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**Between Cultural Boundaries and Legal Traditions: Ethics in  
International Commercial Arbitration**

**Catherine A. Rogers**

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## **Between Cultural Boundaries and Legal Traditions: Ethics in International Commercial Arbitration**

By Catherine A. Rogers<sup>†</sup>

International commercial arbitration dwells in an ethical no-man's land. Often by design, arbitration is set in a jurisdiction where neither party's counsel is licensed.<sup>1</sup> The extra-territorial effect of national ethical codes is usually murky, as is the application of national ethical rules in a non-judicial forum such as arbitration.<sup>2</sup> There is no supranational authority to oversee attorney conduct in this setting<sup>3</sup> and local bar associations rarely if ever extend their reach so far.<sup>4</sup> Arbitral tribunals have no legitimate power to sanction,<sup>5</sup> and specialized ethical

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<sup>1</sup> See Detlev Vagts & William W. Park, *National Legal Systems and Private Dispute Resolution*, 82 AM. J. INT'L L. 616, 628 (1988) (describing how the "arbitral seat" rarely coincides with the parties' citizenship or residence"); Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COMM. 301, 333 (1998) (reviewing caselaw that affirms ability to represent clients in arbitrations in foreign jurisdictions where counsel is not licensed).

<sup>2</sup> See *infra* notes 68-71.

<sup>3</sup> The only possible candidate is the International Bar Association ("IBA"), which, despite its name, cannot accurately be understood as a supranational regulatory authority. The IBA is a federation of national bar associations and law societies, not a licensing body that could impose any penalties for non-compliance. See *infra* note 242 and accompanying text.

<sup>4</sup> See IVO G. CAYTAS, *TRANSNATIONAL LEGAL PRACTICE: CONFLICTS IN PROFESSIONAL RESPONSIBILITY* 3 (1992) [hereinafter 'CAYTAS, TRANSNATIONAL LEGAL PRACTICE'] ("[I]t is fairly rare that misconduct 'abroad' results in all to serious consequences 'at home' (examples notwithstanding) . . . . [S]anctions remain essentially local.").

<sup>5</sup> The proposals in this Article include a new power for arbitrators to sanction attorneys who appear before them for misconduct, which would represent a change from the current consensus that arbitrators do not have any such power. For further discussion existing sources addressing an arbitrator sanction power and proposals for implementing such a power, see *infra* section III.A.3.

norms<sup>6</sup> for attorneys in international arbitration are nowhere recorded.<sup>7</sup> Where ethical regulation should be, there is only an abyss.

The purpose of this Article is to propose a methodology for developing ethical norms to govern attorney conduct before international arbitral tribunals,<sup>8</sup> and to design integrated mechanisms for making those norms both binding and enforceable in international commercial arbitration.<sup>9</sup> As a predicate, in Part I, I assess the reasons why ethical regulation is needed in

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<sup>6</sup> In its comparative analyses, this Article uses the term “ethical norms” to include not only those ethical principles that have been reduced to professional codes of ethics, but also those norms that are incorporated into procedural rules (such as Federal Rule of Civil Procedure 11), other legal rules (criminal and malpractice), as well as customary norms that have a bearing on the definition of lawyers’ ethical role. See Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 205 (1997). This broad approach is necessary for accurate comparison because in the United States virtually all ethical norms (wherever else they exist) have also been codified, but the same is not true in other nations. See Mary Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117, n.184 (1999) [hereinafter “Daly, *Dichotomy Between Standards and Rules*”]. Moreover, some systems treat particular conduct as implicating ethical considerations, while others may treat the same conduct as solely a matter of procedure or discretionary strategy. In referring to ethical norms that have been codified, I use the term “rules.” A more precise definition of “ethical norms” is bound up in the thesis of this Article. See *infra* Part I.A.1.

<sup>7</sup> As discussed elsewhere in this Article, there are other sources for ethical guidance in international cross-border practice, see *infra* notes 62-65, but they are limited in their scope and utility in international arbitration. See Peter C. Thomas, *Disqualifying Lawyers in Arbitrations: Do the Arbitrators Play Any Proper Role?*, 1 AM. REV. INT’L ARB. 562, 563 (1990) (noting that despite the fact that issues relating to ethics in arbitration are complex and “intriguing,” the area “has not received significant attention” from either scholars or regulators).

<sup>8</sup> International commercial arbitration provides a unique incubator for development of international law and consequently may provide insights that can be used to fashion similar advances in other public fora for international adjudication. See Andreas F. Lowenfeld, *Introduction: The Elements Of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 654-55 (1997) (arguing that lessons learned in international arbitration can aid in refining national and international adjudicatory techniques and procedures). Cf. Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 89, 95 n.83 (2000) (arguing that, as a highly competitive business, international commercial arbitration is a valuable source for evaluating commercial norms). Although my focus in this Article is on international commercial arbitration, the absence of ethical codes for international advocates causes problems in other international adjudicatory contexts as well. See Daly, *Dichotomy Between Standards and Rules*, *supra* note 6, at n.184 (describing ethical conflicts in the Yugoslav War Crimes Tribunal); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT’L L. 250, 250 (1996) [hereinafter “Vagts, *The International Legal Profession*”] (describing problems in Iran Claims Tribunal caused by lack of ethical consensus among attorneys).

