

## CAAV – FACILITATING DISPUTE RESOLUTION

### GUIDANCE TO THE APPLICATION PROCESS AND FORM FOR APPOINTMENTS TO THE CAAV'S PANEL OF ARBITRATORS

July 2020

*Caution – This note offers guidance on the application process put in place for summer 2020 to enable the establishment of a Panel of Arbitrators in time for the prospective statutory power to appoint arbitrators under the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995.*

*These procedures may change for later applications or for renewals of appointments to this Panel or for other Panels.*

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### 1. The CAAV Approach

The CAAV sees dispute resolution as professional work that is:

- of necessary importance to business life in providing answers for businesses and people to be able to move on
- 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.

Dispute resolution is seen to encompass everything from effective negotiation and proactive approaches with early neutral evaluation to mediation, expert determination and arbitration. Throughout, the CAAV is looking to dispute resolution to be appropriate, timely, cost effective, fair and robust in providing effective answers.

**Arbitration** - The CAAV is acting to refresh arbitration and change the perception that it has to be costly, over-procedural and lengthy. That requires active confidence and competence in the use of the provisions of the Arbitration Act 1996 (in Scotland, the Arbitration (Scotland) Act 2010), not only by arbitrators but also those advising parties to disputes.

### 2. Expectations

The CAAV's expectations are set out in:

- its **Dispute Resolution Charter**, setting out the style of approach it is promoting. For arbitration, this means full, practical and robust use of the powers available to the arbitrator under the relevant Arbitration Act. This approach will inform the assessment of applications to be appointed to the CAAV Panel of Arbitrators
- the **Terms of Engagement** on that Panel
- the **application form**.

As arbitration is a process within a statutory framework of law, a sound knowledge of the Arbitration Act 1996 (in Scotland, the Arbitration (Scotland) Act 2010) is seen as a basic and fundamental requirement.

Applicants are expected to demonstrate a commitment to dispute resolution being robust, fair, timely, cost-effective, proportionate and appropriate.

It is appreciated that applicants will have differing levels of experience, ranging from those who have acted for over 20 years and those who have only recently qualified. The Interview Panel and process will take that into account, knowing that everyone had to start once.

Those applying to embark on a career as an arbitrator will need to show a level of training to support their knowledge of arbitration law and practice and will be tested on a situation.

Those with experience might have that experience probed, taken in conjunction with their training, and could be asked for an award (redacted for confidentiality) or a set of directions.

### **3. Introduction to the Appointment Process**

This paper sets out the procedure for appointment to the CAAV's Panel of Arbitrators for use in the exercise of the President's power of appointment, whether under the proposed statutory authority of prospective Agriculture Act or otherwise. In doing that, it offers guidance on the application form.

The intention is to establish a rotational system with arbitrators serving a three year term before renewal. With the intention of achieving a rotational basis for the subsequent renewals to be for three year terms, the initial terms of appointment will be for three, four and five years.

The application process has opened as soon as possible after the CAAV Council of July 8<sup>th</sup> approved the regime for the CAAV's handling of dispute resolution matters.

It will be open to applicants from across the United Kingdom as it will be a UK-wide Panel, albeit recognising that most will have skills and experience relevant only to particular parts of the country.

With the need for a Panel of Arbitrators to be in place for the commencement of the proposals for England and Wales in the current Agriculture Bill, the earlier an application is made the more likely it is to enable an application to be considered in time. As guidance, it will be easier to consider and determine applications before the autumn if they are made in July, rather than in mid-August or later.

### **4. The Application Form and Supporting Papers**

Applications are to be made on the form provided, signed by a proposer and seconder together with:

- a curriculum vitae
- a record of CPD covering the preceding three years – applicants are asked to list all CPD which the Interview Panel can take into account as it deems appropriate. Experience in dispute resolution is requested at Question 11.
- a copy of a current Professional Indemnity Insurance certificate that covers the applicant's personal work in undertaking appointments as an arbitrator (where an applicant is not yet an arbitrator, a commitment to secure such cover will be required)
- the non-refundable administrative application fee of £150 (including VAT), either by cheque with the application or paid electronically
- any other papers thought helpful to the application.

### **5. Completing the Application Form**

All parts of the form are to be completed. This note now offers guidance on specific points in the form.

**Page 1** – Applicants working in England, Wales and Northern Ireland are expected to have a good knowledge of the Arbitration Act 1996. Those working in Scotland are expected to have a good knowledge of the Arbitration (Scotland) Act 2010. There is no ordinary expectation that applications will know both Acts, though where relevant it should be highlighted.

In the event of any uncertainty about the declaration regarding criminal offences, disciplinary proceedings or investigation, please provide full information with the application form so that the issue can be understood.

**Page 2** – A non-business e-mail address is requested so that, should it be necessary to contact the applicant out of hours (as where working part-time) either regarding the application process or, if successful, about a subsequent reference for appointment, that can be done expeditiously.

At **Question 7**, please confirm the address to which you want the outcome of this application to be sent.

