

Can Professional Ethics Wait? The Need for Transparency in International Arbitration

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‘Standards of professional ethics form the backdrop for everything lawyers do.’¹ In the 2001 Goff Lecture, Johnny Veeder made an impassioned case demonstrating the need for ethical guidance in international arbitration:

- ‘For the parties to an international commercial arbitration, justice should be the paramount objective; and procedural fairness by their legal representatives is subsumed in that single objective. But the practice of international arbitration is not so simple, certainly not for the parties’ professional lawyers coming from different jurisdictions to a still different place of arbitration. Lawyers are no musicians or ballet dancers: a lawyer’s training, skills and ethics are still essentially rooted in a national legal system; and it is far from clear how and to what extent national professional rules apply abroad to the transnational lawyer in the international arbitration process.’
- ‘[T]here are no “rules of conduct” applied generally to lawyers before an international arbitration tribunal. The major institutional rules of arbitration, including the ICC and LCIA Rules, are silent as to the conduct of a party’s legal representative.’
- This situation ‘can easily breed procedural unfairness in the particular case, and it matters generally because it attacks the integrity of the system of international arbitration. [Without practical guidance for counsel,] [t]he system of self-policing may become impossible and there may be a gradual deterioration in the standards of legal professional conduct. The international arbitral process would then

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1 President’s Message, Canadian Bar Association Code of Professional Conduct.

be brought into disrepute and, once its good reputation was lost, it could take decades to rebuild confidence.’

More than seven years on, the guidance for which Veeder pleaded remains largely absent from the international arbitration landscape. One might well ask 50 arbitration practitioners to describe the professional conduct principles applied by them and one would receive 50 different answers. While this has not seen the international arbitral process brought into disrepute, the lack of ethical guidance continues to breed (or at least permit) procedural unfairness in various cases, attack the integrity of the system and invite deterioration in standards of professional conduct.

It is puzzling this remains the case. One would think all participants in international arbitration would have an interest in promoting at least some standardisation in expectations for professional conduct, particularly the lawyers acting as counsel. If the bounds of permissible and expected conduct are transparent, counsel need not worry about where the ethical lines are or what conduct their adversaries may feel free to engage in without ethical constraint. Similarly, counsel would no longer have difficulty (or at least they would have less difficulty) explaining to clients why certain actions must be taken and certain must never be. Despite these apparent incentives, however, little has been done and, at least in the author’s experience, such matters are seldom raised in the course of arbitral proceedings.

What accounts for this? Perhaps we have all been too busy. Perhaps the dangers cited by Veeder have been viewed as the Bush administration viewed global warming, with the assumption made that all lawyer participants in the process share certain fundamental ethical standards which more or less get things right. Stated another way, perhaps it all falls under the adage of ‘If it ain’t broke don’t fix it.’ But does anyone really know if it’s ‘broke’ and, if so, to what degree? Surely not.

One could posit a more cynical explanation for the relative silence of the arbitration community on this issue. As Veeder noted in his 2001 address, ‘it is far from clear how and to what extent national professional rules apply abroad to the transnational lawyer in the international arbitration process’ and ‘there are no “rules of conduct” applied generally to lawyers before an international arbitration tribunal.’. These propositions, each unquestionably correct, might permit arbitration counsel to entertain the following conclusion: national professional rules do not apply and there are no international rules; hence, conduct of counsel and their clients is not regulated by any minimal ethical standards but rather by a Machiavellian cost-benefit analysis of what conduct can be ‘gotten away with’ without undue risk of discovery or sanction by the tribunal.

There are, of course, more innocent explanations. One might be termed the ‘global warming/uncertainty’ approach. Under this hypothesis, counsel appreciate the risks of an uneven playing field but believe that lawyers participating in international arbitration are governing their conduct by subjective ‘internationalised’ versions of national codes which are sufficiently similar in content so as not to present material prejudice. This assumption or belief is accompanied by the lawyer’s uncertainty as to whether his or her own internationalised code of ethics is precisely what an international tribunal – with its own baggage of expectations as to professional conduct – might consider it should be. Short of a perceived material prejudice, the conscious or unconscious preference of the lawyers on both sides is to avoid the glare of the ethics spotlight.

