



VISHLAW GLOBAL

(a Registered Trust)

Center of Excellence for Alternative Dispute Resolution

THE NON-WAIVABLE RED LIST

The **Non-Waivable Red List** represents a category of conflicts of interest in arbitration that are so severe that they cannot be waived under any circumstances, even if all parties to the arbitration agree to do so. These conflicts are deemed to fundamentally compromise the arbitrator's ability to be impartial and independent, thereby undermining the integrity of the arbitral process.

Key Characteristics of the Non-Waivable Red List:

1. Incurable Conflicts:

The situations on the Non-Waivable Red List involve conflicts that are deemed incurable because they strike at the very core of the arbitrator's duties to be impartial and independent. The arbitrator's connection to one of the parties or the subject matter is so direct that no reasonable measures could eliminate the appearance or reality of bias.

2. Automatic Disqualification:

An arbitrator involved in any situation described in the Non-Waivable Red List is automatically disqualified from serving in that arbitration. The conflict is considered too serious to allow the arbitrator to remain, regardless of the parties' willingness to accept the risk.

3. Mandatory Disclosure:

Even though these conflicts are non-waivable, they must still be disclosed. The transparency ensures that all parties are fully informed of the reasons for the arbitrator's disqualification and the nature of the conflict.

4. Protection of the Arbitral Process:

The Non-Waivable Red List is designed to protect the integrity of the arbitration process. It ensures that arbitrators are held to the highest standards of impartiality and independence, preserving the fairness and credibility of the arbitral proceedings.

The Non-Waivable Red List ensures that certain conflicts of interest, which fundamentally threaten the impartiality and independence of an arbitrator, are strictly prohibited. By mandating automatic disqualification in these situations, the Guidelines safeguard the integrity of the arbitration process, ensuring that it remains a fair and neutral means of resolving disputes.

SAMPLE SCENARIOS

Below is not an exhaustive list, but it includes some of the most common conflicts of interest scenarios, provided for illustrative purposes only. In practice, parties and arbitrators should carefully consider each situation, make appropriate disclosures, and assess the nature and extent of any conflicts of interest.

Examples of Non-Waivable Red List Situations:

Scenario 1: Arbitrator as a Legal Representative

- An arbitrator is currently acting as legal counsel for one of the parties in the ongoing arbitration. This situation is non-waivable because the arbitrator's involvement as a legal representative in the same dispute undermines their ability to remain impartial and independent.

Scenario 2: Significant Financial Interest in the Outcome

- An arbitrator has a significant financial interest in one of the parties, such as owning a substantial shareholding in a company that is a party to the arbitration. The arbitrator stands to benefit financially from the outcome of the arbitration, which creates a direct and unavoidable conflict of interest.

Scenario 3: Arbitrator Regularly Advises a Party

- An arbitrator regularly provides strategic legal advice to a party or its affiliate outside of the arbitration context, and this advice forms a significant portion of the arbitrator's income. Even if the advice is unrelated to the current dispute, the close and ongoing financial relationship creates a non-waivable conflict.

Scenario 4: Close Personal Relationship

- An arbitrator has a close family relationship with a party's key decision-maker (e.g., a spouse or sibling is the CEO of the company involved in the arbitration). This close personal connection compromises the arbitrator's independence, making it a non-waivable conflict.

Scenario 5: Arbitrator as a Member of the Tribunal in a Related Dispute

- The arbitrator is currently serving as a member of an arbitral tribunal in a separate but related dispute involving the same parties, where similar legal issues are being addressed. The overlapping roles could lead to a perception of bias or pre-judgment, rendering the conflict non-waivable.