appointing (or, as required, nominating) a dispute resolver appropriate to each case. Such a dispute resolver may be able to undertake a number of different dispute resolution roles.

Aims - The CAAV is therefore committed to dispute resolution, including arbitration, being:

- fair to and impartial between the parties
- active in offering a timely and cost-effective service
- conducted as far as possible in a robust manner appropriate to the dispute
- focused on providing a decisive answer to the dispute.

Expectations - The CAAV expects all those it appoints to resolve disputes to:

- be committed to those aims
- have a command of the relevant statute and common law and commercial practice
- be deft in use of the procedures to achieve the aims, recognising what is apt for each case
- be aware of the importance of ensuring timeliness in dispute resolution
- be robust in decision making
- be compliant with its professional standards, including its Professional Conduct Bylaw 1 set out below
- expect and require those participating in an arbitration to comply with the professional standards relevant to them.

Actions – To those ends, the CAAV will:

- establish, maintain and review panels of appropriate professionals able to be appointed to resolve disputes in accordance with this Charter
- set requirements to support its expectations of those people
- provide briefing, guidance and opportunities for their development to meet these aims.

CAAV PROFESSIONAL CONDUCT BYLAW 1

Each member shall in all points of business act professionally and with probity, diligence, honesty and integrity and shall discharge all professional duties:

(a) with due care, attention, competence and respect for all parties

(b) honouring, as relevant, the duties of a professional to a court, tribunal or equivalent forum

(c) with the objective and independent exercise of professional judgement upholding and demonstrating these professional standards in that work, so as to maintain the reputation of the Association and that of the member as a professional.

4. THE REFRESHED ARBITRATION APPROACH

Esto bonus miles, tutor bonus, arbiter idem integer
Juvenal, Satura, viii l.79

Be a good soldier, or upright trustee
An arbitrator from corruption free
(*Translation, John Dryden, 1692*)

Arbitration Act 1996

1 General Principles.
The provisions of this Part are founded on the following principles, and shall be construed accordingly—
(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
(c) in matters governed by this Part the court should not intervene except as provided by this Part.

Arbitration (Scotland) Act 2010

1 Founding Principles
The founding principles of this Act are—
(a) that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense,
(b) that parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest,
(c) that the court should not intervene in an arbitration except as provided by this Act.
Anyone construing this Act must have regard to the founding principles when doing so.

4.1 In summary, the CAAV sees that:
- the proposed statutory recognition, supported by farming's representative bodies, is an honour and a duty to be fulfilled for the sector
- agricultural arbitration has been withering on the vine for many years
- it needs to be refreshed if it is to survive as an area of work
- the Government is looking for wider choice of arbitrators
- there is much else to be developed in rural dispute resolution, both for dispute resolvers and members advising clients in disputes.

4.2 In seeking to refresh arbitration and recover its reputation, the concerns are to encourage:

- business efficacy in the cost effective and timely achievement of answers, recognising that cost is not only measured in direct financial terms but also in time, energy, goodwill, uncertainty, lost options and unintended consequences
- the tailoring of the approach so that it is appropriate and proportionate to the issues at stake
- the model of the "robust" decision maker and a "robust" process
- a wider pool of arbitrators than now on the RICS Panel (a stated Government objective).

4.3 The object here is to achieve both change and the perception of change. Failing to do both is likely to mean that agricultural arbitration continues to wither and weaken the overall drive to build dispute resolution as an area of practice.

4.4 For arbitration and with the goals of cost-effective and timely practical business efficacy, two aspects are proposed for this:

- a framework to support "robust" arbitrations with confidence in using approaches including but not limited to:
    - time limits
    - relevant evidence
    - whether settled on written representations or by a hearing
    - the arbitrators' control of the process
    - cost capping

and

- the concept of the "robust" arbitrator using these tools and driving the process so far as the parties do not combine to instruct otherwise.

4.5 The approach proposed for arbitration tackles concerns about both structures and how they are used, so that the structures offer support for and enable their robust use. As simply changing structures is not seen as sufficient, the approach of arbitrators to managing cases - "the ghost in the machine" - and the perception of that are key elements of a new approach, to be reinforced by the education of all with an interest.

4.6 That means looking to arbitrators who are confident in making full use of the comprehensive box of tools available to an arbitrator to encourage and support better outcomes, deliverable within the Arbitration Act 1996 and, in Scotland, within the Arbitration (Scotland) Act 2010. Seeking consensus where none exists or the lowest common denominator incurs unnecessary delay and expense.

4.7 Statutory arbitration for agricultural tenancies under the 1986 and 1995 Acts is to be seen as one component in that comprehensive framework which can also offer options for the resolution of tenancy issues prior to a statutory appointment being required.

4.8 An improved approach to dispute resolution should start with encouraging more constructive negotiation between the parties, so that this is done in a timely way allowing good management of the process and the consideration of options in reaching a conclusion, ideally a mutually agreeable one. With the central example of the rent review, early engagement and early identification of key issues will help that and also allow consideration of alternatives to

statutory arbitration (such as third party, non-binding review – early neutral evaluation) while leaving time for that should it prove to be required.

4.9 The framework for this can be considered as, first, the CAAV's general facilitation of dispute resolution (including options prior to a statutory appointment) and then, more specifically, the approach to a statutory appointment:

Generally (and so, for the 1986 Act, before a statutory appointment need be invoked):

- an offer of a wide range of approaches to disputes and differences (described by Caroline Hutton as constituting a maze of routes rather than a hierarchy) including:
    - those that might assist prior negotiations in reaching a conclusion, such as:
        - non-binding review of an issue or issues, seen as an option with considerable potential to help parties over a difficulty by drawing on an external, respected view
        - mediation with its capacity to review more issues than can be referred to a statutory dispute
    - options for voluntary agreement as alternatives to statutory arbitration, such as:
        - "med-arb"
        - expert determination
        - frameworks for a jointly instructed arbitration to be cost effective.

For arbitrations, more specifically:

- what can be done within the 1996 Act (2010 Act in Scotland)
- a proactive model of conduct which could include:
    - viewing the arbitration appointment as a trigger
    - the arbitrator offering a willingness to have the reference widened to consider other issues or take alternative instructions
    - a problem-solving focus on the core issues in a case, the arbitrator putting issues to the parties, etc
    - conduct of the parties
    - cost capping, etc
- the arbitrator's relative immunity from action.

4.10 That framework will require explanation, training and support for advisers and dispute resolvers, with promotion to the outside world.

5. THE ROBUST ARBITRATION AND THE ROBUST ARBITRATOR

"It did arbitrate on the several reports … not like a drowsy judge, only hearing but also directing their verdict"

Robert South, The Image of God in Man, St Paul's Cathedral, 9th November 1662

Arbitration Act 1996

33 General Duty of the Tribunal.

(1) The tribunal shall—

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

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

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

34 Procedural and Evidential Matters.

(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include—

(a) when and where any part of the proceedings is to be held;

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

(h) whether and to what extent there should be oral or written evidence or submissions.

(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

40 General Duty of Parties.

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

(2) This includes—

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

5.1 The Robust Arbitration

5.1.1 An arbitration does not have to be operated on the model of traditional court room process. Its object is to achieve an outcome within a statutory framework that requires impartiality and fairness, turning on the evidence and arguments that have been tested with the parties, and doing so without unnecessary cost and delay.