Regardless of the explanation, the current state of affairs is less than satisfactory. Much has been written about the goal of an autonomous system of international arbitration where national courts play a supportive, but not obstructive, role. Equally, the increasing standardisation of the international arbitral process has been welcomed in many corners as meeting the demands of the system’s users for a more transparent and predictable process. Ethics cannot be left behind, not without a real risk that much of what has been accomplished might be undone.

The outlook is not entirely bleak. The Arbitration Committee of the International Bar Association has established a Task Force on Counsel Ethics, the goal of which is to examine whether ethical guidance is required and, if so, what form it should take. These issues were the subject of a lively discussion and debate at the IBA’s Annual Conference in Buenos Aires in October of last year. ‘Ethics in International Arbitration’ is slated to be the subject of the ITA’s Annual Workshop to be held in June 2009. These are but a few examples and counsel ethics appears to be slowly slipping into the mainstream of discussion.

The objectives of this article are twofold. First, it seeks to identify where the risks of uneven playing fields may lie, with a particular focus on the national codes of professional conduct in selected jurisdictions.²

² The jurisdictions examined were Argentina, Australia, Belgium, Canada, Chile, England & Wales, the European Union, France, Germany, Mexico, New Zealand, Saudi Arabia, Singapore, Sweden, Spain, Switzerland, the United States and Venezuela. Thanks are extended to Nathalie Allen (formerly of Gibson, Dunn & Crutcher) and to Nicolas Autet and Michael Reich of Gibson Dunn’s Paris and Munich offices respectively. Special thanks go to Hassan Mahassni in Jeddah, Fernando Del Castillo of Santamarina y Seta in Mexico City, the arbitration group of Schellenberg Wittmer in Geneva and the members of the IBA Task Force on Counsel Ethics for serving as useful sounding boards. It should be emphasised that input or feedback received from the above does not suggest that there is agreement on the substance of any of the matters addressed herein.

This exercise is limited to ethical rules governing the conduct of legal proceedings. It was considered, rightly or wrongly, that the international arbitration community cannot really seek to insert itself into areas of conduct lying outside arbitral proceedings themselves (eg, advertising, fees, conflicts of interest, organisation/association, etc). Similarly, the concept of attorney—client privilege, about which much has been written, is a principle of evidence rather than ethics, and has not been addressed. In any event, there is much that may be done in the core area of professional conduct of proceedings before any thought may be directed elsewhere. Having completed a comparative exercise and contemplated the areas where professional conduct can come into play in the arbitral process, the second objective of the article is to present a proposed ‘Checklist of Ethical Standards for Counsel in International Arbitration’ in the hope of stimulating debate and further action.³ Each of these objectives is discussed below.

How great is the risk of uneven playing fields?

There are no readily accessible data from which to draw conclusions about the frequency with which the application of different ethical standards in international arbitration proceedings may result in uneven playing fields. Indeed, there is no data at all on the basis of which one might determine what ethical standards have been applied by any single counsel to any single arbitration. It might be suggested, however, that when contemplating the nature of the international arbitration system, and the panoply of players in it, the odds of a perfectly level playing field existing in any particular case are remote. This stems from the facts that: (i) opposing counsel often come from different jurisdictions with different notions of what constitutes ethical conduct (and perhaps little understanding of the differences among national codes); and (ii) even counsel from the same jurisdictions may have diverging views on the extent to which their national ethical codes apply to international arbitration.⁴ The odds, then, of counsel to any particular arbitral proceeding applying the same ethical standards to their conduct are slim. So too are the odds that members of a given arbitral tribunal will possess a shared view of ethical standards for counsel. The dangers are obvious.

³ The proposed Checklist is attached hereto.

⁴ eg, compare Hans Van Houtte, ‘Counsel-Witness Relations and Professional Misconduct in Civil Law Systems’, 19(457), *Arbitration International* (2003) (under Articles 4.1 and 4.5 of the Code of Conduct for Lawyers in the European Union, ‘whenever the seat of the arbitration is within the European Union, the “[ethical] standards of the seat apply”.’) with V Veeder QC, ‘The 2001 Goff Lecture: The Lawyer’s Duty to Arbitrate in Good Faith’ (‘This rule [article 4.1] is largely meaningless in the field of international arbitration . . .’).