<sup>9</sup> “Arbitration” is a form of adjudication by which parties confer, through private agreement, decision-making power on a non-governmental tribunal whose decision is made binding and enforceable through delimited involvement of national courts. See Vagts & Park, *supra* note 1, at 631 (elaborating on the theory advanced in R. DAVID, *L’ARBITRAL DANS LE COMMERCE INTERNATIONAL* 9 (1982)); see also GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS* 1 (1994). Notwithstanding the relative ease with which arbitration can be defined at a practical level, there remains substantial debate about the nature of arbitration. Is it a contractual arrangement, akin to settlement? Or is it better understood, as the Supreme

international arbitration. There is a pervasive myth that broad consensus exists among the nations of the world regarding attorney conduct.<sup>10</sup> If this were true, then against the backdrop of consensus, the presumably rare occurrences of ethical conflicts in arbitration could be dealt with on an *ad hoc* basis or with only a few discreet rules—as opposed to an entire specialized code of conduct and separate regime for enforcement. I will demonstrate that in fact the apparent consensus is merely “acoustic agreement,”<sup>11</sup> which conceals deep divisions among national ethical regimes. As the field of players continues to expand, these divergences will become increasingly problematic.

Compounding the existence of conflicts, the absence of an ethical regime in international arbitration means there are no standards for arbitrators to identify and evaluate misconduct, and no meaningful consequences for misconduct,<sup>12</sup> even if it could be identified. In

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Court likes to describe it, an alternative adjudicatory forum? Compare Allen Rau, *Arbitration as Contract: One More Word About First Options v. Kaplan*, 12-3 MEALEY’S INT’L ARB. REP. 21 (1997) (arguing that arbitration is “above all a matter of private ordering”); with Tom Carbonneau, *Le Tournoi of Academic Commentary on Kaplan: A Reply to Professor Rau*, 4 MEALEY’S INT’L ARB. REP. 35 (1997) (rejecting the private ordering notion of arbitration in favor of an approach that recognizes the public interest in adjudication). Moreover the practice of arbitration has changed dramatically in recent years, from an informal system to a more sophisticated and formal one.

<sup>10</sup> See, e.g., T. LUND, PROFESSIONAL ETHICS 18 (1970) (“[D]espite differences in legal systems, practices and procedures, lawyers throughout the world have laid down for themselves substantially the same standards of legal ethics.”); David Luban, *The Sources of Legal Ethics*, 48 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 246, 264-267 (1984) (concluding that German and American ethical rules are similar) (cited in Laurel S. Terry, *An Introduction to the European Community’s Legal Ethics Part 1: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1 & Appendix C (1993) [hereinafter “Terry, *Introduction to the European Community’s Ethics Code*”]).

<sup>11</sup> In comparative studies, it is easy to mistakenly assume that apparent similarities represent deeper correspondence between different systems. See COMPARATIVE LAW: CASES-TEXT-MATERIALS 481 (Rudolf B. Schlesinger, et al., eds., 6<sup>th</sup> Edition) (1998) (using the term “acoustic agreement” to describe the readily apparent but superficial commonalities between systems).

<sup>12</sup> There may of course be informal consequences in terms of an attorney’s reputation. The controlling effects of what economists call “reputational bonding” are, however, limited outside the context of a small community with repeat players. See Larry E. Ripstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998) (arguing that client’s rely primarily on attorney’s reputation, which an attorney invests to create and is therefore reluctant to risk by bad behavior); Ted Schneyer, *Reputational Bonding, Ethical Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777 (1998) (challenging the logic and empirical support for Ribstein’s “reputational bonding” theory and its supposed consequences for large law firms). The need

the earlier years of international arbitration, when the system was controlled by a small group of lawyer-idealists, this void was filled by informal social norms and control mechanisms. As the lawyer participants have increased and arbitration has become a more formal process, there is less agreement about what is proper conduct, but also less room to tolerate ethical insurgency.<sup>13</sup> A code of ethics for international arbitration<sup>14</sup> is needed to resolve the conflicts between the ethics of national participants and to provide guidance in regulating attorney conduct in arbitral proceedings.

Having established the need for a code of ethics for international arbitration, Part II turns to the methodology to be used in developing the content of the code. I propose adoption of what I call a *functional approach* to understanding national professional ethics and to prescribing new ethical norms for international arbitration. This approach focuses on the relationship between morality and role, viewing professional ethical norms as a product of the functional role served by the advocate-lawyer in relation to other actors within a particular legal

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for ethical regulation in international arbitration is precipitated by the growth and diversification of the international arbitration community, which has reduced the potential benefits that may come from “reputational bonding.”

