



VISHLAW GLOBAL

(a Registered Trust)

Center of Excellence for Alternative Dispute Resolution

THE WAIVABLE RED LIST

The **Waivable Red List** comprises a set of conflict of interest situations that are serious and could raise justifiable doubts about an arbitrator's impartiality and independence. However, unlike the Non-Waivable Red List, these conflicts may be waived if all parties involved in the arbitration are fully informed of the circumstances and explicitly agree to the arbitrator's appointment or continued service.

Key Characteristics of the Waivable Red List:

1. **Serious Conflicts with Potential for Waiver:**

The conflicts listed on the Waivable Red List are considered serious enough to require disclosure, as they could reasonably give rise to concerns about the arbitrator's impartiality or independence. However, they are not deemed so severe as to automatically disqualify the arbitrator. If the parties, after being fully informed, choose to waive the conflict, the arbitrator may continue to serve.

2. **Requirement for Explicit Party Consent:**

In order for a conflict on the Waivable Red List to be waived, all parties must give their explicit and informed consent. This means that the arbitrator must disclose the conflict in detail, and the parties must clearly and unequivocally agree to the waiver. Silence or implied consent is not sufficient.

3. **Emphasis on Transparency:**

The Waivable Red List emphasizes the importance of transparency in the arbitral process. Arbitrators are required to disclose any situation that falls within this list to ensure that parties can make an informed decision regarding the waiver. The disclosure serves as a safeguard against potential challenges to the arbitrator's impartiality later in the proceedings.

4. **Balancing Party Autonomy with Integrity:**

The Waivable Red List reflects a balance between party autonomy and the need to maintain the integrity of the arbitration process. It allows parties the flexibility to waive certain conflicts if they believe the arbitrator can remain impartial despite the circumstances. However, it also ensures that the process remains fair and transparent by requiring detailed disclosure and informed consent.

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 Waivable Red List Situations:

Scenario 1: Previous Representation or Advice with Limited Financial Impact:

- An arbitrator who has previously represented or advised one of the parties in unrelated legal matters but did not derive significant financial income from this representation may be listed on the Waivable Red List. The arbitrator's past involvement with the party could raise concerns, but these concerns can be waived if the parties are fully informed and consent.

Scenario 2: Concurrent Roles in Unrelated Arbitrations:

- If an arbitrator is currently serving alongside counsel for one of the parties in a separate, unrelated arbitration, this situation would be on the Waivable Red List. The ongoing professional relationship could raise doubts about impartiality, but it is not so severe as to be unwaivable if the parties agree after disclosure.

Scenario 3: Common Employment with a Party:

- An arbitrator who shares the same employer with one of the parties, such as both being employed by a large multinational corporation, would fall under the Waivable Red List. This common employment may create a perception of bias, but the conflict can be waived if the parties are aware of the details and choose to proceed.

Scenario 4: Repeated Appointments by the Same Party or Counsel:

- If an arbitrator has been appointed by the same party or represented by the same counsel in multiple previous arbitrations within a certain period (e.g., the past three years), this situation is listed on the Waivable Red List. The arbitrator's repeated involvement with the same party or counsel could lead to doubts about impartiality, but these doubts can be waived with the informed consent of all parties.

Scenario 5: Close Personal Relationships with a Party's Representative:

- An arbitrator who has a close personal friendship with the lead counsel or a key representative of one of the parties would be on the Waivable Red List. While this relationship could create a perception of partiality, it is waivable if the relationship is disclosed and the parties agree that it will not affect the arbitrator's decision-making.

Scenario 6: Public Advocacy of Legal Positions Relevant to the Case:

- An arbitrator who has publicly advocated a legal position relevant to the issues in the arbitration, such as through social media or professional platforms, is included on the Waivable Red List. This public stance could influence the arbitrator's impartiality, but it can be waived if all parties agree that the advocacy does not constitute a conflict.

Scenario 7: Advisory Roles in Related Industries or Entities:

- If an arbitrator has advised entities in a related industry or sector to that of one of the parties but not directly involved with the party itself, this would be a waivable conflict. For example, advising a competitor of one of the parties on general industry trends. The conflict can be waived if the parties agree after full disclosure.

The Waivable Red List outlines significant conflicts of interest that, while serious, can be waived by the informed consent of all parties involved in the arbitration. The key principles are transparency and informed decision-making, ensuring that parties have the opportunity to evaluate the conflict and decide whether to proceed with the arbitrator. This list balances the need for impartiality with respect for party autonomy, allowing the arbitration process to remain both flexible and fair.