Absent data directly on point, a useful starting place might be to assume that counsel to arbitration proceedings apply to themselves the national codes of professional conduct of the jurisdictions in which they are admitted. On this assumption, which, it is appreciated, likely does not represent reality in the majority of cases, a comparison of various national codes might provide at least a sense of where problems may arise.

Based upon a number of such comparisons (by no means exhaustive), and broadly speaking, relatively few direct conflicts appear to exist among national codes of professional conduct. This is not to say that the national codes examined are substantially the same, but rather that they do not, for the most part, facially conflict. There are also some fundamental similarities. The major differences between codes are represented by the different approaches to the regulation of professional conduct found in common law vs civil law jurisdictions. Most common law codes of professional conduct are far more detailed in identifying conduct to be regulated than their civil law counterparts, where lawyer conduct is governed by general standards of integrity and good faith. Further, common law systems of ethics incorporate a lawyer's duty to the tribunal or court, in addition to that owed to the client. This duty is largely unrecognised in civil law systems.

The comparisons reveal that the most basic principles of lawyer ethics are found across jurisdictions. Virtually all national codes recognise the special role played by lawyers and the need for lawyers' conduct to be guided by honesty, integrity and good faith.⁵ Most distil from these common features minimum ethical requirements that lawyers conduct themselves with courtesy and respect for the process and its participants.⁶ Again, virtually all require that lawyers not make false and misleading statements or engage in the creation, use or preservation of false or fraudulent evidence.⁷ Putting aside the Machiavellian lawyer who considers there are no ethical constraints on 'international' conduct, the international arbitration community thus would appear justified in assuming that counsel adhere to these basic principles, as most invariably do.⁸

5 eg, Canada, Code of Professional Conduct, Chapter 1; Chile, Código de Ética Profesional, article 3; England & Wales, Solicitors' Code of Conduct, rule 1.02; EU, Code of Conduct, rule 2.2; Argentina, Reglas de Ética Profesional, article 1.1.

6 eg, Chile, Código de Ética Profesional, article 5; England & Wales, Solicitors' Code of Conduct, rule 1.01; EU, Code of Conduct, rule 4; Switzerland, Code Suisse de déontologie, article 1; USA, Model Rules of Professional Conduct, Preamble.

7 eg, Canada, Code of Professional Conduct, Chapter 1; EU, Code of Conduct, rule 4.4; England & Wales, Solicitors' Code of Conduct, rule 11.01; Australia, Model Rules of Professional Conduct & Practice, rule 14.1; New Zealand, Rules of Professional Conduct for Barristers & Solicitors, rule 8.01.

8 Similar principles may be found in previous attempts by bar associations to address ethics in the international arena. See, eg, IBA International Code of Ethics.

This is not to say, however, that the risk of uneven playing fields, or procedural unfairness, is low. In fact, the risk grows with each passing day as lawyers from increasing numbers of jurisdictions around the world join the arbitral community, bringing with them their own subjective understandings of ethical conduct as well as the views enshrined in their national codes and rules. If we accept that lawyers' ethical conduct is shaped at least in some meaningful part by their national codes of professional conduct and related training, this potential risk exists in at least two scenarios: (i) where national codes conflict with respect to particular conduct; and (ii) where one code addresses certain conduct while another is silent. A few examples may help illustrate the point.

Many national codes or rules of professional conduct provide that a lawyer may not communicate directly with an adverse party the lawyer knows to be represented by counsel absent permission or extraordinary circumstances.⁹ But what does this mean in the context where the adverse party is a corporation? Specifically, may a lawyer interview or communicate with the employees of an adverse corporate party which the lawyer knows to be represented by counsel? Under UK rules, this conduct is permitted. Under US rules, it is absolutely forbidden. German lawyers generally must refrain from such contact. Mexican rules are silent on this issue, although in general terms a Mexican lawyer would view it as permissible. The result is a potential inequality in access to information or evidence. A US or German lawyer representing a party in an international arbitration may feel ethically constrained not to communicate with employees of the adverse corporation (should access to them be available); the lawyer for the adverse corporation may feel no such constraint where the US or German lawyer's client is concerned.

What about preparing witnesses to testify? Here, the US lawyer may have an ethical advantage. Under US rules, it is common practice to rehearse proposed lines of direct or cross-examination in detail provided the witness is not improperly influenced to adopt certain testimony. Under UK rules, this cannot be done.¹⁰ The question is unclear/untested in most civil law jurisdictions, although traditionally civil law systems permit little if any contact with witnesses prior to trial (exceptions having been made to accommodate arbitration).