<sup>13</sup> Extended debate exists about whether there is any such thing as an international “legal system.” Compare H.L.A. HART, *THE CONCEPT OF LAW* 79-99 (2d ed. 1994) (contending that international law lacks secondary rules of recognition, adjudication, and change necessary to constitute a legal system); with Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791 (1999) (concluding that there is an international legal system and challenging Hart’s analysis to the contrary); see also JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2d ed. 1980). For the purposes of developing international ethical norms, it is not necessary to weigh in on this debate, or to contemplate whether international commercial arbitration might constitute a sub-system or its own legal system. To avoid confusion with this debate, I use the term “system,” rather than a “legal system,” to refer to the intricate network of governmental, intergovernmental and private institutions, along with the national laws and international agreements that facilitate the practice of international commercial arbitration. See REISMAN, *SYSTEMS OF CONTROL*, *supra* note 57.

<sup>14</sup> International commercial arbitration is not a monolithic institution. There are many different types of arbitral institutions, each of which has somewhat unique functions and purposes. See *infra* notes Part II.D.2. Because my thesis is that ethical norms should be developed through arbitral institutions, I am actually advocating that there be multiple codes. For the sake of simplicity, however, I will refer to a “code” of ethics for arbitration in the singular form.

system.<sup>15</sup> Notwithstanding certain shared fundamental precepts, the nations of the world have divergent views about the purposes and goals of adjudication and the role of advocates in their legal systems.<sup>16</sup> National ethical regimes impose on lawyers professional obligations that promote and prescribe conduct consistent with the functions those systems have assigned to advocates.<sup>17</sup>

To demonstrate the *functional approach*, I construct a comparative “proof,” which explains the underlying reasons for differences among national ethical regimes. Based on these findings, I explain why other proffered or possible approaches—from a *Law-and-Economics* efficiency-based approach, to a choice-of-laws approach—cannot work to develop international ethical norms. The problem with all of these approaches is that they treat ethical norms as autonomous principles, which can be mixed and matched between systems until some form of consensus is attained. The *functional approach* demonstrates that ethical regimes must be tethered to the values of the systems in which they operate, as those values are expressed in the

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<sup>15</sup> In reality, lawyers act in many different roles, which means that they will inevitably face unique ethical problems and the factors they must consider in solving those problems are likely to be different. See Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 930-31 (1993) (suggesting that practice-specific codes be drafted to guide attorneys in specialized fields).

<sup>16</sup> This Article focuses primarily on those areas of ethical regulation that are necessary to guide lawyers when they are acting in their capacity as advocates before international commercial arbitration tribunals. Such a code can be narrower in scope than a code governing all cross-border practice, and need not address certain areas of ethical regulation that are not directly implicated in advocacy in this setting, such as attorney advertising, maintenance of client funds and contingency fees.

<sup>17</sup> See Philip S.C. Lewis, *Comparison and Change in the Study of Legal Professions* 27-79, in *LAWYERS IN SOCIETY*, VOLUME THREE, *supra* note 16 (“Every legal system will have theories of the legal profession, which usually can be deduced from their rules governing lawyers or describing proper representation.”); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990) (“[T]he ‘dutiful’ attorney is obviously a culturally specific standard”; see also Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 520-22 (1989).

inter-relational roles assigned to the actors in that system.<sup>18</sup> The content of norms for international arbitration, therefore, must be developed—not from national norms or abstract ideas about the purpose of ethical norms—but from the defining features of international commercial arbitration and the role of the advocate in that setting. The final sections of Part II use the *functional approach* to recommend ethical norms that might be developed for an ethical code for international commercial arbitration.

Identifying ethical norms is only the first step toward effective regulation of attorneys in international commercial arbitration. The rules must be integrated into the international commercial arbitration system so that they can guide and regulate attorney behavior. Integrating these norms means making participants aware of them, as well as making them binding on and enforceable against parties and their attorneys. I outline in Part III an enforcement regime that will append ethical norms to existing bodies of arbitral rules, meaning the rules promulgated by the major arbitral institutions.<sup>19</sup> This approach will make their application the product of party agreement and subject to party modification. Enforcement of these ethical norms will require that arbitrators be empowered to impose what I will call *sanction awards*,<sup>20</sup> and that attorneys be made personally subject to this new arbitrator power.<sup>21</sup> To

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<sup>18</sup> See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 837 (1984) (“Procedure is a mechanism for expressing political and social relationships.”).

<sup>19</sup> See *infra* section III.A. The most prominent arbitral institutions are the International Chamber of Commerce (“ICC”) in Paris, the American Arbitration Association (“AAA”) in New York, the London Court of Arbitration (“LCA”), and the Stockholm Chamber of Commerce (“SCC”). See REISMAN, SYSTEMS OF CONTROL, *supra* note 57, at 107. In addition to these stalwart institutions, there are a number of newer institutions that are worth noting, such as the Chamber of National and International Arbitration of Milan (CNIAM) and Venice Court of National and International Arbitration and the Chinese International Economic and Trade Arbitration Center (CIETAC). As alternative to institutional arbitration, the United Nations Conference on International Trade Law (“UNCITRAL”) has published rules for use in non-institutional or *ad hoc* arbitration. See *id.*

<sup>20</sup> See *infra* section III.B.

