

## **GUIDANCE NOTES IN RELATION TO A REQUEST FOR THE APPOINTMENT OF AN ARBITRATOR OR INDEPENDENT EXPERT**

When the Secretary of SAAVA receives an application for the appointment of an arbitrator or independent expert the President, whom failing the Vice President, will make the appointment from suitably qualified individuals, usually from within SAAVA's membership.

The aim of SAAVA when appointing an arbitrator or independent expert is to act independently and transparently. When we receive an application we will usually select potential appointees from our membership. After checking to ensure the appointee is suitably qualified and free from conflicts of interest, the appointment will be made by the President, whom failing the Vice President, of SAAVA and notified to the parties.

### **The Application**

The application requires to be submitted on our template with the appropriate fee before it will be entertained. SAAVA aim to make an appointment within 15 working days of receipt of a completed application.

You must state whether you require either:

- an arbitrator – who will decide the dispute on the basis of the evidence submitted by the parties

or

- an independent expert – who will decide the dispute from his expert knowledge but will want submissions by the parties to assist with the specific facts and issues

to be appointed. That will be a matter for parties to agree.

Certain details are required to assist in the appointment process. We rely on information given in the application to select someone who will have the confidence of the parties. An incomplete, or incorrect, application can result in an appointment that may be inappropriate, or may result in delays.

- **Information about the parties**

Details of the parties to the dispute are required.

SAAVA will take reasonable steps to establish that the appointed arbitrator or independent expert is free from conflicts of interest. It is therefore essential that you provide full details of the landlord and tenant or other parties (including any parent and/or subsidiary companies or related entities) which a prospective appointee will need to consider in his or her conflict checks.

The parties' professional representatives must be identified and we will forward all relevant correspondence to them. Communications from SAAVA may be sent by email and it is important that you provide email addresses. If this is not possible, appointments will take longer.

If you are aware of any persons who have conflict of interests, you may provide details separately. You must give proper reasons for each person objected to. The President or Vice President will carefully consider representations that go to the identity of the person to be appointed, but cannot be bound by them and will make his own decision as to whom is appointed.

- **The property**

SAAVA need to understand the nature and location of the property. This aids the selection of someone who is appropriately qualified and experienced in the matters likely to arise.

Parties are requested to provide the full postal address (including post code), together with a brief description of the property, its location and other relevant information.

- **Information about the dispute**

It is important that we understand the nature of the dispute and brief details should be provided. This aids the selection of someone who is appropriately qualified and experienced in the matters likely to arise.

- **The authority for the appointment**

In the event that the parties agree to refer a dispute to an arbitrator or independent expert to be appointed by SAAVA they should complete and thereafter sign our template application form, sending it to SAAVA with a copy of the agreement to make the appointment.

Please note that SAAVA only acts in an administrative capacity and will simply make an appointment in accordance with the application made. SAAVA will not engage in discussion about the merits of the dispute.

As explained below, SAAVA will forward the information contained in any application form to prospective appointees in confidence, to help them decide whether or not they are able to take on the appointment. This is the basis on which your application is accepted.

## **Fees**

SAAVA charge a fee of £150 inclusive of VAT for administering an appointment. The fee is non refundable whether or not the President or Vice President makes an appointment (e.g. if the matter is settled by agreement).

The fee may be paid by cheque which must accompany a hard copy of the application form, or by electronic transfer.

## **The Process**

The President (or, if necessary, the Vice President in his place) will consider the nature of the dispute, the property and any information on the form to assist in identifying one or more potential appointees.

He will then check with those potential appointees that they are suitably qualified, impartial and have no conflict of interest, sending them, in confidence, a copy of the application form with the information it provides.

This is to help them decide if they have sufficient knowledge and experience of the type of the property and dispute to deal with the case and whether they have any conflict of interest with parties stated on the application form.. They will be required to disclose any involvements they may have had with the parties and/or the property within the last five years or is sufficiently material as to call his impartiality into proper question. It is important to identify these issues before being appointed rather than have them arise and give cause for potential challenge once it is under way.