What about interviewing more than one fact witness at the same time?

9 eg, Australia, Model Rules of Professional Conduct & Practice, rule 18.5; Chile, Código de Ética Profesional, article 41; Mexico, Código de Ética, rule 5.5; New Zealand, Rules of Professional Conduct, rule 6.02; Spain, Código Deontológico de la Abogacía Española article 14.1.

10 See Bar Council of England and Wales Code of Conduct, Part II, Section 705(a).

This is not permitted in Australia;¹¹ apparently it is fine everywhere else.

May a lawyer make a statement to the tribunal as to what the facts are or will be demonstrated to be if such statement is not supported by any known evidence? The answer is 'No' in the United States, United Kingdom and Germany; 'Yes' in Mexico and Saudi Arabia.¹² Does a lawyer have an obligation to bring pertinent adverse legal authority to the attention of the tribunal if opposing counsel fails to do so? Again, the answer is 'Yes' in the United States/United Kingdom and other common law jurisdictions where the lawyer's duty extends to the tribunal; 'No' in Germany and elsewhere in the civil law world.¹³

Document disclosure presents a particularly problematic area. What is the lawyer's professional obligation in terms of ensuring that documents required to be disclosed are searched for diligently and, to the extent found, produced? Civil law codes of conduct, where document disclosure is largely alien to the adversary process, have nothing to say on this subject. Canadian lawyers, on the other hand, are required to explain to the client the necessity of making full disclosure and to assist the client in doing so.¹⁴ US lawyers, at least as developed in federal court practice, must make a reasonable inquiry and certify that disclosure is complete and correct.¹⁵ The import of these rules is that many common law lawyers are trained that they may not rely solely on the client's representations with respect to the completeness of any search for, and/or disclosure of, information required to be disclosed. The view of the civil law lawyer confronted with these issues is uncertain and could vary widely.¹⁶ The resulting possibility of unequal access to evidence, and thus an uneven playing field, is patent. It bears repeating that in this example, as with the others, the problem is compounded by uncertainty as to whether relevant national ethical standards apply to international arbitration proceedings and,

11 See Australia, Model Rules of Professional Conduct & Practice, rule 17.4.

12 eg, USA, Model Rules of Professional Conduct, rule 3.1; England & Wales, Solicitors' Code of Conduct, rule 11.01; England & Wales, Bar Council Code, rule 708.

13 eg, USA, Model Rules of Professional Conduct, rule 3.3; Australia, Model Rules of Professional Conduct & Practice, rules 14.6, 14.8; Canada, Code of Professional Conduct, Chapter IX.

14 Canada, Code of Professional Conduct, Chapter IX.

15 United States Federal Rules of Civil Procedure, Rule 26(g).

16 Issues may also arise with respect to the scope of a disclosure obligation. For example, an instance has been reported to the author anecdotally where a lawyer trained in civil law jurisdiction, where parties generally have no obligation to produce information other than that on which they rely, took the position in responding to an order for disclosure of documents that any information adverse to the client could be redacted and that the tribunal and the opposing party need not be notified that such redactions had been made.

where it is considered none do, how the void should be filled. It also bears noting that the essential point is not to judge which standards are more or less 'ethical' but to ensure as much as possible that counsel to proceedings apply the same ones.

Ex parte communications with arbitrators have not been entirely eliminated. Of the major arbitral rules, only the ICDR Rules (Article 7(2)) preclude such communications, and counsel from certain jurisdictions do not see an ethical problem in having them. By way of example, the author has been told of a recent case where an arbitrator posed questions to a witness that could only have come from counsel to one of the parties. While such instances may be rare in today's practice, there are also grey areas where counsel may have different conceptions of where the line lies between improper communication and permissible social interaction.

And the list goes on . . .