<sup>21</sup> See *infra* section III.C.

effectuate these new powers and liabilities, I propose that *sanction awards* be published<sup>22</sup> and national court review of such awards be enhanced over the minimal review that substantive awards are subject to.<sup>23</sup>

Under this regime, the general ethical norms laid out in codes will be developed and amplified through a body of arbitral jurisprudence that is subject to a partial review by national courts. National courts and bar organizations will provide the power and safeguards necessary to ensure that the sanctioning of attorneys is both effective and fair. Moreover these institutions will be able to protect their national interests in attorney regulation through enforcement of fundamental limitations on the power to modify arbitral ethical codes. An enforcement regime that appears to privatize both ethical rule making and enforcement is bound to have detractors. In the final section of Part III, I answer the most significant substantive objections and conclude that remaining symbolic objections must be overcome in light of the overwhelming practical importance of international commercial arbitration and the inescapable need for attorney regulation in this context.

## **I. The Need for Enforceable Ethical Norms in International Commercial Arbitration**

The primacy and legitimacy of arbitration as a forum for international commercial disputes is a relatively recent phenomenon. Despite its ancient history,<sup>24</sup> up through the mid-

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<sup>22</sup> See *infra* section III.D.

<sup>23</sup> See *infra* section III.E.

<sup>24</sup> “[P]rivate dispute resolution among commercial men is as old as commerce itself.” W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 22 TEX. INT’L L.J. 1, 2-11 (1995). For a more detailed description of the ancient history of arbitration, see Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B. UNIV. L. REV. 953, n.3 (1986) (citing F. KELLOR, AMERICAN ARBITRATION 3 (1948)) (dating commercial arbitration back to the time when “Phoenician and Greek traders roamed the ancient world” and to “the desert caravans of Marco Polo[.]”); W. DURANT, THE STORY OF CIVILIZATION: OUR COMMON HERITAGE 127, 361 (1935) (“The ancient Sumerians, Persians, Egyptians, Greeks, and Romans all had a tradition of arbitration.”). The development of a formal system



nineteenth century, in Europe and the United States arbitration was regarded as “bastard remedy” and arbitrators as “caricatures of their judicial siblings.”<sup>25</sup> Arbitration agreements were routinely voided<sup>26</sup> and arbitral awards were subject to intense judicial scrutiny, sometimes even rewriting.<sup>27</sup> Only by virtue of domestic courts’ respect for principles of international comity were arbitral awards enforced at all.<sup>28</sup>

Today, the scene has changed. International commercial arbitration holds an exalted status<sup>29</sup> and is commonly revered as vital to world trade.<sup>30</sup> Any nation interested in

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of private dispute resolution is attributable to the medieval English courts of fairs and boroughs, which could adjudicate disputes between merchants and traders at markets and fairs. For an expanded history of international arbitration, see Craig, *Some Trends*, *supra* note 24, at 2-11 (tracing the important milestones in the development of modern international arbitration).

<sup>25</sup> See Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996). The precise reasons for the common law hostility toward arbitration are unknown, but some scholars surmise that they trace back to the English judges’ almost complete reliance on fees from cases for their income, which meant that arbitrators were unwelcome competitors. See John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodations of Conflicting Public Policies*, 64 N.C. L. REV. 219, 224 (1986). A second possible reason is the centuries’ long struggle by the early courts for jurisdiction and their consequent unwillingness to surrender it. *Id.*; see also *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983 & n.14 (2d Cir. 1942).

<sup>26</sup> Throughout the nineteenth century, courts in the United States and England frequently invoked the doctrine of “ouster” to void contractual arbitration clauses “as unlawful circumventions of judicial jurisdiction and as denials of judicial justice.” Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999) (citing Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT’L L.J. 33, 39 n.12 (1984)); see also Edward Chukwuemeke Okeke, *Judicial Review of Foreign Arbitral Awards: Bane, Boon or Boondoggle?*, N.Y. INT’L L. REV. 29, 32 (1997).

<sup>27</sup> For example, in England, courts were permitted to and routinely did revise legal determinations made by arbitrators. See Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1948 (1996).

<sup>28</sup> See Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L. J. 1049, 1049-55 (1961).