5.1.2 The key lies in the arbitrator's powers over procedure to deliver the statutory duties. Provided the approach lies within the statutory requirements, the only fetter on the arbitrator is a joint direction by the parties. Where the parties do not agree on procedure, the arbitrator can consider the submissions of each but then resolve on the process to be taken and set this out in directions.

5.1.3 It might simply be unreasonable and disproportionate to the case for the arbitrator to accede to the demand by one party only that, for example, a full hearing be held. Even where an initial case is made that leads an arbitrator to accept that, it might still be subject to a caution that should it prove unwarranted it will be relevant to costs.

5.1.4 The practical point is to have a realistic framework of expectations and time limits for action so that, subject to alternative agreement by the parties, the arbitration moves through its stages effectively without undue cost and delay. "Justice delayed is justice denied" while delay imposes cost when commercial life requires decisions.

5.1.5 The principal stages after the arbitrator's appointment and any ancillary correspondence then are:

- the preliminary meeting (whether real or virtual) and resulting directions setting out the procedural path to a conclusion
- the submission and exchange of written evidence and argument, which would need to be required to be in substantive form and undertaken within a stated time period
- responses to those submissions and to any arbitrator's questions on them to be exchanged within a stated time period

- arrangements for a hearing (if one is to be held), to be focussed on substantive issues, or the determination
- publication of the award or determination
- consideration of costs.

5.2 The Robust Arbitrator

5.2.1 Within and using the framework of the 1996 Act (2010 Act in Scotland), the arbitrator would be expected to act to reach an assured and decisive conclusion, working from evidence that has been considered by the parties. Caroline Hutton's Rowland Beaney Memorial Lecture put it more dramatically: "Be bold and bloody as an arbitrator - but act lawfully" in commending "the freedom of a determined and skilful arbitrator to act fairly but swiftly in resolving an agricultural tenancy dispute".

5.2.2 This is likely to see the arbitrator use the powers of s.34 of the 1996 Act to take a pro-active role in managing procedure, focusing on the key issues, treating the parties with respect and delivering a conclusion. The approach to costs will be part of that and may consider the quantum of the case, the outcome and the conduct of the parties.

5.2.3 As Caroline Hutton observed in her Rowland Beaney Memorial Lecture:

> "In practice, however, a firm and pro-active arbitrator with a real understanding of the dynamics of dispute resolution and co-operative parties are required if the benefits in terms of cost and time savings of arbitral flexibility and finality are to be obtained. Otherwise the process falls apart and, where the parties have been compelled to arbitrate, that matters."

5.2.4 She continued:

> "Ultimately the procedure under AA 1996 need not be adversarial as the arbitrator can, unless the parties agree otherwise, in the last resort play the grand inquisitor under section 34(2) if that is the best way to achieve a fair and cost effective resolution."

5.2.5 Confidence in guiding business, capping costs, putting questions and reaching conclusions are all features of this approach.

5.2.6 This might typically see less reliance on legal assessors in the determination of procedural disputes; it is for the parties to put or respond to any legal arguments (which may, if novel or complex, need to be referred to a legal assessor) and for the arbitrator to take the responsibility for the process and the determination of the dispute.

5.3 The Parties

Recognising a point frequently made by arbitrators, this approach supports the arbitrator in acting where the parties are dilatory, whether passively or actively so. Ultimately, the arbitrator can proceed without one party (*ex parte*), once confident that sufficient notice and warning has been given.

5.4 Appeals against Awards?

5.4.1 Since Schedule 11 of the 1986 Act, with its provision for stating a case, was repealed in 2006, there are few opportunities under the 1996 Act to challenge an award in the courts.

5.4.2 Even when, despite the limited grounds for doing so, an award is referred to the courts, the experience is that the courts allow very few of those appeals. It is reported that of the 274 arbitration appeals lodged in England and Wales between January 2015 and March 2018, just five were successful. The Scottish Courts and Tribunals User Group records just 13 appeals to the Court of Session between April 2011 and August 2017 of which only 3 appear have had any success.

5.4.3 These statistics, if nothing else, should reassure arbitrators that if a robust approach properly undertaken is challenged it is highly unlikely to result in a successful appeal. While there may have been an historic stigma associated with being challenged, that is not necessarily an indication that a mistake has been made. There should be more concern to act in true accord with the Arbitration Act. "Bold and bloody" arbitrators will, by definition, annoy at least one of the parties and possibly all of them. Appeals may be made but an arbitrator who has acted in accordance with the Arbitration Act, drawing on a good knowledge and competent use of its provisions, will find the courts respect that.

5.4.4 Some of the possible issues in this were considered by the Court of Appeal in *Checkpoint v Strathclyde Pension Fund* which dismissed an appeal against an award. *Compton Beauchamp Estates v Spence* is an example where an award on an FBT rent review dispute was referred to the court which, although perhaps critical of the arbitrator, dismissed it.

6. APPROPRIATE AND PROPORTIONATE PROCEDURE

6.1 Introduction

6.1.1 With these objectives, the toolbox for this approach draws on the common themes revealed by a review of the array of simplified schemes:

- using time limits
- limiting the volume of evidence submitted
- ensuring that the costs are proportionate to the issues in dispute
- leaning towards written representations
- active control of proceedings by the arbitrator.

These and other tools provide arbitrators with means to set out a process proportionate to the case in hand.

6.2 Other Schemes

6.2.1 Consideration has been given to the existing examples of:

- the RICS **Simplified Arbitration Scheme** aimed at rent reviews under the 1986 and 1995 Acts with:
    - each party paying their own costs
    - arbitrator's fee capped at £3,000 with a further £1,000 for a hearing
    - arbitrator able to
        - decide if any expert opinion evidence should be heard
        - examine that expert (without examination and cross examination)
    - the aim of an award within 20 working days of written submission or close of the hearing

  It is seen to have attracted little use, perhaps because it is
    - little known or understood
    - pitched as being for minor issues, so discounted by many
    - with its name, tainted by the perception of arbitration
- the CIArb **Business Arbitration Scheme** (BAS) for lowest value disputes with:
    - tight time limits
        - 7 days each way for the submission and response
        - 10 days for the appointment
        - arbitrator's directions as to timetable to be given in 7 days
        - any hearing and site visit each limited to a half day
        - 89 days from appointment for the award
    - cost awards limited to £1,000
    - a fixed arbitrator's fee (before expenses) of £2,500 (in principle each party paying half) with a further £1,000 for a hearing and again for a site visit (both limited in time)
    - the CIArb's DAS taking and releasing the fee after the conclusion on receiving the arbitrator's fee invoice and award
- the CIArb **Controlled Costs Arbitration Scheme** with
    - time limits of 28 days each way
    - any hearing limited to a day and the arbitrators able to specify who will be heard, conduct the questioning and require if any witnesses are to be heard together

    - 180 days as the default period for the award
    - default cost caps of
        - 5 per cent of the quantum for the arbitrator's fee
        - 15 per cent of the quantum as awardable costs
- the **Construction Contracts Adjudication** regime operated by a range of bodies under statutory provisions designed to give a business answer now, to keep payments flowing and construction in progress, even if the result is later subject to appeal. With various permutations:
    - the adjudicator is to be appointed within 7 days of the application
    - the claimant submits the statement within seven days of applying
    - the respondent then has seven days.

6.2.2 All these schemes limit evidence to a lever arch file though BAS sets a limit of 5,000 words for evidence and witness statements if there is no hearing.