The proposed checklist

It is posited that the comparative analysis described above suggests a real possibility of procedural unfairness in international arbitration, although it certainly falls well short of empirical proof and relies upon an assumption (ie, that counsel are guided to some meaningful degree by their national ethical codes and training) that is admittedly blunt. The proposed solution or, more precisely, topic for debate, is an ethical checklist that might be employed at the outset of a case to ensure that the parties, their counsel and the tribunal are on the same page insofar as ethical standards are concerned. Such a checklist would seek to identify the areas where ethical standards among counsel may differ and offer parties suggested resolutions that may be adopted (or not) as the parties and the tribunal determine. Parties and their counsel would be encouraged to seek agreement in advance of the initial procedural hearing, with the tribunal then called upon to resolve any disagreements. The principal goal throughout would be to create an even playing field insofar as ethics is concerned (ie, parties and their counsel should be playing by the same ethical rules) while removing from the equation any diverging views held by tribunal members as to what conduct may be acceptable or unacceptable. A necessary corollary to such an approach is that counsel would need to be prepared to adapt/revise their ethical standards in particular cases in order to achieve this goal. The parties, and any tribunal called upon to resolve disagreements with respect to the Checklist, should be guided by the principle that, in addition to achieving a level playing field, no counsel should be placed in the position of having to choose between engaging in conduct

that is unethical under his or her national rules or being disadvantaged. Stated differently, if one lawyer is ethically permitted to engage in certain conduct while his or her opposing counsel is not, the first lawyer must agree not to engage in such conduct. From this it can be seen that any adaptation/revision of ethical standards required of counsel would act to raise the ethical bar, not lower it.¹⁷ One would hope this is a price the arbitral community is prepared to pay (to the extent it is a price at all); it is difficult to conceive of a workable alternative.

The methodology used to prepare the proposed Checklist is fairly simple. Extracted from each of the codes of conduct reviewed were principles and language applicable to the conduct of legal proceedings. These principles were then sorted into categories which, when later refined, became the basis for the various sections in the Checklist. Once sorted into categories of conduct, specific proposed resolutions were drafted either by adopting language from the code which was considered to convey most effectively the principle at issue or by drawing from a number of codes to craft new or revised language. In every case, the language for each proposed resolution was reviewed and adapted as necessary to account for its application to the conduct of international arbitration. In addition, care was taken in an attempt not to suggest language or principles which would clearly conflict with the provisions of any of the codes of conduct reviewed (ie, be considered unethical under any such code)

It should be noted that the Checklist could have taken at least two forms. In the first form (that followed), the checklist represents merely a menu from which parties and their counsel may select according to their agreed preferences and the ethical obligations under which counsel are operating. Alternatively, the proposed resolutions to the Checklist categories might have been presented as an ideal, with parties encouraged to adopt them in full. In the first scenario, a level 'ethics' playing field should result. The second scenario would seek not only to produce a level playing field but also to shape the international arbitration system itself by promoting a certain scheme of professional conduct. This would be motivated by the view that integrity of the system is of equal importance to a level playing field. However, as the recent firestorm of debate on 'e-discovery' illustrates, participants in international arbitration have widely ranging views on integrity and the 'search for truth'. In the author's opinion, integrity of the system requires conduct of parties, counsel and the

¹⁷ An analogy may be found in the area of attorney–client privilege where it has been accepted in many arbitral proceedings that, where one party (under laws applicable to it) may have the protection of the privilege and the opposing party does not, the opposing party should be permitted to enjoy its protection as well.

arbitrators that is designed to inform the arbitrators fully, transparently and efficiently of the relevant facts and law in order that they are best positioned to determine objective fact (in a relative sense)¹⁸ and issue a just award based upon a reasoned application of governing law. This in turn requires that counsel accept the principle that a duty is owed to the tribunal in addition to that owed to the client. But we are far from a consensus on this principle and may never have one. So, for now, a level playing field will have to suffice.

The proposed Checklist is divided into 12 sections. The preamble deals with the applicability or use of the Checklist, while the first and second categories address the basic principles of professional conduct common to most legal systems. The third category looks at the lawyer's obligations with respect to legal advocacy; the fourth and fifth deal with evidence and disclosure, respectively. Categories 6–8 address the lawyer's communications with others, specifically witnesses, arbitrators and opposing counsel. Finally, category 9 applies to orders or awards of the arbitrators. There are, no doubt, other areas where a similar discussion of ethical standards may be warranted.