<sup>29</sup> See Stephen T. Ostrowski & Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroads*, 73 N.Y.U.L. REV. 1650, 1650 (1998). Judicial critics of arbitration remain, although the focus of modern criticisms is more on the protection of parties’ procedural rights and arbitrator adherence to the rule of law. See, e.g., *Bowles Fin. Group, Inc. v. Stifel Nicolaus & Co.* 22 F.3d 1010, 1011 (10<sup>th</sup> Cir. 1994) (“Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system.”); *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 751 n.12 (8<sup>th</sup> Cir. 1986) (“[T]he arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law.”).

participating in the global economy must adjust its laws to accommodate the demands of international arbitration.<sup>31</sup> International commercial arbitration has transformed itself from a “bastard remedy” into the crown prince of international dispute resolution. Overcoming judicial reticence may be characterized as a triumph over its image problem, but to accommodate modern business needs international arbitration had to undergo a more substantive transformation, which is described below in Section A. Section B documents the vast difference among national ethical regulation and the ensuing need, in Section C, for a uniform code of ethics for international commercial arbitration.

### **A. The Reformulation of International Arbitration**

The story of international arbitration’s modern status can be told in two acts, the first being the early-modern period of arbitration in the early part of this century, and the second its modern era of the last twenty years.

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<sup>30</sup> Nearly thirty years ago, the U.S. Supreme Court acknowledged that international arbitration is vital to the global economy and U.S. participation in world trade. *See* *Breman v. Zapata Off Shore Co.*, 407 U.S. 1 (1972); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

<sup>31</sup> *See, e.g.*, Park, *Safeguarding Procedural Integrity in International Arbitration*, *supra* note 68 at 680 (documenting a “scramble among western European nations” to compete for international arbitration business); Sir Michael J. Mustill, *Arbitration: History and Background*, 6 J. INT’L ARB. 43, 53 (1989) (“One must take note of the efforts made by individual nations to make their arbitration laws . . . more attractive.”). This trend extends to developing countries, such as Mauritius, Estonia, Latvia, Lithuania and many Latin American countries, which in recent years have made legal commitments to support international arbitration as part of an effort to facilitate trade with foreign investors and business interests. *See* Arthur D. Harverd, *The Concept of Arbitration and Its Role in Society*, THE COMMERCIAL WAY TO JUSTICE (Geoffrey M. Beresford Hartwell, ed. 1997); Donald Francis Donovan, *International Commercial Arbitration and Public Policy*, N.Y.U. J. INT’L L & POL. 645, 650-51 (1995); *see also* 10 WORLD ARB. & MED. REPORT 209 (1999) (“The Turkish parliament’s decision to approve a constitutional amendment allowing for international arbitration in investment disputes should attract foreign investors to the multi-billion dollar energy projects currently awaiting funding.”); David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. INT’L L. REV. 2 (2000) (discussing potential for China in developing more reliable international arbitration enforcement record).

## 1. The Judicialization of International Arbitration

Until about twenty years ago, arbitration was an *ad hoc* compromise-oriented process characterized by its informality and emphasis on fairness.<sup>32</sup> Arbitral decisions were not revered so much for their legal accuracy or precision as much as for their sense of fairness and practical wisdom. The arbitrator of yesteryear was often an expert from the same industry as the parties,<sup>33</sup> who exercised a sort of paternal (there were no women)<sup>34</sup> authority. The arbitrator was expected to render a just and equitable result, even if that sometimes meant disregarding the express terms of the contract or the clear provisions of chosen law. These modes of decision-making are sometimes described in terms of formal doctrines, such as *amiable compositeur* and *ex aequo et bono*,<sup>35</sup> which expressly authorize arbitrators to disregard the strictures of so-called auxiliary rules, such as statutes of limitations, in order to justice.<sup>36</sup>

Another key attribute of arbitration in this era was the popular use of *lex mercatoria*. This unwritten law of merchants was developed by academics who were also

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<sup>32</sup> Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition*, 21 L. SOC. INQ. 285, 295 (1996).

<sup>33</sup> See Craig, *Some Trends*, *supra* note 24, at 6 (“Many arbitration clauses, or rules of trade associations, specifically required that arbitrators be ‘commercial men.’”).

<sup>34</sup> See DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 55, at 34-35, 36-38.

<sup>35</sup> See John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, AUG/OCT DIS. RES. J. 32 (2000). The doctrine of *amiable composition*, which is often translated to mean “author of friendly compromise,” has been described as:

allow[ing] arbitrators to decide cases in accordance with customary principles of equity and international commerce. This power permits arbitrators to arrive at an award that is fair in light of all circumstances, rather than in strict conformity with legal rules[, but] . . . generally [they] may not disregard mandatory provisions of substantive law or the public policy of the forum state.

*Intervention and Joinder as of Right in International Arbitration: Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. INT’L L. 915, 932 (1998); see also CRAIG, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION*, *supra* note 101, at § 8.04, p.137. . The doctrine of *ex aequo et bono* is very similar to *amiable compositeur*, except that the powers of arbitrators are slightly broader, enabling them to disregard even mandatory provisions of substantive law in order to reach an equitable outcome. See *id.*

<sup>36</sup> See Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 Bus. L. 577 (2000).

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<sup>37</sup> Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition*, 21 L. SOC. INQ. 285, 295 (1996). These principles are sometimes referred to as the “new *lex mercatoria*,” because they are a modern reincarnation of a substantive law of merchants that was developed by medieval English mercantile courts. See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 22 TEX. INT’L L.J. 1, 6 (1995).

