Ethics in Arbitration

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Introduction

A central theme of this wonderful conference has been that arbitration plays vitally a significant part in our system of justice. One need not go past the *Commercial Arbitration Acts* creating a uniform domestic arbitration law throughout Australia to find this is so.[1] The system is supported by the Supreme Courts of each state and territory which provide supervisory functions.

Arbitrators therefore assume important ethical duties to the public to maintain the integrity of the arbitration process as well as to the parties to fairly adjudicate the dispute which they have entrusted to the arbitrator. These are important values of arbitration.

In addition, I venture to suggest that it is important for bodies which seek to provide arbitration facilities to adopt Codes of Ethics of a high standard. This will work to enhance the status of the institution and foster public confidence in the services which it seeks to provide.

The application of ethical standards in arbitration often presents difficulty. The Principles can only be stated generally, yet the circumstances to which they apply are invariably unique and diverse.

I served as Secretary of the Victorian Bar Ethics Committee for some four years.

Two amusing but bizarre cases illustrate my point (and hopefully will keep your attention late in the day towards the end of this very fine conference). The breadth of factual situations which can give rise to ethical dilemmas knows no boundary. I refer to the 'Dead Fish' case and the 'Biting Case' which confronted my Ethics Committee in the 80s.[2]

There are often no clear answers to the problems which arise. The line between conduct which contravenes and that which is acceptable can be thin. In particular situations, application of the Principles may even appear to conflict.

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1 *Commercial Arbitration Act 2017* (ACT); *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld\); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA).

2 Any reader who did not attend this segment of the online conference will have to consult with those who did to unravel the details of the examples as best they can be remembered and not glossed with inaccuracy or exaggeration.

Ultimately, adopting an appropriate course is a matter of judgement for the arbitrator following careful analysis of the problem which is presented.

Members of Resolution Institute are encouraged to seek advice from senior arbitrators when faced with difficulty.

Nevertheless, the Principles if applied with robust common sense and without unduly formalistic interpretation, are capable of being formulated to provide useful, if not essential, guidelines for the assistance of arbitrators and those that may appear before an arbitral tribunal to advise of the expected standards which will be applied.

There are Two Notes of Caution

It should be noted that these Principles are not intended to provide any new or additional grounds for the setting aside of an arbitral award.

It should be further noted that the Principles are not qualified by, or seek to qualify, the immunity provided to arbitrators, for example to the effect that an arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.[3]

Common Structure of Ethical Standards

My research into the issue of ethical standards in arbitration traversed a number of sources, both national and international. Common themes and structures were revealed for the expression of ethical standards for arbitration in written form.

A common approach is to commence with an 'Overarching Statement of Principle', otherwise known as the 'Golden Principle'. This sets the tone for the rules which follow and provides both an educative function by stating the fundamental purpose which the rules seek to address, and a yardstick to assist in interpretation of the rules which follow. Here below I have identified one well accepted Overarching Statement of Principle.

Then usually follows a set of 'Subsidiary Principles'. These can be expressed in general terms to define in a short-hand fashion the basic principles which are designed to give effect to the Overarching Statement of Principle. Here below I have identified 10 Subsidiary Principles.

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[3] See *International Arbitration Act 1974* (Cth) s 28 and s 39 of the State and Territory Uniform Commercial Arbitration Acts in Australia; but cf New Zealand where, under *Arbitration Act 1996* (NZ) s 13, an arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator.

Then follow a set of 'Sub-Rules'. These provide essential explanation of how each Subsidiary Principle is intended to work in different and common circumstances. Of course, not all circumstances can be anticipated or provided for. Nevertheless, the main situations experienced in an arbitration may be addressed.

It can be a subject of debate as to how prescriptive a set of Sub-Rules (or the equivalent) should be.

Nevertheless, to my mind, a well-crafted set of Sub-Rules is critical to an understanding of each of the Subsidiary Principles and how they are expected to work in practice. They serve as the 'engine room' of the ethical structure and perform a valuable educational function, especially for new and inexperienced arbitrators, and for parties and their advisors contemplating arbitration, and for parties who may appear before an arbitral tribunal.

Content of Ethical Rules

Here is a set of written ethical standards derived from both national and international sources, following the structure earlier discussed:

Overarching Principle – An Arbitrator Should Uphold the Integrity and Fairness of the Arbitration Process and Professionalism in its Conduct

A well accepted and often quoted starting point is provided by the *ICC Note to Parties and Arbitral Tribunals*,[4] which provides:

> Arbitral Tribunals are expected to abide by the highest standards of integrity and honesty, to conduct themselves with honour, courtesy and professionalism, and to encourage all other participants in the arbitral proceedings to do the same.