Certain of the proposed resolutions in the Checklist are aspirational in nature; others are mandatory. Mandatory resolutions (if adopted) are identified by the use of 'must' or 'shall', the violation of which is subject to sanction by the tribunal. The tribunal is vested with sole and absolute discretion to determine appropriate sanctions depending upon the nature of the violation and the circumstances in which it occurs.¹⁹

Thus described, the Checklist largely speaks for itself. It is recognised that a much more rigorous and inclusive process must occur before anything similar to the Checklist becomes a useful reality. As noted previously, that process is under way in a number of fora. That said, readers are encouraged to examine the Checklist to identify: (i) any subjects where discussion is unnecessary or would cause more trouble than is solved; (ii) better ways to resolve potential ethical conflicts; and (iii) areas where the Checklist is silent but where guidance would be of assistance to counsel. Feedback of any kind would be welcome, and debate desired. At the end of the day we may conclude that counsel ethics is not 'broke' and requires no fixing. But the dangers of being wrong mandate that we be sure before permitting ourselves to remain in that comfort zone. In closing, with respect to a transparent system of ethics for counsel in international arbitration we may perhaps be provoked by the words of Mahatma Gandhi who, when asked what he thought of Western Civilisation, responded, 'It would be nice'.

18 Considerations of cost, efficiency and related factors ensure that no tribunal will be possessed of all relevant information such as to assess objective fact in an absolute sense.

19 The subject of appropriate sanctions for violations of agreed ethical standards itself requires significant thought and discussion.

Checklist of Ethical Standards for Counsel in International Arbitration

Preamble

A. 'Standards of professional ethics form the backdrop for everything lawyers do.'²¹ International arbitration is no exception, and the pressing need for ethical guidance was succinctly stated by V Veeder in the 2001 Goff Lecture as follows:

- 'For the parties to an international commercial arbitration, justice should be the paramount objective; and procedural fairness by their legal representatives is subsumed in that single objective. But the practice of international arbitration is not so simple, certainly not for the parties' professional lawyers coming from different jurisdictions to a still different place of arbitration. Lawyers are no musicians or ballet dancers: a lawyer's training, skills and ethics are still essentially rooted in a national legal system; and it is far from clear how and to what extent national professional rules apply abroad to the transnational lawyer in the international arbitration process.'
- '[T]here are no "rules of conduct" applied generally to lawyers before an international arbitration tribunal. The major institutional rules of arbitration, including the ICC and LCIA Rules, are silent as to the conduct of a party's legal representative.'
- This situation 'can easily breed procedural unfairness in the particular case, and it matters generally because it attacks the integrity of the system of international arbitration. [Without practical guidance for counsel,] [t]he system of self-policing may become impossible and there may be a gradual deterioration in the standards of legal professional conduct. The international arbitral process would then be brought into disrepute and, once its good reputation was lost, it could take decades to rebuild confidence.'

B. This Checklist of Ethical Standards for Counsel in International Arbitration (the 'Checklist') is designed to (i) identify areas of professional conduct where counsel may be subject to differing ethical obligations under their respective national codes or rules and (ii) offer proposed resolutions to such conflicts which may be accepted (in whole or in part), rejected or modified as appropriate. The proposed resolutions take the form of affirmative obligations; rejection or failure to adopt any such resolution communicates an agreement that there is no such obligation.

- C. The Checklist is conceived as a resource which, if and to the extent used at the outset of proceedings, should promote procedural fairness in arbitral proceedings (ie, a ‘level playing field’). Parties are encouraged to agree on the adoption, rejection or modification of the Checklist items in advance of the initial procedural hearing, with any disagreements to be resolved by the tribunal. The principal goal throughout would be to create an even playing field insofar as ethics is concerned (ie, parties and their counsel should be playing by the same ethical rules). In resolving any disagreements, the tribunal should be guided by this goal and by the principle that no counsel should be placed in the position of having to choose between engaging in conduct that is unethical under his or her national rules or being disadvantaged. Stated differently, if one lawyer is ethically permitted to engage in certain conduct while his or her opposing counsel is not, the first lawyer must agree not to engage in such conduct.
- D. The overriding principle of the Checklist is that international arbitration should be characterised not by gamesmanship and guesswork as to what may or may not be ethically required or permitted, but by transparency and application of the same ethical standards by counsel in the context of any particular arbitral proceeding.
- E. Certain of the proposed resolutions in the Checklist are aspirational in nature; others are mandatory. Aspirational resolutions are characterised by use of ‘should’, while mandatory resolutions are identified by the use of ‘must’ or ‘shall’. It is intended that violation of mandatory resolutions (to the extent adopted) be subject to sanction by the tribunal. The tribunal is vested with sole and absolute discretion to determine appropriate sanctions depending upon the nature of the violation and the circumstances in which it occurs.