6.3 Lessons Drawn

6.3.1 While each of these schemes is essentially presented as a carve-out from a full regime and only relevant for application in specific cases such as low value issues, construction disputes or rent reviews, they can be seen as offering tools for use in any arbitration. Instead, the use of fuller and more traditional procedures might need to be justified by the scale or complexity of a case, the salience of legal issues or evidence having to be taken on oath.

6.3.2 While these are the tools for an arbitrator, they are also part of the repertoire of the advocate for a party. Advocates and advisers need to be familiar with these tools to advise their clients of the approaches that are appropriate.

6.3.3 The relevance of this observation to rural disputes is that, by the standards of the wider economy, many are for low value issues. Of itself, that points to tailoring the procedure to suit the case within the requirements of the relevant Arbitration Act rather than automatically following a more courtroom-style procedure. Even in the wider economy, arbitrations are now typically conducted in writing without a hearing – as now is much judicial work. Agricultural disputes have perhaps become an outlier, especially when their value is considered.

6.3.4 Common Themes in Simplifying Arbitration

Reviewing those schemes shows that the common components that can be considered in determining the appropriate procedure for any arbitration are:

- **time limits** – especially for submissions and responses
- **limiting the scale of written submissions** – a lever arch file seems customary
- **default to written submissions** – though not all arbitrators consider that this always saves time and cost
- **arbitrator's control of the hearing** – to be encouraged with consideration of
    - seeing a day as standard
    - power to say which witnesses will be heard in person
    - power to question them and to lead the questioning

- **costs capping** which could be:
  - a default to each party carrying their own costs
  - a specified default limit on costs to be awarded whether as
    - a specified sum (as with the BAS £1,000)
    - a proportion as with the Controlled Cost scheme though perhaps not apt for non-financial disputes such as over a notice to quit
    - retrospective control by the arbitrator over the extent of recoverable costs
  - **a cap on the arbitrator's fee.**

6.3.5 With the object of achieving a robust system that remains flexible for each case, these components are now considered in the following paragraphs to help develop a basic toolkit for robust arbitrations. It is suggested that, in the absence of contrary directions from the parties, each point can be seen as a default approach to be adopted unless the arbitrator sees a reason to amend or depart from it as felt appropriate to the case in hand.

6.3.6 An underlying theme in considering the use of these tools is the importance an early identification of the actual issues in dispute as that will then inform every step that follows.

6.4 Time Limits

With experience suggesting that it is easy to be over-optimistic in setting tight early time limits and the inability to require a statement of case to accompany a statutory application (by contrast to the BAS), the options might be:

- not to set any
- make it 28 days each way but with the requirement that they provide full statements (not skeletal "Walmsley" statements, reserving all details and leaving the arbitrator and other party uninformed)

as well as setting, say, three calendar months for the award.

6.5 Limiting the Volume of Evidence

6.5.1 It is suggested that this be adopted more widely. How much evidence is really needed to set out a good case for a rent? In an increasingly electronic age, the limit of a lever arch file used in the schemes noted above could be anachronistic; indeed, full electronic submission could be encouraged. It is suggested that default cap be set at 200 sides of A4 in a 12 point type, before plans and photographs.

6.5.2 The object is for the evidence and argument to be concise and relevant, focused on the issues that need to be resolved. One test could be whether all the evidence submitted was referred to in presenting the case and was of assistance in determining the issues in dispute. Surplus submissions might on occasion go to the consideration of costs.

6.5.3 Each party would be expected to set out their full case in the initial submission with limited or no opportunities for later development, polishing and refining.

6.5.4 The closing observation of the Scottish Land Court in the agricultural tenancy case, *Capital Investment Corporation of Montreal v Elliot*, seems pertinent:

"The Court shares the anxiety of the industry for quicker, simpler and cheaper resolution of rent cases in the future. … If greater speed, simplicity and economy are going to be achieved in the future – and we believe they can be – close attention will have to be paid to the guidance which now exists as to what evidence is relevant and what is not. It is also for consideration whether matters have to be explored in as much detail as they were in this case. To use what is perhaps an improbable image, a lighter touch with a broader brush might serve equally well."

6.6 Written Submissions or a Hearing?

It has been suggested that the default here be to written representations with arbitrator able to move from that default where considered appropriate. However, parties can feel that a hearing is more consistent with fair and effective treatment; it is noted that some of the simplified schemes provide a hearing at extra cost. The real issue may lie in control of the hearing.

6.7 Arbitrator's Control of the Hearing

6.7.1 This seems key to an efficient hearing. It is suggested that the arbitrator might see a standard approach, having regard to the requirements of s.33, as being to:

- limit the expected time with default to a day
- identify the points that are to be the specific subjects of the hearing, rather than having the full case heard
- identify which witnesses are to be heard
- fully expect to lead questioning.

6.7.2 S.34(2)(f) allows the arbitrator to consider whether the strict rules of evidence should apply opening the way to, for example, admitting hearsay evidence. The spirit of that could, more generally, allow readier acceptance of "tone of the list" and equivalent evidence. It is then for the arbitrator to decide what weight to give to each point of evidence submitted.

6.7.3 The limits of the arbitrator's independent action have been considered by the courts in decisions from *Fox v Wellfair* to *Checkpoint v Strathclyde Pension Fund*. While the arbitrator draw on personal experience to evaluate the arguments and evidence put, under s.34(2)(g), the arbitrator:

- can put questions to the parties and, indeed, lead the questioning
- should put any points in his mind that might constitute evidence to the parties for their observations (as required by s.33(1)(a)), and illustrated by two extracts from *Fox v Wellfair*:

  "… he should not use his own knowledge to derogate from the evidence of the plaintiffs' experts – without putting his own knowledge to them and giving them a chance of answering it and showing that his view is wrong." (Lord Denning)"

  "If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties." (Dunn LJ)

6.7.4 The Biblical story of Solomon's judgment might be one dramatic illustration. Confronted with two women each contending that a baby was theirs and gainsaying the other,

he proposed to give each a half of the child. Their differing reactions allowed him to determine which was the mother. While, perhaps three millennia later, aspects of his approach might offend some current sensibilities, he had put a proposition to two parties in stalemate in a way that crystallised the issue between them when continued argument between them had not. That proposition elicited responses that yielded an answer. (I Kings 4 vv. 16-28).

6.8 Cost Control and Capping

6.8.1 Introduction - The regulation or the capping of the costs that could be awarded against a party seems a powerful tool.

6.8.2 Cost has been one of the key criticisms made of arbitration, though other issues such as delay and procedure also reveal themselves in cost and a monetary concern can serve as a simple encapsulation of wider frustrations. The assessment and apportionment of costs is one of most direct methods for an arbitrator to demonstrate an understanding of the issues, the application of the law and robustness of approach.

6.8.3 Under the Arbitration Act, the arbitrator's tools are, subject to any agreement by the parties:

- the traditional and retrospective one of a costs award under s.63 (Scottish Arbitration Rule 62), in which the arbitrator can award costs incurred by one party against the other
- the route specifically introduced by the 1996 Act at s.65 (Scottish Arbitration Rule 65) under which the arbitrator can act prospectively to limit the extent to which one party could recover costs from the other, even if successful on the issue at stake.

6.8.4 It should not be forgotten either that the arbitrator's power over procedure and the conduct of the hearing are such as to govern the costs that might be at stake. Thus, if the arbitrator chooses to focus on just two issues seen as critical or take some evidence as read or lead the questioning that too will reduce the overall costs of the process.