Subsidiary Principles (with accompanying Sub-Rules)

1. Basic Preliminary Considerations are to be met in accepting appointment as Arbitrator

A prospective arbitrator shall accept an appointment only if fully satisfied that certain Basic Preliminary Considerations can be complied with, namely that he or she:

(a) can act without bias, impartially and independently from the parties, potential witnesses (if known), and other arbitrators (if appointed);

(b) is competent to serve by being appropriately qualified or experienced;

[4] International Chamber of Commerce, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2021) available at <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> cl 65.

(c) has an adequate knowledge of the language of the arbitration; and

(d) is able to commence and complete the arbitration within the expected time frame (or a reasonable timeframe if none is stipulated) and devote to the arbitration the time and attention which the parties are reasonably entitled to expect

2. Pre-Appointment communications are limited to avoid impropriety in dealing with the parties

Save with the consent of all parties, before accepting an appointment, a prospective arbitrator should not permit any discussion with a party on the merits of the case, and may only discuss with a party:

(a) the general nature of the case;

(b) the identity of the parties, their representatives and key witnesses (if known);

(c) logistical matters such as the expected times and place(s) for hearings and other arrangements for the conduct of hearings;

(d) any response to inquiries directed to his or her suitability for appointment as arbitrator; and

(e) in an arbitration where there are three arbitrators in which two party-appointed arbitrators are expected to appoint the third, each party-appointed Arbitrator may consult with his or her appointing party solely concerning the choice of the third Arbitrator and any associated administrative matters.

A prospective arbitrator shall not otherwise confer with any of the parties or their legal advisers or counsel until duly appointed as the arbitrator, and then only in accordance with the process permitted by these Principles.

A prospective arbitrator shall not take part in any pre-appointment interviews with any of the parties or their advisors.

A prospective arbitrator shall not make any misleading or deceptive statement to any party as to his or her qualifications or experience.

3. Pre-Appointment disclosure is to reveal any interest or relationship likely to affect impartiality and independence

A prospective arbitrator is obliged to disclose all facts or circumstances that may give rise to justifiable doubts as to his or her impartiality or independence or which may create an appearance of partiality or a conflict of interest.

For example, a prospective arbitrator should disclose to any party who approaches him or her for possible appointment:

(a) any past or present close personal relationship or business relationship, whether direct or indirect, with any party to the dispute, or any representative of a party, or any person known to be a potentially important witness in the arbitration; and

(b) the extent of any prior knowledge he or she may have of the dispute.

However, the existence of any matters described under this Principle does not render it unethical to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continuation following full disclosure of the relevant facts.

Further, past relationships will only give rise to justifiable doubts if they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment. He or she should decline to accept an appointment in such circumstances unless the parties agree that the arbitrator may proceed.

Disclosure by itself does not imply the existence of partiality or a conflict of interest. Only if there are justifiable doubts as to the arbitrator's impartiality or independence must the arbitrator withdraw.

On the other hand, if the conclusion is that there are no such justifiable doubts, the arbitrator is free to accept appointment and continue with the arbitration.

4. Duty of disclosure continues throughout the Arbitration

The duty of disclosure is a continuing duty which continues throughout the arbitration with regard to new facts and circumstances as they may arise, or which are recalled or discovered.

Where an arbitrator is or becomes aware that he or she is incapable of having or maintaining the required degree of impartiality or independence, the arbitrator shall promptly take such steps as may be required, which will include advising the parties of the new facts or circumstances and may include resignation or withdrawal from the process if necessary.

5. Arbitrator must act without bias

In support of the principle that the arbitral tribunal be impartial and independent, an arbitration must be conducted in a manner which is free of both actual bias and apparent bias as described below ('Bias Tests'):

(a) Actual bias arises when an arbitrator actually favours one of the parties or where he or she is actually prejudiced in relation to the subject matter of the dispute; and

(b) In Australia, apparent bias arises when a fair-minded lay observer with knowledge of the material objective facts *might* reasonably apprehend that the arbitrator *might* not bring an impartial mind to the resolution of the question the arbitrator is to decide.[5] Note that the NZ and UK tests vary slightly.[6]

For the purposes of the Bias Tests, the content of the relevant objective facts in an arbitration will vary but will include the matters in issue to be decided in the arbitral proceeding and the conduct of the arbitrator that is of concern.