Category 1 General Conduct

1. A lawyer should avoid bias and condescension towards, and treat with dignity and respect, all parties, witnesses, lawyers, arbitrators and all other persons involved in the arbitral process. A lawyer should not engage in any conduct that offends the dignity and decorum of proceedings. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding the arbitral proceedings which do not prejudice the rights of the client. **ADOPT: Y N**
2. A lawyer shall not assert a position, conduct a defence, question witnesses or take other action on behalf of the client when the lawyer knows, or when it is obvious that, such action is irrelevant to the case and/or would serve merely to (i) delay proceedings, (ii) cause undue burden or expense or (iii) harass or maliciously injure another. **ADOPT: Y N**

Category 2 Integrity/Duty of Candor

1. Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. The lawyer must discharge with integrity all duties owed to clients, the tribunal, opposing parties and their counsel. **ADOPT: Y N**
2. A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. **ADOPT: Y N**
3. A lawyer who receives information clearly establishing that the client has, in the course of the arbitration, perpetrated a fraud upon the tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the tribunal. **ADOPT: Y N**
4. A lawyer should subscribe to or make only those submissions that the lawyer believes are in compliance with applicable law. A lawyer should not make any statement before the tribunal in regard to the purported facts of the case unless the lawyer believes the statement is both relevant and supported by evidence. **ADOPT: Y N**
5. A lawyer shall not knowingly misstate the facts or the law or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. More generally, the lawyer has a duty not to, and shall not, knowingly or recklessly mislead the tribunal, the opposing party or its counsel. **ADOPT: Y N**
6. An undertaking given by the lawyer to the tribunal or to another lawyer in the course of arbitration proceedings must be scrupulously carried out. Unless clearly qualified in writing, the lawyer's undertaking is a personal promise and responsibility. **ADOPT: Y N**

Category 3 Legal Submissions

1. The duty of a lawyer, both to the client and to the arbitral system, is to represent the client vigorously within the bounds of the law. The advocate may urge any permissible construction of the law favourable to the client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail. The lawyer's conduct is permissible if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer may not assert a position in the arbitration that is frivolous or clearly unwarranted under existing law. **ADOPT: Y N**
2. The complexity of the law often makes it difficult for a tribunal to be

fully informed unless the pertinent law is presented by the lawyers in the case. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The arbitral process contemplates that each lawyer will present and argue the applicable law in the light most favourable to the client. However, where a lawyer knows of pertinent adverse authority that the lawyer considers to be directly on point, the lawyer must inform the tribunal of its existence unless the adversary has done so. Having made such disclosure, the lawyer may challenge its soundness in whole or in part. **ADOPT: Y N**

3. If legal authority subject to 3(2) above is discovered by the lawyer some time after the hearing but before the award has been rendered, the lawyer has a duty to bring it to the attention of the tribunal and to counsel for the opposing party. **ADOPT: Y N**

Category 4 Evidence

1. The lawyer shall not knowingly participate in the creation, preservation or use of fraudulent, false, altered or perjured testimony or evidence in any manner whatsoever. **ADOPT: Y N**
2. A lawyer shall not suppress evidence that the lawyer or the client has a legal obligation to disclose or otherwise unlawfully obstruct another party's access to material having potential evidentiary value. Similarly, a lawyer shall not dissuade a material witness from giving evidence or cause a person to hide or to otherwise become unavailable as a witness. **ADOPT: Y N**

Category 5 Disclosure

1. Where the arbitral proceeding involves document disclosure, no disclosure request, response or objection made by counsel on behalf of the client shall be issued or made, to the best of the lawyer's knowledge formed after reasonable inquiry, for any improper purpose, such as to harass or cause unnecessary delay, nor shall such request, response or objection be unreasonable or unduly burdensome or expensive given the needs of the case, the amount in controversy and the importance of the issues at stake in the arbitration. **ADOPT: Y N**
2. Where the arbitral proceeding involves document disclosure, every disclosure made by a party represented by counsel must, to the best of the lawyer's knowledge formed after a reasonable inquiry, be complete and correct as of the time it is made. Among other things, the lawyer shall explain

to the client the necessity of making full disclosure of any information the client is obligated or has undertaken to disclose and shall assist the client in fulfilling the obligation to make full disclosure. For the avoidance of doubt, the lawyer may not rely solely on the client's representations with respect to the completeness of any search for, and/or disclosure of, information required to be disclosed pursuant to a tribunal's order or undertaking by or on behalf of the client. **ADOPT: Y N**