Potential appointees will be asked to disclose any circumstances that give rise to justifiable doubts as to their independence. That disclosure is of vital importance in assessing the question of an arbitrator's or independent expert's independence. Further, the Arbitration (Scotland) Act 2010 (the 2010 Act) requires that any individual who is asked to be an arbitrator, but who has not yet been appointed, must without delay disclose any circumstances known to him or her (or which become known to him or her before the arbitration ends) which might reasonably be considered relevant when considering whether he or she is impartial and independent. SAAVA will apply the same procedure in respect of the appointment of an independent expert.

An arbitrator, after appointment, has a further requirement to disclose any facts of a similar nature which may arise during the course of the arbitration process.

The duty of disclosure is broad and the onus is upon the potential appointee to disclose such information, whether in relation to the dispute in question or in relation to any of the parties, which could possibly be seen as affecting their independence, even if they do not believe that such independence is actually affected as a result of the circumstances. Any potential appointee cannot choose not to disclose information because he or she believes it does not affect the ability to act independently and impartially. The arbitrator or expert must put himself in the shoes of the parties and ask whether, as a result of any facts or circumstances in existence, and taking account of the cultural and commercial background and any other factors which may affect the parties' perceptions, his or her independence or impartiality might be placed in question.

A declared financial or business relationship between a potential appointee and one of the parties will be grounds for not making the appointment because of the potential for lack of independence or impartiality.

The President will appoint an individual in his own right, not the firm or practice of which he may be a member or employee. There will be cases where the proposed individual has not personally acted for either of the parties but is a partner or employee in a firm that has done so, and accordingly, such professionals will be called upon to make the requisite checks within their organisations and to declare any relationship between their firm and the parties.

Because SAAVA rely upon the information provided, failure by a potential appointee to make the requisite declarations the provision of inaccurate information may lead to disciplinary action.

In cases where the person who seems the most appropriate appointee has declared a potential conflict, SAAVA will make an objective decision (sometimes after consulting with both parties) whether or not an over-riding conflict of interest arises. In this process SAAVA have adopted the International Bar Association traffic light system to assess the seriousness of any potential conflict declared by potential appointees. Declarations will be considered by the President and categorised according to the following: -

### **Red**

These are conflicts that bar the appointment of an arbitrator or independent expert and fall into two categories: those that can be waived and those that cannot. Conflicts that cannot be waived are where the potential appointee has a significant financial interest in one of the

parties, or regularly advises one of the parties. Other conflicts can be waived if both parties agree. These include situations where the arbitrator or independent expert has a close family member with a significant financial interest in the outcome of the dispute.

In the event of such disclosures, the President will always revert to the parties providing copies of the information provided by the potential appointee.

### **Orange**

These are situations where the President considers it may be necessary to put the disclosed information to the parties for consideration before the individual is appointed. That individual would only then be appointed if both parties made no objection within the allotted time. Please note that SAAVA will not always seek comment from the parties on disclosures made by potential appointees within this category.

### **Green**

Declarations from potential appointees will be categorised as green where SAAVA feels there is no conflict, and so will have no duty to disclose anything to the parties before making the appointment.

### **After the appointment**

The Secretary will write to the parties with a copy of the President or Vice President's appointment.

The appointee will write to the parties setting out the terms of his engagement.

Once the appointment is made. SAAVA has no further role in the dispute. In an arbitration the parties may have the right to remove the arbitrator under the provisions of the 2010 Act.

The arbitrator, once appointed, has a duty to report back to SAAVA to confirm either:-

- a. The arbitration is complete and the award issued, or
- b. The arbitration is cancelled and the arbitrator is discharged.

If you have any queries about the application, contact: -

The Secretary  
SAAVA  
C/o Anderson Strathern  
1 Rutland Court  
Edinburgh  
EH3 8EY