At **Question 10**, please give:

- all relevant qualifications for each section with the date(s) when they were achieved
- the date when appointed to any dispute resolution panel
- the date when that appointment next comes up for review.

**Page 3** – At **Question 11**, the summary of dispute resolution experience, whether as resolver or in acting for parties, can be in a separate document submitted with the form if this assists the applicant in being complete.

**Pages 4 and 5** – The information here will assist the Interview Panel. It will then also assist the allocation of appointments if the applicant is successful in joining the Panel as the CAAV's object is to appoint a person appropriate to the case in hand.

If the applicant has a working knowledge of Welsh, Gaelic or other languages that may be relevant to particular appointments.

**Payment** – This is a non-refundable administration fee for the application and was set by reference to that for Recognised European Valuer (REV) V applications. It includes VAT. No charge is currently envisaged thereafter for membership of the Panel until the next review.

**Page 6 – Proposer and Seconder** – The applicant is asked to have the support of two sponsors, each of whom have experience of the applicant in a dispute resolution matter, whether the applicant was an arbitrator, expert, expert witness, advocate or in some other capacity in that matter.

These sponsors are to be:

- a Proposer who is a professional of any discipline who is of good standing in the field of dispute resolution
- a Secunder who is a CAAV Fellow with the same standing.

Neither is to be of the same firm or family as the applicant and either or both may be asked for a reference. Both are required to have read the CAAV Dispute Resolution Charter.

### **6. A Final Word on the Form**

The object of the process is to identify and appoint good arbitrators for the future who will do themselves and the CAAV credit across the range of work envisaged by the CAAV. The form is simply a means to achieve that; if other and further information would assist, it should be submitted.

### **7. Timetable for Initial Applications**

With applications for appointment to the Panel then open, those received by the end of July would be in a better position to be appointed to the initial Panel which might need to be in place for late August to be ready for the commencement of the proposed statutory appointment power under the 1986 and 1995 Acts.

It is recognised that this places time pressure on the initial process for all involved. with the first interviews possible in the week commencing 27<sup>th</sup> July and then in early August. While it is envisaged that the interviews would usually be held physically, time pressure and the Covid-19 restrictions mean that the initial interviews are likely to be by video conference.

It should be known by mid-July (before interviews are due to start) whether and when the Agriculture Bill's provisions might commence ahead of the Michaelmas term date for rent reviews and other issues. The Bill will then either be due to have Royal Assent when Parliament rises for the summer recess or it is still outstanding for the autumn. If the Bill has then had Royal Assent:

- priority in timing would be given to applicants from England and Wales to meet the then known deadline
- it is likely that each panel will hold interviews on a day each week for several weeks.

**Open to Later Applications** - While this paper is immediately concerned with the initial creation of the Panel of Arbitrators to serve the prospective statutory purpose, there is no cut-off date for applications and the process of appointment would continue thereafter, albeit probably under less pressure. That means that applications could be received when an applicant feels ready. Successful applicants would be added to Panel when they were approved.

### **8. Interview Process**

The applications would be acknowledged and reviewed with further information requested where needed.



All applicants will have an interview with a panel. This process is being designed to be able to deal equally with a longstanding experienced arbitrator and a newly qualified one.

It is expected that there would be not less than three interview panels in this initial phase, each constituted of three people who are likely to be:

- an arbitrator
- a member with experience of acting in dispute resolution
- an agricultural lawyer or similar person with dispute resolution experience

The Panels will be clerked by the Secretariat, which will manage contact with the applicants.

The interview, thought likely to take around an hour, would be on an “open book” basis with the applicant able to refer to textbooks during the interview.

The interview will first consider the information given by the applicant on the application form, partly to understand the balance of training and experience of each applicant.

With the CAAV’s objectives as laid out in the Dispute Resolution Charter, after considering the application form, core parts of the interview will then concern:

- arbitration procedure (including appointment, jurisdiction, conflicts, initial communications and duties)
- managing the process (including preliminary hearings, jurisdictional challenges, conflicts and directions)
- evidence (including the law of evidence, burden standard, types of evidence, weight, admissibility, experts and privilege)
- awards (including types, statutory requirements, appeals and timing)
- costs (including approach to costs, cost capping, proportionality and Calderbanks/settlement offers)
- corrections and appeals

looking for applicants to demonstrate a thorough understanding of the relevant Arbitration Act and the procedures available to deliver the required service.

A scenario or other proposal would be sent to each applicant 24 hours before the interview with their work (such as a set of directions or an award) on that scenario to form part of the interview.

A prior meeting of all interview panel members would be convened to consider and reviewed the expected answers with their variants and an agreed marking schedule, so that they are tested before the first interview and to assist consistency between panels.

## **9. Decisions**

After the interview, the Panel may recommend that the applicant be:

- appointed
- appointed on conditions, as perhaps to specified areas of work or a given scale of dispute

- deferral until meeting a specified requirement
- rejected.

With the need to establish a rotation for subsequent review (see the Guidance Note to the Application Form), a recommendation to appoint could advise the period (see above and likely to be for three, four or five years) for which the appointment should be made.