6.8.5 The Costs Award - In considering a costs award in a traditionally structured arbitration, the arbitrator, after receiving submissions from the parties on costs, can recognise exaggerated claims, unnecessary evidence, superfluous documentation and other poor conduct that has acted against the statutory injunction to avoid delay and unnecessary cost, penalising it the appropriate manner and to a degree that is fair.

6.8.6 The arbitrator can determine either or both of:

- the quantum that can be recovered
- the categories of costs that may be recovered, as for example disallowing the costs of a witness not seen to be necessary to the issue

giving reasons in each case.

6.8.7 The starting point is to allow a reasonable amount for the costs reasonably incurred. This may (but does not have to) follow the Civil Procedure Rules that costs incurred must be proportionate to the issues in dispute.

6.8.8 The arbitrator has the power, where warranted by the case:

- to adopt the indemnity basis, so that doubts about whether costs were reasonably incurred are resolved in favour of the receiving party, rather than the paying party
- to penalise poor conduct as by disallowing the costs of a superfluous part of a hearing or an argument that resulted in disproportionate costs being incurred.

6.8.9 Cost Capping – Again subject to any contrary agreement by the parties, the arbitrator can act in advance to cap the extent to which costs might be recovered by one party from the other. This is best done:

- early (as at the preliminary hearing) and, applying to the costs it might influence, that will put the parties equally on notice with the greatest effect
- after inviting the parties to make representations, quite possibly on a proposal tabled by the arbitrator.

6.8.10 With that power, it is still possible to award some costs to the successful party but that be defined to limit it:

- with the range of possible cases, a fixed default ceiling would be easier to apply than one based on the quantum at dispute or an assessment of "those costs reasonably incurred". S.65(1) (and Scottish Rule 65(1)) require the amount to be "specified". It might be expressed by stating that the arbitrator will set a cap on the cost award of a figure:
    - in absolute terms – is it a fair question to consider what figure might be the minimum for some representation for a party who would not otherwise venture on this route but settle unhappily?
    - that allows the arbitrator some discretion to the case in hand and so a cap that will usually not be more than, say, £1,250 in the lowest value cases and, say, £5,000 in the higher value cases
- if thinking specifically of rent reviews that could be set on a proportionate basis, not of the difference between the parties (lest that encourage wilder claims) but of the existing rent: say, a cap of 15 per cent of the passing rent as that appears to be a "specified amount".

6.8.11 On such a model and depending on the caps set, the losing party would have its own costs, and, say, an award against it of £4,500 to £9,000. The winning party would have, at best, a contribution of £1,250 to £5,000 to its costs.

6.8.12 With that illustration, the arbitrator might, in the absence of contrary agreement between the parties, make a direction capping recoverable costs. As both s.65 of the 1996 Act and the Scottish Rule 65 limit the effect of such a direction to the subsequent costs that might be influenced by it, such a direction is best made from the preliminary meeting, when the proposal for it has been put to the parties for comment.

6.8.13 However, the arbitrator might then exercise discretion over costs to move from the default approach (or where, the power is reserved, from such an initial position capping cost recovery) where:

- that was appropriate to the case in hand because of such issues as unreasonable conduct or

- disallowing recovery of costs unreasonably incurred
  or
- the parties had consented to this possibility as part of the terms of the appointment – standard wording could be provided as part of the model for contractual appointments

6.8.14 The ability of an arbitrator to vary a cost capping order includes a power to remove it completely though an arbitrator would have to consider such an action carefully. It might be used retrospectively to take account of unreasonable conduct by the paying party.

6.9 Giving Reasons?

While an arbitrator should always have reasons for the award, it has been suggested that in some cases costs can be saved by either giving an award without reasons or outlining the basic argument for the parties to understand the outcome without setting reasons out as fully as might be seen in a court decision.

6.10 The Application of Technology

6.10.1 The acceleration of business practice during the Covid-19 restrictions makes it yet more pertinent to consider the potential application of technology to the process of dispute resolution. It has already been touched on as regards the submission and exchange of evidence. That leaves the larger question of the possible options for the operation of a dispute resolution process itself.

6.10.2 Those options might fall into two broad categories of approach:

- using on-line techniques to deliver the current approaches (as is being done now in the courts)
- to see new technology as offering different ways to achieve the outcome of effective dispute resolution.

To a greater or lesser extent, both categories test variants of the question of whether a court is a place or a service.

6.10.3 The version of the first approach that sees written representations and responses exchanged between parties by e-mail is already here.

6.10.4 The next obvious thought is how far remote hearings (as by Zoom, Teams, Pexip or other platform) can save costs and ease diary pressure, for one or both of a preliminary meeting and a hearing, possibly even being seen as a halfway house between written representations and a full hearing, allowing direct and live interrogation and responses.

6.10.5 Both these follow the traditional structured sequence of business in a dispute, with or without the chance for oral interactions between the parties and the arbitrator.

6.10.6 The second approach could be seen as setting aside the need for processes to be at the same time for each party and the dispute resolver but, instead, focussed on the outcome of a properly resolved dispute. If that is the goal, how might new technology enable that to be done?

6.10.7 One model is the "continuous on-line hearing", as explained (with Tribunals more in mind than courts) by Sir Ernest Ryder, the Senior President of Tribunals, in 2016:

> "Change your point of view of litigation from an adversarial dispute to a problem to be solved. All participants … are able to iterate and comment upon the basic case papers online, over a reasonable window of time, so that the issues in dispute can be clarified and explored. There is no need for all the parties to be together in a court or building at the same time. There is no single … hearing in the traditional sense … We will have a single, digital hearing that is continuous over an extended period of time … the judge will take an inquisitorial and problem-solving approach, guiding the parties to explore and understand their respective positions. Once concluded, this iterative approach may allow the judge to make a decision there and then, without the need for physical hearing." ("*The Modernisation of Justice in Times of Austerity*")

6.10.8 As Richard Susskind has commented from his legal reform interests:

> ".. on the face of it, this could lead to a greatly simplified, less forbidding, and proportionate system …" (*Online Courts and the Future of Justice*)

Seeing this as answer to the problems faced by "the high volume, relatively low value cases that are decided in these lower courts", he observes that "this would require a new set of civil procedure rules" for the courts. We might think such an approach could perhaps be more readily adopted within arbitration but recognise that it could call for more intervention by the arbitrator for the continuous process to make progress.

6.10.9 The Civil Justice Council with its Online Dispute Resolution Advisory Group has already in 2015 outlined a structure for civil cases on claims of up £25,000 in Online Dispute Resolution for Low Value Civil Claims. (In passing, we have seen that assisting clients in making effective cases in such a system could be an area of future work for members.) This was reviewed in section 9.3 of *Means of Dispute Resolution*.

6.10.10 While that work seems to have settled arbitrarily on a ceiling of £25,000 as a crude sieve for those cases for which such an approach might be appropriate, that is not a necessary truth though it does bear on the question of disproportionate cost. Other factors could include the complexity of the legal issues and facts, the volumes of documents necessarily involved, the sensitivity of the matters in hand and the extent to which the issue turns on the credibility of witnesses. An arbitrator might be well placed to judge which cases were suited for this and which not.

6.11 Alternative Roles?

6.11.1 Once the arbitrator has seen the initial papers for a case, it may seem possible that it could be better tackled by another route.