3. If a lawyer comes into possession of a document belonging to another party by some means other than the normal and proper channels (for example, if the document has come into his or her possession in consequence of a mistake or inadvertence by another person or if the document appears to belong to another party and to be privileged from disclosure or otherwise be one which ought not to be in the possession of the lawyer's client), the lawyer should (i) where appropriate make inquiries of the client in order to ascertain the circumstances in which the document was obtained and (ii) unless satisfied that the document has been properly obtained in the ordinary course of events, at once return the document to the person entitled to possession of it and destroy any copies. **ADOPT: Y N**
4. If during the course of the case a lawyer becomes aware of the existence of a document which should have been but has not been disclosed, the lawyer shall advise his client to disclose it forthwith. If it is not then disclosed, the lawyer must alert the tribunal and opposing counsel to such non-disclosure. **ADOPT: Y N**

Category 6 Communications with Witnesses

1. A lawyer shall not communicate on the subject matter of the arbitration with any person the lawyer knows to be represented by counsel unless (i) pursuant to law or order of the tribunal, (ii) the lawyer has the consent of counsel for that person or (iii) the interests of the lawyer's client will be severely prejudiced if the communication is delayed. For the avoidance of doubt, current directors, officers, employees or agents of a corporation or other legal person represented by counsel are themselves considered to be so represented. **ADOPT: Y N**
2. A lawyer's interview of any witness or potential witness shall not take the form of rehearsing specific lines of direct, cross- or redirect examination or otherwise coaching the witness to adopt proposed testimony as his or her own. **ADOPT: Y N**
3. While the lawyer may assist in the preparation of written witness statements, the lawyer must take steps to assure that such statements are,

so far as practicable, in the witnesses' own words and reflect all material knowledge possessed by each witness and not just information favourable to the client's case. Similarly, while the lawyer may assist in the preparation of expert reports, the lawyer must take steps to assure, so far as practicable, that such reports contain the independent, objective and unbiased product of the expert based upon consideration of all material facts. **ADOPT: Y N**

4. A lawyer who calls a witness to testify orally shall not, while the witness is under examination, communicate with that witness absent permission of the tribunal. **ADOPT: Y N**
5. A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. A lawyer may advance, guarantee or acquiesce in the payment of (i) expenses reasonably incurred by a witness in attending or testifying, (ii) reasonable compensation to a witness for the loss of time in attending or testifying or preparing for same, and (iii) fees for the professional services of an expert witness. **ADOPT: Y N**

Category 7 Communications with Arbitrators

1. A lawyer shall not attempt or allow anyone else to attempt, directly or indirectly, to influence the decisions or actions of the tribunal by any means other than open persuasion as an advocate. **ADOPT: Y N**
2. All parties and counsel should have access to the tribunal on an equal basis. Generally, a lawyer should not communicate with an arbitrator in circumstances which might have the effect or give the appearance of granting undue advantage to one party. Without limitation, absent permission from the tribunal or otherwise as permitted by law, no party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator. Lawyers should also avoid undue solicitude for the comfort or convenience of the arbitrators and should avoid any other conduct calculated to gain special consideration. **ADOPT: Y N**

Category 8 Communications with Opposing Counsel

1. A lawyer should, so far as is practicable, respond promptly to communications from opposing counsel. **ADOPT: Y N**
2. Communications between lawyers for the parties in a case will not be deemed confidential absent an express written request by the lawyer making the communication. **ADOPT: Y N**
3. A lawyer must not divulge or submit to the tribunal any proposals for

settlement of the case made by the other party or its lawyer without the express consent by the other party's lawyer. **ADOPT: Y N**

Category 9 Orders/Awards of the Arbitrators

1. A lawyer shall not disregard or advise the client to disregard an order or award of the tribunal made in the course of the proceeding, but the lawyer may take appropriate steps in good faith to test or challenge the validity of such order or award. **ADOPT: Y N**