Those recommendations would then be reviewed by the Chairman of the Oversight Board for consistency and any questions arising, before being put to CAAV's Executive as recommendations for decision. The Executive will review those recommendations, consider any issues arising in that, including consistency and the balance of periods of appointment, and determine the result of the application.

The Secretariat would notify the applicant of the outcome after the Executive has determined the matter.

Successful applicants asked to sign acceptance of the Terms of Engagement for the Panel and on the Secretariat's receipt of the signed Terms of Engagement, the applicant will be notified of membership of the Panel of Arbitrators.

The operation of the process will be kept under review and amended as considered appropriate with the literature revised for any changes.

### **10. An Appeal Mechanism**

It will be possible to appeal against a rejection or a qualification on appointment on one of these grounds:

- (i) the procedure set out in this paper was not applied correctly
- (ii) the Interview Panel acted in a way that was not reasonable in the circumstances
- (iii) there was a serious error in the way the decision was taken

and the error complained of could have materially affected the decision.

The procedure for this is:

- written appeal, stating its ground, lodged with the Secretary within 28 days of the notification of the outcome of the application for appointment
- the original interview panel to provide its report, reasoning and observations on the appeal to the Secretariat
- a three strong Appeal Panel is to be appointed by the most recent Past President
  - o not on the Executive and
  - o who is not an applicant or arbitrator appointed under this process and
  - o who is willing and availablefrom members of other interview panels than the one subject to appeal.
- that panel is to convene to review the matter within six weeks
- that panel proceeds as it deems right, reviewing papers and, if necessary, having a hearing



- it makes a recommendation to the Executive, that recommendation being for appointment with or without qualifications, dismissal of the appeal or that the appellant must fulfil some condition to be appointed
- the outcome will be final save that the appellant can apply again for appointment 12 months or more later.
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### APPENDIX A

#### 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.

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## APPENDIX B

### TERMS OF APPOINTMENT TO THE CAAV PANEL OF ARBITRATORS

**“The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense”** (Arbitration Act 1996, s.1(a)).

**“The object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense”** (Arbitration (Scotland) Act 2010, s.1(a)).

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#### **Appointment to the CAAV Panel of Arbitrators**

On your signing, dating and returning this document, the President of the CAAV is pleased to appoint you to the CAAV’s Panel of Arbitrators for the period until ..... on the following terms which apply throughout that period so long as you are a member of the Panel. This appointment does not guarantee that you will receive any appointments in this period

1. You will act to uphold and implement the CAAV’s Dispute Resolution Charter (attached as an Appendix) and, in particular, you will perform your duties as an arbitrator to achieve cost-effective and timely answers that resolve disputes referred to you.
2. You will undertake appropriate continuous professional development relevant to dispute resolution as may be required by the CAAV.
3. You will ensure that you are covered for all your work by appropriate professional indemnity insurance in accordance with the CAAV’s Professional Conduct Bylaw 3(b) and decline appointments to undertake work for which you do not have the appropriate cover.
4. When approached for a potential appointment or nomination as an arbitrator you will respond promptly and recognise that without an initial response within two working days the CAAV may seek to appoint someone else without contacting you again.
5. On being approached for a potential appointment, you will, with the overriding duty of impartiality, conduct the appropriate investigations and then disclose any involvement and/or conflict of interest that you or your practice may have in the matter. The approach to this is to follow the International Bar Association’s *Guidelines on Conflicts of Interest in International Arbitrations* (2014).
6. All information provided to you by the CAAV concerning the dispute or the parties is confidential, having been provided only for the purpose of inviting you to consider whether to accept the invitation to be appointed. You will not:
  - (i) contact the parties to any proposed appointment until the President of the CAAV confirms your appointment

- (ii) use the information provided for any other purpose.
7. On the conclusion of a reference, you agree to co-operate with the CAAV in such monitoring as it may undertake to assist its understanding and continuing improvement of this service to support the public interest in effective dispute resolution while respecting the confidentiality of the matter at arbitration.
8. Your continuing appointment will be subject to a renewal process as:
- (i) the ordinary renewal of your appointment, should you then want that, will be subject to a renewal process.
  - (ii) and your appointment may be reviewed within that period where cause arises to give concern about your competence or conduct as a member of the Panel. That review may see your appointment re-affirmed, suspended or revoked, in all cases with or without conditions. You agree to co-operate with the CAAV in the event of such a review.
9. You will notify the CAAV as soon as possible of any occasion where you are:
- (i) the subject of criticism by a judge or an arbitrator
  - (ii) charged with or convicted of a criminal offence
  - (iii) subject to insolvency proceedings
  - (iv) subject of a disciplinary investigation and/or action by any other professional body of which you are a member
- or where your membership of any other professional body is terminated by that body.
10. These terms apply in respect of any arbitration that you might be appointed to which continues after the expiry of this appointment to the Panel.

I agree to accept this appointment.

Name

Signature

Date