Guidance is provided by the following, though sometimes overlapping, main categories, where the Bias Tests may be satisfied:[7]

(a) by interest, being some direct or indirect interest in the arbitral proceeding, whether pecuniary or otherwise;
(b) by conduct, taken in its context, either in the course of, or outside, the arbitral proceeding;
(c) by association, where there is some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the arbitral proceeding; and
(d) by extraneous information, where knowledge is gained by the arbitrator of some prejudicial but inadmissible fact or circumstance.

If an arbitrator considers that one of the Bias Tests has been satisfied, he or she must withdraw from the arbitration.

However, an arbitrator is not compelled to automatically disqualify himself or herself whenever requested by one party to do so. Unless the arbitrator determines on reasonable grounds that one of the Bias Tests has been satisfied, the arbitrator has a duty to continue with the arbitration.

Deciding an issue or series of issues against a party in the course of an arbitration, or delivering an interim award against a party, will not by itself result in the arbitrator being compelled to withdraw, unless one of the Bias Tests has been satisfied.

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5 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
6 In the UK the test is found in *Porter v Magill* [2002] 2 AC 357, 494 [103] where Lord Hope described the test, said to be 'in harmony with the objective test which the Strasbourg court applies', as 'whether a fair-minded and informed observer, having considered the facts, *would* conclude that there was a real possibility that the tribunal was biased'. For the New Zealand approach, see *Saxmere Company Ltd v The Escorial Company Ltd* [2010] 1 NZLR 35.
7 *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

6. Arbitrator's obligations include understanding the dispute and providing information as to process

An arbitrator is required to prepare appropriately in advance for the arbitral process concerned.

Once the arbitration proceedings commence, the arbitrator shall acquaint himself or herself with all the facts and arguments presented so that he or she can properly understand the dispute and prepare a rational and reasoned award.

Where appropriate, and having regard to whether some parties may not be represented by professionals familiar with arbitration, the arbitrator shall ensure that the parties are informed of the procedural aspects of the process.

7. Arbitration is to be conducted in a fair and professional manner

An arbitrator must allow each party a fair opportunity to present its case through relevant evidence and arguments.

Co-arbitrators should afford to each other full opportunity to participate in all aspects of the proceedings.

Unless otherwise agreed or provided for in the applicable Rules of the arbitration, co-arbitrators if three are appointed including two party-appointed arbitrators, must act all as neutral arbitrators.

An arbitrator:

(a) should conduct the proceedings in a courteous and even-handed manner;
(b) should encourage all parties, their representatives and witnesses to observe appropriate courtesies and respect for all participants in the arbitration;
(c) shall not behave in a manner which is unduly annoying, harassing, intimidating, offensive, oppressive, or humiliating towards any party, party representative, witness or other participant in the arbitration; and
(d) shall not behave in a manner which might reasonably be perceived as conduct unbecoming of a professional appointed to the position of arbitrator.

If a party fails to appear, upon being satisfied that due notice of a hearing has been given to the absent party, the arbitrator may proceed with the arbitration.

If the arbitrator determines that more information is required to determine the case or any issue, he or she may advise the parties accordingly, and may thereafter take such steps as are permitted under the applicable Rules of the arbitration.

Although it is not improper to suggest the possibility of negotiation or mediation to resolve the dispute or any issue, an arbitrator should not exert undue pressure on any party to settle or mediate.

The arbitrator should, after careful deliberation, decide in the award all issues submitted for determination, but no more, unless with the agreement of the parties.

It is improper for an arbitrator to inform anyone of any decision, or to inform anyone of the deliberations of a three-person arbitral tribunal about any decision, in advance of the time it is given to all parties.

8. Arbitration communications are to be limited to avoid impropriety

An arbitrator shall communicate with those involved in the dispute resolution process only in a manner appropriate to the process.

Throughout the proceedings an arbitrator must avoid any unilateral communications of whatever kind with any party, or its representatives, save with the consent of all other parties or as permitted by the applicable Rules of the arbitration.

The arbitrator is obliged to send copies of his or her written communications to all parties at the same time, and to promptly forward copies of any written communications received from a party to all other parties if they have not already received a copy, unless otherwise agreed by all parties.

9. Conduct of the Arbitration is to be fair, expeditious, economical and final

The arbitrator is expected to discharge his or her duties to ensure the fair, expeditious, economical and final determination of the dispute by the arbitrator.

An arbitrator must not:

(a) be influenced by outside pressure or self-interest;
(b) delegate any duty to decide the issues in dispute to any other person unless permitted to do so by agreement of the parties, applicable Arbitration Rules or applicable law; or
(c) unduly delay the completion of the dispute resolution process or delivery of the award.