6.11.2 That might see the arbitrator suggest to the parties such options as:

- them instructing the arbitrator to act instead as an expert to give a final and binding determination
- a "med-arb" approach in which the arbitrator (or another person) also acts first as a mediator, enabling discussion of more issues than can be referred to arbitration. This can lead to a narrowing or eradication of the issues in dispute but needs care in drafting

the resulting appointment. The approach is reviewed in *Rural Arbitration in the United Kingdom*.

6.12 Conclusion

Such a review of arbitration from first principles and putting its objectives at the heart of the approach, with procedure as a means to those ends rather than a set of train tracks to be followed regardless, is offered by the CAAV as the way to refresh and revive arbitration as a well-regarded means of final and binding dispute resolution. That task is necessary where arbitration is the statutorily provided method and desirable so that all parties have the widest choice of dispute resolution approaches when needing them.

APPENDIX

ROWLAND BEANEY MEMORIAL LECTURE

Given on Thursday 18 February 2016 at the Centenary Hall, Culford School, Suffolk

DELAY – THE ENEMY IN DISPUTE RESOLUTION: IS ARBITRATION UNDER THE ARBITRATION ACT 1996 A STEP FORWARD OR BACK?

INTRODUCTION

DELAY

1. Which brings me to this evening's topic - delay as an enemy to satisfactory dispute resolution and, using its satisfactory control as a touchstone, an examination of whether or not compulsory arbitration governed by the Arbitration Act 1996 in agricultural tenancy disputes should continue.

2. The local saint, Edmund King and Martyr, killed by the Vikings in 869, was, until the 14th century, also the national saint. The country then swapped a saint killed by "dragons" for the dragon slayer, St George. Justice delayed is justice denied - so is delay a "dragon" and is 1996 Act arbitration a better method for slaying or at least capturing and controlling it than either the previous regime or other forms of dispute resolution?

3. "Nothing wrong with delay" I was told in discussing this topic with a London commercial agent "I use it all the time to put pressure on in negotiations". However, pressed in his turn, even he accepted that, whilst it had its uses tactically, in the case of genuine disputes there had to be a determination and delay rapidly became costly, indeed, delay itself constituted a serious cost. The reason we have invented formal means of resolving disputes is (apart from preventing violence) in order to do so cost effectively so that productive co-operative commercial life can resume its normal course and pace.

4. The dispute resolution methods in common use (leaving out trial by ordeal etc.) can be categorised as:
   (a) private negotiation
   (b) private third party facilitated conciliation (early neutral evaluation or mediation)
   (c) private expert determination
   (d) private or, to adopt Vivienne Williams' adjective in the most recent edition of *Scammell & Densham,* "consensual" arbitration
   (e) statutory or "compulsory" arbitration – legislatively binding and governed, in the absence of a specified statutory or other code, by AA 1996
   (f) public expert determination – by statutory tribunals or inquiries e.g. planning inquiries

(g) litigation - often the last resort and, where there is an alternative dispute resolution mechanism which is compulsory on the parties to a dispute (whether contractually or legislatively) it is the last resort and very difficult of access. Under section 9 of AA 1996 any party to an arbitration agreement will be granted a stay of litigation even before any arbitration has been commenced save in exceptional circumstances. However, ultimately the court controls the use of all forms of ADR and is required for enforcement purposes – the State has a monopoly of force.

5. These do not constitute a hierarchy but, rather, a maze of potential routes (more or less optional and not always mutually exclusive) to the central destination of resolution of the dispute. In some the conditions of utilisation are strict in others much less so; in some power and control lies with a third party or institution, in others with the disputing parties themselves. They should be deployed in parallel or in tandem as and when they are most appropriate in keeping up the momentum to resolve a dispute and all should be kept in mind.

6. What matters is cost effectiveness and "cost" represents not only money but also other expense: of time, energy, goodwill, and often unintended consequences. The longer the process of dispute resolution continues the longer uncertainty continues and that is always a bad thing whether the dispute is personal or commercial (although sometimes uncertainty is used to create increasing pressure it is the most deleterious consequence of delay because the best decisions are those which are best informed as to the consequences of the decision itself). The most expensive delay is the pause during which nothing happens because "getting up a case again" is always costly. Further, what had seemed at one point to be a good plan may cease to be so through changes in circumstance in the intervening period.

7. Delay, therefore, is the "cost" to be avoided – a "dragon". I can illustrate this by reference to a bitterly fought case of my own, *MOD v Spencer* [2003] 1 WLR 2701, [2012] EWCA Civ 1389: an agricultural rent review case which began in 2000 with one pre-2006 rent review which was determined in 2004 following a diversion on a Schedule 11 case stated through the Court of Appeal and then revived by a second arbitral attack (also pre-2006) on the subsequent notice to pay the increased rent, part of which was determined by refusal of a petition to the Supreme Court in 2013 but is now on its way into the courts again on another case stated on a preliminary issue for the third time and may well end up in the Supreme Court. Any process must be better than that. The legal issues on each occasion have been serious but this simply could not happen under AA 1996.

8. Many of you will have your own experiences. Delay matters, particularly in agricultural cases where clients usually have only parts of the year during which they can pay attention to "overheads" such as dispute resolution.

THE ARBITRATION ACT 1996 AND CONTROLLING DELAY

9. So much for why delay should be controlled in agricultural tenancy or any other dispute resolution – now for how and what AA 1996 does or does not add to the armoury. Let's take the case for that legislation on its own merits in general terms first.

10. The AA 1996 was not a consolidation of the string of earlier legislation known collectively as the Arbitration Acts 1950 to 1979. It introduced a new regime for arbitration compatible with the UNCITRAL Model Law following a thoroughgoing review by the highly qualified and experienced Departmental Advisory Committee set up by the Department of Trade and Industry (as it then was) in the early 1990s.

11. It is not a complete code but comes near to it. It provides that the terms of an arbitration agreement can only be overridden by the mandatory provisions which are listed in Part I of the Act e.g. the court's jurisdiction under section 9 and, under section 12, its discretion to extend time for commencement of arbitral proceedings which will, once commenced, exclude court action if satisfied that it is just to do so either because the need for an extension arises out of circumstances outside the reasonable contemplation of the parties when arbitration was agreed, or because one party's conduct makes it unjust to hold the other to the agreed time limit. The intention in relation to delay is obvious – cut it out.

12. The section 12 power is one of only four to extend time reserved to the court. The others, which are not mandatory, are:
    (a) Section 50 – power to extend time for making an award where all other arbitral processes have been exhausted and there would otherwise be substantial injustice i.e. where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that the court would be expected to act.
    (b) Section 79 – power to extend any time limit either agreed or specified in Part I as having effect in default of agreement. It does not therefore apply to any other statutory time limit whether under AA 1996 or another statute such as the AHA 1986 or the ATA 1995. The same conditions for exercise of the discretion apply as for section 50.
    (c) Section 80 – power to extend time for making an application or appeal to the court under the Act. Because this is in relation to the commencement of a court process rather than in relation to the progress of the arbitration the rules applied under the CPR to extensions of time apply and that means *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 275 and the paramount utilitarian importance of procedural cost effectiveness.

    In all instances, although the application for an extension of time can be made before or after expiry of the relevant time limit, delay in doing so is, in and of itself, material and can be fatal.

13. So, AA 1996 is bent on eliminating delay unless unavoidable in the interests of justice. Not only is delay to be avoided for practical commercial reasons but it is highly dangerous in the context of any dispute resolution procedure and, in particular, in relation to compulsory arbitration.