<sup>38</sup> See *id.*

<sup>39</sup> See ICC Partial Award in Case No. 5073 of 1986, 13 Y.B. Commercial Arb. 53, 65 (1988) (cited in Drahozal, *Commercial Norms*, *supra* note 9, at 128).

<sup>40</sup> See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, Win. TEX. INT’L L.J. 1, 7 (1995).

<sup>41</sup> See *id.* “It was expected that moral norms and the force that businessmen of a country can bring to bear upon a recalcitrant neighbor’ would e sufficient to ensure respect for arbitral awards.” *Id.*

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<sup>42</sup> This trend is, as demonstrated by the provocative and insightful work of Dezalay and Garth, also likely attributable to competition among the lawyers who participate in arbitration. *See id.* at 297-98.



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<sup>43</sup> The term “alternative dispute resolution” is also inappropriate because in the international context there is no viable alternative. The overwhelming practical problems that complicate the prosecution of international cases in national courts and enforcement of their judgments, *see supra* Section I.B.2, make international litigation an unreliable option. *See* Nicholas de B. Katzenbach, *Business Executives and Lawyers in International Trade*, in SIXTY YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 67-68 (1984) (explaining that while arbitration might be a choice for domestic disputes, because there exists in national courts a reliable alternative, the unpredictability and risks of failure in domestic litigation of international business disputes makes international arbitration the only real option). For this reason, an estimated ninety percent of all international agreements contain arbitration clauses. *See* KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 n.62 (1993) (citing ALBERT JAN VAN DEN BERG, ET AL., ARITRAGERECHT 134 (1988)); *see also* Charles N. Brower, *Introduction*, in INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY” (Richard B. Lillich & Charles N. Brower, eds. 1993) (discussing popularity of ICC arbitration); Celia R. Taylor, *National Iranian Oil Co. v. Ashland Oil, Inc.: All Dressed Up and Nowhere To Arbitrate*, 63 N.Y.U. L. REV. 1142, 1143-44 (1988) (Comment) (same regarding AAA arbitration).

<sup>44</sup> Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition*, 21 L. SOC. INQ. 285, 299 (1996). In the words of Dezalay and Garth:

The legitimacy of international commercial arbitration is no longer built on the fact that arbitration is informal and close to the needs of business rather legitimacy now comes more from a recognition that arbitration is formal and close to the kind of resolution that would be produced through litigation.

*See id.* at 299.

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<sup>45</sup> *See generally* INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY” (Richard B. Lillich & Charles N. Brower, eds. 1993).





ŠP ä lly had been open-textured and subject to improvisation, has become more definite and precise, both in content and form.<sup>47</sup> While they once left vast discretion to the arbitrator, modern arbitral procedural rules generally shift more control to parties in the presentation of evidence and regulate arbitrator evaluation of evidence through formal rules of evidence.<sup>48</sup> Arbitral awards are being published with greater frequency and are even making an appearance as persuasive authority cited to other arbitration panels.<sup>49</sup> Selection of *lex mercatoria* by the parties is extremely rare,<sup>50</sup> most likely because the definition of “custom” among ever-expanding trade usages is harder to identify. Moreover, the *lex mercatoria* cannot provide adequate guidance for a range of statutory and so-called “mandatory law” claims and defenses that are now asserted in modern business disputes.<sup>51</sup>

International arbitration has emerged as the preeminent means for resolving

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<sup>46</sup> Stephen Bond’s study of 500 arbitration clauses from 1987 to 1989 revealed that only three percent of clauses empowered the arbitrators to decide under these doctrines. See Drahozal, *Commercial Norms*, *supra* note 9, at 129.

<sup>47</sup> See *infra* notes 170-176, and accompanying text.

<sup>48</sup> For a detailed discussion of the commonly chosen arbitral procedures, and their reduction to a prefabricated set of default rules, see *infra* Section I.C.1.

<sup>49</sup> *Comparative Analysis of International Dispute Resolution Institutions*, AM. SOC. INT’L L. PROC. (1991) (Mod. Barry e. Carter).

<sup>50</sup> Bond’s revealed that only a handful of clauses selected “general principles” and none expressly selected *lex mercatoria*. See Drahozal, *Commercial Norms*, *supra* note 9, at 129.

<sup>51</sup> For a description of the increase in mandatory law claims that can arise in arbitration, see *infra* notes 413-414, and accompanying text.

disputes that arise in the ever-expanding international arena. “By the mid-1980s, at least, it had become recognized that arbitration was the *normal* way of settlement of international commercial disputes.”<sup>52</sup> As a consequence, its aspiration cannot be simply to provide *ad hoc* remedial relief in individual cases. It must develop into a fully operational transnational adjudicatory process.<sup>53</sup> The assertion of this Article is that effectively guiding and regulating the conduct of attorneys who participate in the process is an essential part of that goal.