Subject to the exceptions which follow, once an arbitration has commenced, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue, or as otherwise required under these Principles.

An arbitrator may withdraw from an arbitration if a party fails or refuses to pay the arbitrator's fees or expenses as agreed.

If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. The parties are not obliged to give reasons for the request.

10. Confidentiality - Arbitration proceedings are and shall remain confidential at all times, including following completion of the Arbitration

Unless otherwise agreed by all parties, or permitted or required by applicable law, both during and after completion of the arbitration, an arbitrator shall not disclose or use any confidential information acquired in the course of or for the purposes of the arbitration, whether to gain personal advantage or advantage for any other person, or to affect adversely the interest of another, or use the confidential information in any other way, other than for the purposes of the arbitration.

An arbitrator who withdraws from an arbitration prior to completion should take reasonable steps to protect the interests of the parties in the confidentiality of the proceedings, including by returning to the parties all evidentiary materials in a timely manner.

How to Approach a Borderline Ethical Issue

I mentioned in the introduction that the application of ethical standards in arbitration often presents difficulty. The Principles can only be stated generally, yet the circumstances to which they apply are invariably unique and diverse.

There are often no clear answers to the problems which arise. The line between conduct which contravenes and that which is acceptable can be thin. In particular situations, application of the Principles may even appear to conflict.

Ultimately, adopting an appropriate course is a matter of judgment for the arbitrator following careful analysis of the problem which is presented.

Are there any guidelines which can assist in applying established ethical rules to the difficult case?

Yes, may I suggest that there are.

The first is to consider and apply the accepted 'Overarching Statement of Principle', (otherwise known as the 'Golden Principle') discussed earlier, and consider the problem in this context.

A second approach is to consider what might be described as the 'core principles' of arbitration. These work together to ultimately provide an important rationale for parties engaging in the arbitral process.

In the course of my practice I examined a group of eleven bodies of rules of domestic and international arbitration in current use, which I will call the 'Sample Rules'.[8] They are intended to provide a cross-section of domestic and international arbitration rules drawn from the UNCITRAL Model Law, and the arbitration rules of the great seats in Europe, Asia, the United Kingdom, America and the Asia-Pacific.[9] They will serve to provide illustrations of key concepts in the process of both domestic and international arbitration.

At all times, I suggest that the arbitral tribunal must be mindful of, what might be described as 'core principles' of flexibility, efficiency (expedition and cost-effectiveness) and fairness.[10]

As Allsop CJ has earlier mentioned in this conference, 'No one is well served by a "scorched earth" approach to litigation.' 'An efficient arbitral culture' should be the adopted, with the aim of 'solving the problem'.

These three Core Process Principles of the arbitral process may also provide useful guideposts as the application of the ethical principles to the infinitely variable facts which may confront an arbitrator.

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8 The Sample Rules referred to are: The UNCITRAL 'Model Law' on International Commercial Arbitration (the 'Model Law'); the rules of Arbitration of the International Chamber of Commerce ('ICC Rules'); the rules of the London Court of International Arbitration ('LCIA Rules'); the rules of the Dubai International Arbitration Centre ('DIAC Rules'); the rules of the Dubai International Financial Centre - London Court of International Arbitration ('DIFC-LCIA Rules'); the rules of the Hong Kong International Arbitration Centre ('HKIAC Rules'); the rules of the Singapore International Arbitration Centre ('SIAC Rules'); the rules of the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC Rules'); the rules of the New Zealand International Arbitration Centre ('NZIAC Rules'); the International Centre for Dispute Resolution Rules ('ICDR Rules'); and the International Bar Association Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules').

9 The five most preferred international arbitral institutions are the ICC, LCIA, SIAC, HKIAC and SCC, and the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva. See School of International Arbitration (SIA), Queen Mary University of London and White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> 9.

10 See: Peter Vickery, 'Evidence in International Commercial Arbitration – Exploring a New Framework' (2019) 38 *The Arbitrator & Mediator*.

Role of Resolution Institute – A Parting Thought

I mentioned earlier my role as Secretary of the Victorian Bar Ethics Committee.

One function it performed well was the provision of ethical advice to barristers in the field. This was a valuable service. A barrister could telephone an Ethics Committee member, virtually at any time that a committee member was available and receive immediate advice on the problem.

Subject to volunteers stepping forward from the senior ranks of Resolution Institute, there would be no apparent reason why such a scheme could not be introduced for the great advantage of institute members.