14. Non-intervention is raised to a principle; party autonomy in making agreements is recognised as paramount. This contrasts strongly with the position under the original Schedule 11 AHA 1986 and the regime under ATA 1995. The recent introduction of private expert determination into both by the RRO 2006 and the Deregulation Act 2015 is still grudging.

15. The reason for that contrast in relation to agricultural tenancy dispute resolution is clearly political: to control a perceived continued risk of abuse of a perceived imbalance of power between landlord and tenant were there to be freedom of contract. Statutory arbitration under this legislation is not consensual. The same principle of no contracting out underlies and renders ham-fisted the introduction of private expert determination or mediation as alternatives.

16. So the twin principles of 1996 Act arbitration whether contractual or compulsory are:

    (a) Fairness - Section 1(a) of the AA 1996 states that it is the object of arbitration to obtain the fair resolution of disputes by an impartial tribunal **without unnecessary delay** or expense (my emphasis)

    (b) Party autonomy - Section 1(b) provides that the parties shall have complete autonomy subject only to the public interest as expressed in section 1(a) provided that the parties agree and what they agree upon is not contrary to public policy i.e. as set out in section 1(a) (in the agricultural context also the public policy that there should be limited freedom of contract)

17. In practice, however, a firm and pro-active arbitrator with a real understanding of the dynamics of dispute resolution and co-operative parties are required if the benefits in terms of cost and time savings of arbitral flexibility and finality are to be obtained. Otherwise the process falls apart and, where the parties have been compelled to arbitrate, that matters. Ultimately the procedure under AA 1996 need not be adversarial as the arbitrator can, unless the parties agree otherwise, in the last resort play the grand inquisitor under section 34(2) if that is the best way to achieve a fair and cost effective resolution.

18. The whole duty of the arbitrator is set out in section 33, which is mandatory in the public interest and cannot be overridden by contrary agreement of the parties. If there is a clash the arbitrator must either resign or proceed under explicit protest so as to preclude any inconsistent challenge to his actions. The arbitrator shall:
    (a) act fairly and impartially, giving each party a reasonable opportunity of putting his case and dealing with that of the other (this is the overriding obligation) and, indeed, dealing with any points that the arbitrator considers are material and should be taken into account in order to resolve the dispute – an arbitrator can use his own expert knowledge to evaluate submissions and evidence and can put forward his own arguments and, even, evidence, for the parties' consideration and, indeed, must do so if he wishes to resolve the dispute in reliance on them, and
    (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined

    and

    (c) comply with those general duties in conducting the arbitral proceedings: (i) in his decisions on matters of procedure and evidence, and (ii) in the exercise of all other powers conferred on him.

19. The real power of the 1996 Act arbitrator lies in section 34. Section 34(2) can serve as a rough and ready and non-exhaustive checklist of the matters which, in default of the parties' contrary agreement, the arbitrator has power to deal with as he chooses and which in every arbitration he should of his own motion consider. He does not have to wait for the parties to direct him or give them extensive time and opportunity to disagree. It is wrong to assume that, because an agricultural arbitration has been forced on the parties by strict statutory time limits, the time for negotiations should be extended.

20. The arbitrator is empowered to make orders and directions including orders equivalent to interim injunctions but has no power of enforcement or to affect third parties. Therefore, in case of urgency or in case of a need to affect third parties or for enforcement purposes it is nearly always better to make a parallel application to court and the arbitrator should be aware of and consider putting that choice expressly to the parties. The role of the court is:
    (a) supervision of the proper conduct of an arbitrator in reaching a viable determination, and
    (b) enforcement

    It is the art of the successful arbitrator to ensure, so far as possible, that his directions are both practical and likely to carry conviction with the parties so as to avoid the need for enforcement measures but the arbitrator has his own enforcement powers and can make orders which can even debar further participation by a defaulting party upon notice.

AGRICULTURAL DISPUTE RESOLUTION

21. So how does dispute resolution in an agricultural context differ from any other commercial or private context? The methods, apart from compulsion/lack of power to contract out and the existence of the ALDT, are the same:

    (a) of course private negotiation and agreement have always been available both before and after a compulsory arbitration has been triggered – the consequences of statutory prohibition on "contracting out" must be carefully borne in mind but, subject to any requirement for a Tribunal order to confer title on a succession, there is absolutely no prohibition upon a compromise agreement which itself refers a remaining issue to some non-statutorily approved form of dispute resolution. But this does not mean that an arbitrator, once appointed, should give the parties long periods of time for negotiation

    (b) statutory arbitration in relation to improvements began in 1900, and in relation to rent in 1923 but what became Schedule 11 of the AHA 1986 started only in 1958. All arbitrations commenced since 19 October 2006 have been governed by AA 1996 (save the limit to one arbitrator per matter and the strict time limits for application for appointment of a rent review arbitrator in the AHA 1986). The importance of the RRO for the purpose of dragon slaying is that it finally disposed of the case stated basis for appeal to the dangers of which I have already referred thus emphasising the fundamental principle of finality and the arbitrator's responsibility under section 33. Some older arbitrators, brought up under Schedule 11, find the change of gear difficult

(c) the ALDT, which is also suffering from grinding procedural gears with the requirement for more nearly judicial conduct rather than judiciously inquisitorial conduct of dispute resolution under the TCLA 2007 and the procedural regulations made in 2013

(d) the courts may be able to play a role in preventing delay by reference of preliminary points of law not only under AA 1996 section 45 (as Lord Neuberger reminded the world at the London Centenary Conference of the CIArb in June 2015 there may be a faster, cheaper and smarter result under a Part 8 application to a specialist court) and even in the context of an ALDT case (see e.g. *Woodhouse v Besent [2015]* succession application). My own preference is for bringing in a specialist legal adviser to the arbitrator but the parties could agree to refer a legal issue to expert determination in the course of an arbitration.

22. One very serious difficulty in terms of delay in relation to statutory agricultural tenancy arbitrations is the statutory requirement that the PRICS appoint arbitrators in default of agreement. To ensure that there is no default of agreement there is therefore perhaps much to be said for what was apparently a common late mediaeval custom of making a numbered list of names and then rolling a dice.

23. The AHA 1986 (as amended in 2006 and 2015) applies the AA 1996 to all arbitrations and the arbitral provisions are compulsory in relation to all disputed matters which are in each case statutorily required to be referred to arbitration by notice with appointment of the arbitrator either by agreement or by PRICS with varying time limits applicable (interesting question as to whether a reference to arbitration under statute or agreement can "lapse" by passage of time) There is no longer a panel of approved arbitrators.

24. The Deregulation Act 2015 (by Schedule 4) has introduced a new section 84(1A) and section 84(A) into the AHA 1986 which have the effect of giving the parties an option to have anything which would otherwise be determined by arbitration under the AA 1996 (other than the validity of notices to quit) determined instead by an independent expert of their choice but arbitration remains the default position. I do not accept that section 84A(2), which provides that the parties' opportunity to opt for expert determination, is exhausted by the commencement of an arbitration unless that provision is to be treated as avoiding a compromise of the arbitration to that effect because such a reading would be wholly unreasonable. It was clearly felt that the quasi-judicial role of the arbitrator was better suited to security of tenure issues. There is a short discussion by Christopher McNall in Issue 81 of the ALA Bulletin Summer 2015 with whose comments as to the consequences I do not entirely agree preferring the approach in the CAAV June 2015 publication 223. This is certainly not dragon slaying.

