



VISHLAW GLOBAL

(a Registered Trust)

Center of Excellence for Alternative Dispute Resolution

2024 GUIDELINES FOR MANAGING CONFLICTS OF INTEREST IN APPOINTMENT OF ARBITRATOR

1. Introduction

The 2024 Guidelines for Managing Conflicts of Interest in Arbitration establish a robust framework to ensure impartiality, independence, and transparency in arbitral proceedings. These Guidelines build on previous standards and adapt to evolving legal and corporate structures, fostering greater confidence in arbitration proceedings.

2. General Standards

2.1 Obligations of Impartiality and Independence

Arbitrators must maintain impartiality and independence from the time of their appointment until the final award is rendered or the proceedings are terminated.

The obligation does not extend beyond the issuance of the final award, even if the award is challenged.

If a case is referred back to the same tribunal, a fresh disclosure and review of potential conflicts of interest are mandatory.

2.2 Tests for Conflict of Interest

An objective test is applied to determine whether an arbitrator should decline an appointment or refuse to continue, particularly in situations outlined in the non-waivable Red List.

Arbitrators must disclose any potential conflicts as per the circumstances described in the waivable Red List.

2.3 Thresholds for Disclosures by Arbitrators

Arbitrators are required to disclose all relevant facts and circumstances known to them that might give rise to a conflict of interest.

The subjective test under General Standard 3 requires arbitrators to assess potential conflicts based on their own knowledge and awareness.

2.4 Waiver of Potential Conflicts by Parties

Parties are deemed to have waived potential conflicts of interest if they do not raise objections within 30 days of receiving the arbitrator's disclosure or upon becoming aware of facts that may lead to a conflict.

The Guidelines presume that parties should have known of such facts through reasonable inquiry.

3. Relationships of Arbitrators with Parties

The 2024 Guidelines expand the scope to include relationships between arbitrators and their law firms or employers, recognizing the influence of corporate and sovereign structures.

Relationships with entities such as in-house counsel, state-owned entities, or autonomous agencies must be disclosed if they impact the arbitrator's independence or impartiality.

The Guidelines also account for situations where a party may exert controlling influence over a natural person or legal entity involved in the arbitration.

4. Duties of Parties to Disclose

Parties must disclose any controlling influence, direct economic interests, or indemnification obligations over other persons or entities that could affect the arbitrator's impartiality.

This disclosure is crucial in helping arbitrators fulfill their duty under General Standard 3.

5. Practical Application of the General Standards: The Lists

5.1 Red List

Non-Waivable Red List: This category encompasses situations where conflicts of interest are considered so severe that they cannot be remedied or waived, regardless of the parties' consent. These situations undermine the fundamental principles of impartiality and independence in arbitration. For instance, if an arbitrator is or has been a legal representative, counsel, or advisor for one of the parties involved in the arbitration, this creates an inherent bias that is impossible to cure. Other examples may include cases where the arbitrator has a significant financial interest in the outcome of the arbitration, has a close family relationship with one of the parties, or is an employee of a party. These scenarios are so egregious that they are deemed to automatically disqualify an individual from serving as an arbitrator, as they pose an unacceptable risk to the integrity of the arbitration process.

Waivable Red List: This category includes situations where conflicts of interest exist but are considered less severe and may be waived by the parties involved in the arbitration. While these conflicts might raise legitimate concerns about an arbitrator's impartiality, they are not deemed to be so severe as to automatically disqualify the arbitrator. Instead, the parties may choose to overlook these conflicts if they mutually agree to do so. For example, if an arbitrator currently represents or has represented one of the parties in a different matter, but this representation does not constitute a substantial part of the arbitrator's income or professional activity, the conflict might be considered waivable. Similarly, if an arbitrator has a minor, indirect financial interest in a party or a close professional relationship with someone involved in the case (e.g., a colleague at the same law firm but not directly involved in the arbitration), these situations may be included in the Waivable Red List. The key aspect is that the parties must be fully informed of the conflict and agree to waive it, acknowledging the potential impact on impartiality but accepting the arbitrator nonetheless.

5.2 Orange List

The Orange List identifies situations that do not automatically disqualify an arbitrator but may raise doubts about their impartiality and independence. This list has been expanded to include new and emerging scenarios that could reasonably create concerns, particularly from the perspective of the parties involved in the arbitration.

For instance, repeated appointments of the same arbitrator by a particular party or their counsel could suggest a close relationship that might influence the arbitrator's judgment, even if unintentionally. Similarly, if an arbitrator serves alongside other arbitrators in cases that are related or involve similar issues, this could lead to perceived or actual biases due to the potential for overlapping interests or shared viewpoints. Disclosures under the Orange List are context-dependent and require careful consideration of whether the situation could create doubts "in the eyes of the parties." The arbitrator is obliged to disclose any such circumstances, allowing the parties to assess whether these doubts are significant enough to warrant further action. However, the existence of a situation on the Orange List does not automatically disqualify the arbitrator; instead, it triggers a need for transparency and possible discussion among the parties. If the parties, after being fully informed, believe the arbitrator can still serve impartially, they may proceed with the appointment.

5.3 Green List

The Green List outlines situations where there is neither an apparent nor an actual conflict of interest, meaning these circumstances do not raise any legitimate concerns regarding an arbitrator's impartiality or independence. These situations are considered so minor or routine that they are deemed irrelevant to the arbitrator's ability to conduct the arbitration fairly and without bias. As such, arbitrators are not required to disclose circumstances falling within this category, and no further inquiry or consent from the parties is necessary. The key characteristic of the Green List is that the situations listed are universally regarded as having no impact on the arbitrator's neutrality, thus ensuring the arbitration process remains both efficient and focused on genuinely relevant concerns.

The 2024 Guidelines introduce subjective standards to determine the absence of conflicts.

All stakeholders are encouraged to apply these standards rigorously to ensure fair and impartial arbitration proceedings.