## **2. The International Legal Profession**

The shift to more formal control mechanisms in the international arbitration system is mirrored by the growing need for more formal regulation of the international legal profession more generally. Before the recent influx of new lawyers to the international community, the nascent international legal profession was much like the early years of the American legal profession, when “[t]here [were] are only a few persons in the profession and they knew what they are supposed to do. In the rare case that somebody [was] tempted to lapse from grace, the prospect of disapproval by one’s peers [was] deterrence enough.”<sup>54</sup> Informal control mechanisms were particularly effective among lawyers involved in international arbitration, because they were an intimate group of European practitioners who shared a tacit

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<sup>52</sup> Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *Comparative Arbitration Practice and Public Policy in Arbitration* 257, 293 (Pieter Sanders, ed., 1987) (cited in Craig, *Some Trends*, *supra* note 8, at 2) (emphasis added).

<sup>53</sup> See Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM.J. TRANSNAT’L L. 579, 580 (1985).

<sup>54</sup> Vagts, *The International Legal Profession*, *supra* note 8, at 250. For an exploration of how informal controls are adequate to regulate small social groups, see ROBERT C. BLYCKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 130-32 (1991);

understanding of what constituted proper behavior.<sup>55</sup>

As the field of international lawyers has expanded in both numbers and cultural vicissitudes,<sup>56</sup> however, informal control mechanisms are no longer sufficient.<sup>57</sup> In the context of arbitration, new comers have arrived with a sense that their participation in arbitration is an entrepreneurial venture, and they are thus less constrained by established traditions or an inherent sense of obligation to the system than were the “grand old men,” who regarded their service in arbitration as a duty not a career.<sup>58</sup> As the constraints of social norms break down in the arbitration community and the international legal profession more generally, there is nothing to take its place. Regulation of the legal profession “remains local in both scope and administration, often providing little guidance.”<sup>59</sup> The phenomenon can be imagined as contrasting world maps: Regulation of legal attorneys is tied to the geographic boundaries drawn

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<sup>55</sup> See Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Arbitration and the Construction of a Transnational Legal Order* 34-36 (1996) [hereinafter *Dezalay & Garth, Dealing in Virtue*] (describing the “grand old men” who “played a central role in the emergence and recognition of arbitration).

<sup>56</sup> The ranks of international lawyers now also include small firms and solo practitioners. See Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Search Term Begin Small-Firm Search Term End and Search Term Begin Solo Search Term End Practitioners*, PROF. LAW., June 1995, at 123;

<sup>57</sup> See Professor Dr. Karl Carstens, *Preface* in CAYTAS, *TRANSNATIONAL LEGAL PRACTICE*, *supra* note 4 (noting that with the globalization of legal services, lawyers must become more aware that “[w]hat is appropriate, even mandatory under one regime may not be, and may indeed be even reprehensible under another); Vagts, *The International Legal Profession*, *supra* note 8, at 251 (“As the activities of international law agencies, both public and private, involve more countries and more cultures, disputes about standards of behavior can be expected to multiply.”); see also W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION: BREAKDOWN AND REPAIR* 6 (1992) [hereinafter “REISMAN, SYSTEMS OF CONTROL”] (noting more generally that in international arbitration, informal “control mechanisms” are inadequate in the context of “modern transnational arbitration [which has] increased as a function of the expansion of transnational activity”).

<sup>58</sup> As Dezalay and Garth describe, there is a “generational warfare” between the “grand old men” and the new entrants regarding the future direction of international commercial arbitration. See DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 55, at 34-35 & 36-38.

<sup>59</sup> See Brand, *supra* note 1, at 302. The obscurity surrounding ethical regulation of international practice is best demonstrated U.S. Model Rule 8.5, which regulates to cross-border practice but expressly disavows any application in the international context: “The choice of law provision [in Rule 8.5] is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.” The problem is that there does not appear to be any such international law or agreements. See Detlev Vagts, *International Legal Ethics and Professional Responsibility*, 92 AM. SOC. INT’L L. PROC. 378, 378 (1998) [hereinafter “Vagts, *International Legal Ethics*”].

on a political map of the world, but the practice of law and movement of lawyers more closely resembles a constantly moving radar images of world weather patterns.<sup>60</sup>

Even when the international lawyer was still a relatively rare breed, Professor W. Michael Reisman recognized the need to regulate them at an international level.<sup>61</sup> As the number of international lawyers has multiplied, a number of scholars and practitioners have echoed Professor Reisman's call for an international code of ethics.<sup>62</sup> Despite the significant outcry, however, proposed solutions have been both rare and incomplete,<sup>63</sup> particularly with respect to international arbitration. The limited work that has been done in the area of international ethics

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<sup>60</sup> This image is borrowed from Bernard L. Greer, Jr., *Professional Regulation and Globalization: Toward a Better Balance*, in GLOBAL PRACTICE OF LAW 170 (J. Ross Harper, ed. 1997).

<sup>61</sup> See W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 116-17 (1971) [hereinafter REISMAN, NULLITY AND REVISION].