25. The material detailed provisions of the ATA 1995 regime (as amended with effect from 19 October 2006) for FBTs are of course:

(a) Section 9 no contracting out of statutory rent review unless the written tenancy agreement provides expressly for no alteration in rent; or, there is a fixed formula for alteration of rent; or, there is a mutual reference to binding determination by

independent expert who must have express power to reduce the rent and the agreement expressly excludes Part II of the Act.

(b) Section 10(1) a statutory rent review is triggered by a notice referring the issue to arbitration under section 12 after which the parties can in writing appoint an agreed arbitrator or, under section 12(b), agree to appoint an independent expert (see above) or, failing such agreement, either may apply within the six months ending with the review date to the PRICS for the appointment of an arbitrator. Section 13 then sets out the formula and machinery by which the arbitrator (or presumably the independent expert) so appointed will determine the rent.

(c) Section 19 provides for arbitration of any dispute as to the giving of consent for improvements on the tenant giving notice requiring the arbitrator to be appointed by agreement or, in default, by the PRICS on application of either party.

(d) Section 22 provides for determination of the amount of compensation for improvements by arbitration, the arbitrator being appointed by agreement or, in default, by the PRICS.

(e) Section 28(1) constitutes a general provision for statutory arbitration of any other dispute between landlord and tenant concerning their rights and obligations under the FBT and/or the 1996 Act or custom on service of notice by either party specifying the dispute and stating that an application to PRICS will be made to appoint an arbitrator unless an agreed appointment has been made within the next two months and in default of agreed appointment either may apply to PRICS. Section 30 provides that a section 28 arbitration shall be by sole arbitrator (who may be replaced by further application to PRICS in the event that he becomes wholly incapacitated) and that any application to PRICS for an appointment must be accompanied by his fee (remember *Thomson v Bradley* and don't leave it too late). There is however no equivalent provision to section 9 (see above) which excludes contracting out but it is probably arguable that such is necessarily implied by the existence of section 29 (see below). Nevertheless, consensual settlement of disputes once in the statutory process by an agreed mechanism of any kind cannot be contrary to the Act. These provisions can only apply where the parties are in dispute i.e. at odds with one another and the court's jurisdiction cannot be ousted otherwise than by express provision (such as section 9) or by the binding agreement of the parties on a compromise.

(f) Section 29 constitutes provision enabling parties to an FBT to enter into contractual arrangements (either in the tenancy agreement itself or otherwise) for some other form of ADR which will prevail over statutory arbitration under section 28, provided that the FBT is a written agreement and the ADR agreement does not permit appointment of either the landlord or the tenant themselves, or a third party appointed otherwise than by agreement between them and the reference has either been joint or written notice has been given by one to the other asking for ADR, after which there is a "cooling off" period for 28 days before the statutory arbitration procedure ceases to apply to the dispute. The contractual provision must apply to all disputes but either party can override it and opt for statutory arbitration until expiry of the 28 day period by requiring the dispute to be determined under section 28 arbitration by written notice specifying the nature of the dispute and requiring appointment of an arbitrator by

PRICS after 2 months. But, as already stated, the parties can decide to compromise an arbitration on terms that include opting for independent determination by agreement at any time and whether or not there is a contractual provision in the FBT. Even in cases of rent review, improvements, and compensation where the statutory process is mandatory, once the statutory arbitral process has commenced it can always be compromised or agreement reached for a different process under the AA 1996.

26. The provisions of the AHA 1986 and/or ATA 1995 referred to above which preclude "contracting out" do not prevent the AA 1996 applying in its entirety, see *Peel v Coln Park LLP* [2010] EWCA Civ 1602 where a tenant refused to pay an arbitrator's fees so that the award was not published until after the 28 day deadline for appealing under sections 68 and 69 of AA 1996 and the court refused to extend time. In *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch) the provisions of AA 1996 in relation to an application for adequate reasons were applied. The case is particularly interesting for the emphasis on:
    (a) the expertise and knowledge of the arbitrator, and
    (b) the requirement that there can be no challenge unless there is proof of consequential substantial injustice caused by the lack of reasons

    Another recent agricultural decision is *Brake v Patley Wood Farm LLP* [2014] EWHC 96 (Ch) where an arbitrator's decision to proceed to hearing without further participation by a party because of failures in compliance with directions was held not to be a serious irregularity even though substantial injustice was caused. Arbitration under the AA 1996 is fully Article 6 compliant therefore the provisions for stay of inconsistent legal proceedings under section 9 apply to agricultural tenancy arbitrations even though these are statutory and therefore compulsory and not consensual.

THEREFORE BE BOLD AND BLOODY AS AN ARBITRATOR – BUT ACT LAWFULLY

27. The arbitrator under AA 1996 is free to be so; indeed, it is his duty under section 33 where there is unfair or unnecessary delay. But the parties should also drive proceedings forward and if there is no mutuality then one can and should take steps to drive the arbitrator.

28. All this is important because it demonstrates the freedom of a determined and skilful arbitrator to act fairly but swiftly in resolving an agricultural tenancy dispute. If the *Mitchell* rules on sanctions for failure to comply with directions timetables apply not only in courts but also in the ALDT, see *Bailey v Lockitt* (2014) ALT/W/SR/222, they can certainly be relied upon in principle in the context of arbitrations.

29. Bear in mind also the general duty of parties under section 40 of the AA 1996 to co-operate and the powers of a party with the agreement of the arbitrator or of the arbitrator acting on his own on notice to apply to the court for enforcement of peremptory orders under sections 41(2), 42(1) and 82 AA 1996.

30. The arbitrator has power to dismiss a claim for inordinate delay giving rise to a substantial risk that there cannot be a fair determination or which has caused or is likely to cause

serious prejudice to the other party under section 41(2) and (3) AA 1996. There is not even a requirement for a hearing and a decision not to have one is not a serious irregularity see *O'Donoghue v Enterprise Inns Plc* [2008] EWHC 2273 (Ch) and *Brake v Patley Wood Farm LLP* (already referred to above).

31. There can be no successful section 68 challenge, even if one of the 9 kinds of irregularity listed in section 68(2) is proved to have occurred, unless the challenger can prove "substantial injustice" that "*what happened simply cannot on any view be defended as an acceptable consequence of that choice"* by the arbitrator although, unsurprisingly, in cases of bias, that will be assumed. Effectively, section 68 is a "*long stop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in the section that justice calls out for it to be corrected."* Therefore, where an arbitrator exceeds his powers and erroneously exercises a power he did not have then the award may be challenged, but it can rarely if ever be the case that there can be a successful challenge for the erroneous exercise of a power which he did have no matter how significant for the parties the consequences may be. The courts are wholly unconcerned with the "correctness" of the decision either in law or substantive effect.

SO HOW IS IT ALL GOING?

32. Anecdotal evidence suggests there are an ever-increasing number of arbitrations; most involving issues of fact but many often complex issues of law. However, the confidentiality of the process (statutory agricultural arbitrations are as confidential as consensual arbitrations) makes it very difficult to gather firm evidence as to either numbers or the subject matter, although the RICS has figures for appointments of arbitrators which is only a rough and ready guide because it is likely that nearly all arbitrations (like most court cases) settle.

33. Professional organisations such as CAAV try to collect as much information as they can and individual valuers, surveyors, land agents and lawyers do the same. For the great difficulty arising from unreported statutory arbitration outcomes is the same as lack of transparency in relation to outcomes of any dispute resolution procedure – the risk of inconsistency and, you guessed it, uncertainty and delay. One of my hobby horses is the lack of any official and complete reporting of ALDT decisions.

34. On a number of occasions I have been reproached for suggesting that the resolution of disputes so that there is no reported decision is bad for the development and operation of the law (which, being case dependant, is dependent on reliable case reports) so that it becomes sclerotic and then fossilised and does not do what we are so proud of it doing – evolve with societal including commercial needs both flexibly and rapidly (much more rapidly than Parliament can legislate). Agents and solicitors say why should the law be developed at the expense of my client and they are right to say that but, nevertheless, it is the only way that the law does develop and a lack of information as to how a dispute resolution will go causes uncertainty and delay. Therefore, the most difficult thing about arbitration especially under the AA 1996 is the absence of precedents and this is so even

with the most formal of arbitrations because you will not get permission to appeal on a point of law under section 69 unless the arbitrator was "obviously" wrong i.e. no reasonable judge could have so concluded. It's a lottery.

35. Although, in the foreword to the 23rd Edition of Russell on Arbitration published in 2007 (a new edition is on its way), the absence of court recourse is celebrated without any consideration of the impact on precedent, Lord Neuberger, in his speech to the CIArb Centenary Conference in Hong Kong in March 2015, pointed out that there was also a need for transparency as the great disinfectant i.e. as acting as a disincentive to poor conduct and performance by arbitrators and as a great aid to the understanding and development of the law:

    "*There is a real risk that, if there is no transparency many arbitrators will feel relatively free to do what they want rather than to give effect to the law. This is a temptation which is particularly great now that it is so difficult to appeal an arbitration award. I would suggest that the four strongest pressures on a judge to get the law right arise from the facts that (i) his decisions will be read, and therefore open to criticism, by anyone who wants to see them, and (ii) any decision which he makes can be appealed…Public availability of awards is an important point for another reason. One of the disadvantages of an increase in awards and a concomitant decrease in judgments, particularly in the common law world, is that the law does not develop, that it becomes ossified. The sting from this criticism can easily be drawn if excellent awards by excellent arbitrators are published."*

36. The efforts of the courts have been chiefly directed through the consideration of challenges under section 68 to awards on the grounds of "serious irregularity" to defining the meaning and application of the arbitrator's duties under the revolutionary section 33 "*to act fairly and impartially as between the parties", "giving each party a reasonable opportunity of putting his case"* and adopting procedures which "*avoid unnecessary delay or expense".* There you are, procedural "cost effectiveness.

37. So why should you or your clients care? Because it is achieved without any consideration of the impact on the ability of advisers or their clients to predict with reasonable certainty the outcome of a legal dispute. In doing so the courts take into account the "non-interventionist" principle stated clearly by the House of Lords in *Lesotho Highlands v Impreglia SpA* [2003] UKHL 43 and expressed in sections 1(c) and 34 of the 1996 Act which make clear that in the absence of agreement between the parties all procedural and evidential issues are for the arbitrator alone, including weight, relevance and admissibility of evidence. This makes it incredibly difficult to predict the outcome of a dispute resolution procedure and, therefore, to advise. This is particularly so where, as is the case for agricultural tenancy dispute resolution, arbitration (or, worse, expert determination) is compulsory.

IS 1996 ACT ARBITRATION A RETROGRADE STEP IN SOLVING AGRICULTURAL DISPUTES?

38. Well that depends upon the alternatives. Is expert determination faster and cheaper? It all depends upon how you draft your tri-partite agreement with each other and the expert and

how much explicit monitoring control is retained by the parties (you could explicitly incorporate parts of the AA 1996). You won't have any right of appeal and, absent complete disregard of your instructions, will be bound by the decision leaving you to sue the expert for negligence if you can. You have to start new court proceedings to enforce. You can't sue an arbitrator and there are limited rights of recourse against his decision and you will be bound, but you can enforce an award like a court order but you do retain flexibility and considerable power to control under the AA 1996 scheme. On the other hand, you can't use an expert without the agreement of the other party whereas arbitration can be unilaterally triggered under the AHA 1986/ATA 1995.

39. For many years, despairing of court delays and inefficiencies and the quality of the property law expertise and knowledge of county court judges in cases where there wasn't compulsory arbitration, I have advised commercial clients that, if they are to expect palm tree justice, they might as well choose the cost-effectiveness of control, buy their own palm tree and arbitrate. In agricultural cases you must. Does it matter that Schedule 11 has been replaced by AA 1996? No. Is private expert determination any better? Not really. But, whether expert or arbitrator make sure that in every case you choose an active, knowledgeable and experienced dragon slayer and use him or her well – sadly, Rowland is no longer available.

Caroline Hutton
Enterprise Chambers
9 Old Square
Lincoln's Inn
London WC2A 3SR

18 February 2016

APPENDIX – SECTION 68 – THE NINE IRREGULARITIES

The 9 irregularities which can lead to a successful application under section 68 for remittance of or setting aside an award are:

1. Failure to act fairly including giving all parties a fair and impartial opportunity to put their own and combat the cases of others on all issues. Awards are often made on the basis of a determination of issues not raised, at least formally, by any of the parties but such awards are not "irregular" in the sense of being "unfair" provided that the issue(s) in question were "in play". The threshold is low. Indeed, it has even been held that an arbitrator has "*an autonomous power to make findings of fact which may differ from the facts which either party contended for"* see *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 at paragraph 37. A refusal of an adjournment to permit further evidence to be adduced or issues to be raised is not "unfair" unless contrary to the agreement of the parties *Shuttari v Solicitors Indemnity Fund* [2004] EWHC 1537. Failures of management in relation to the identification of issues with attendant delay and costs would however be a serious irregularity.

2. Exceeding powers (other than excess of substantive jurisdiction (very unlikely to arise in an agricultural arbitration) which falls under section 67).

3. Failure to comply with the parties' agreed procedure.

4. Failure to deal with all issues raised by the parties – these are the issues which are necessary for resolution of the matter; fundamental to the making of any award in relation to it. The courts will not subject awards to narrow textual analysis and will "spell out" the chains of findings and reasoning necessary to support a decision from the text of the award in the context of all available material bearing in mind that the arbitrator is very likely not to be a lawyer. There is in any event (and the first port of call in such a case) section 70(4) which enables a party to request reasons for an award.

5. Any arbitral or other institution or person e.g. the PRICS in making an appointment having powers in relation to the arbitration exceeding its powers.

6. Uncertainty or ambiguity as to the effect of the award – the first port of call is of course section 57(3)(a) enabling a party to ask for any ambiguity to be reviewed and corrected.

7. The award being obtained by fraud or the award or the method of procurement being contrary to public policy. The alleged grounds must be the fraud or illegal or unconscionable conduct of either a party or an agent or representative and not a witness. It is not enough to show that a witness lied but that the party calling that witness or relying on his evidence was privy to the deception. Evidence emerging after publication of an award unless of deliberate concealment prior to the award will not usually be capable of founding an application – even so consequential substantial injustice must be proved.

8. Failure to comply with requirements as to the form of the award. A failure to give reasons for any decision on costs is an irregularity of form but could be the subject of an application under section 70(4) for the giving of reasons.

9. Admitted irregularity in the award or conduct of proceedings.