<sup>62</sup> See, e.g., Vagts, *The International Legal Profession*, *supra* note 8, at 250; Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, 9 GEO. J. LEGAL ETHICS 439 (1995); Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 22 (1986); John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L. REV. 673 (1992); Robert M Jarvis, *Cross-Border Legal Practice and Ethics Rule 4-8.5: Why Greater Guidance is Needed*, 72 FLA. B.J. 59 (1998); see also Martin Hunter, *Ethics of the International Arbitrator*, 53 ARBITRATION 219, 220 (1987) (concluding that the world of commercial arbitration to be no longer a club of gentlemen, but one that needs explicit guidelines for conduct).

<sup>63</sup> See, e.g., Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L. J. 1382 (1998) (“[D]espite the increase in scholarly writing on this topic, the development of cross-border practice throughout the world has vastly outpaced the theory of whether and how such practice should be regulated;”); Justin Castillo (Reporter), *International Law Practice in the 1990s: Issues of Law, Policy and Professional Ethics*, 86 AM. SOC'Y INT'L L. PROC. 272 (“International . . . ethics is an area where there is little solid information available.”). Of particular interest are some recent conferences, including a conference, co-sponsored by the Council of the Bars and Law Societies of the European Community (“CCBE”) and the Stein Institute of Law and Ethics, the results of which were published in a book under the editorial supervision of Professors Mary C. Daly and Roger J. Goebel of Fordham Law School. See RIGHTS LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE (Mary C. Daly & Roger J. Goebel, eds. 1994). The results of another more recent conference, the Paris Forum on Transnational Practice for the Legal Profession in 1998, were published under the direction of Laurel Terry in the Dickinson Journal of International Law. See generally Symposium: Paris Forum on Transnational Practice for the Legal Profession, in 18 DICKINSON J. INT'L L., Vol. 1 (1999). One of the few truly prescriptive pieces is by Professor Richard Abel, whose earlier works on the sociology of lawyers will undoubtedly aid in all future discussion in this area. Richard Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 762-63 (1994) (offering proposals of how lawyers, professional organizations and governments can regulate transnational law practice).

aims primarily at promoting awareness of the problem<sup>64</sup> and focuses almost exclusively on the distinct but related problems facing cross-border practice.<sup>65</sup>

In cross-border practice, where professional activities are performed in one jurisdiction by an attorney licensed in another, problems arise because two sovereigns (one in the attorney's home jurisdiction and one in the host jurisdiction) have an interest in regulating the same attorney.<sup>66</sup> In the context of attorney solicitation, for example, even though an attorney's home jurisdiction may permit advertisement, another jurisdiction in which a foreign attorney may advertise has a competing interest in applying its rule prohibiting such advertisement.<sup>67</sup> The home and host jurisdictions compete to regulate the attorney. In international commercial arbitration, by contrast, there is no regulatory competition.

International arbitration occurs in an a-national space internationally disassociated with any sovereign.<sup>68</sup> While arbitration physically takes place within the geographic boundaries

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<sup>64</sup> There is only one brief article squarely addressing attorney ethics in international arbitration, which aims more at raising questions than resolving them. See Mark P. Zimmet, *Ethics in International Commercial Litigation and Arbitration*, 626 PLI/Lit. 361 (2000). Cf. Thomas, *Disqualifying Lawyers in Arbitrations*, *supra* note 7 (addressing related procedural issues of attorney disqualification in arbitration proceedings, but disclaiming any attempt to encompass ethical regulation issues). Most work regarding ethics in international arbitration has addressed the ethical obligations of arbitrators. See, e.g., Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 U.M.K.C. L. REV. 93 (1998). My purpose in this Article is primarily to address attorney ethics, not arbitrator ethics, although some of the issues overlap (such as the issue of *ex parte* contact), and the methodology proposed in this Article may also be helpful in addressing remaining problems of arbitrator ethics. See *infra* note 234-35, and accompanying text.

<sup>65</sup> See Detlev Vagts, *Professional Responsibility in Transborder Practice*, 13 GEO. J. LEGAL ETHICS 677, 677 (2000) (noting the increasing problems because attorney are subject to rule of "different bar authorities [which] lay down quite different rules within their jurisdictions").

<sup>66</sup> The preeminent basis for prescriptive jurisdiction in the area of legal ethics is territoriality, meaning a state "can regulate persons who appear in their courts, maintain offices, or conduct other transactions within its territory." Vagts, *Professional Responsibility in Transborder Practice*, *supra* note 20, at 689. The second most prevalent basis for jurisdiction is nationality of the attorneys, or in the case of bar organizations, membership. See *id.* at 689-90 (citing the Restatement of Foreign Relations Law).

<sup>67</sup> See Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed but Barriers Remain*, 29 GEO. WASH. J. INT'L L. & ECON. 381 (1995)

<sup>68</sup> See DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 55, at 17. "In most international arbitrations, the situs for arbitration is chosen either by happenstance, for reasons of logistics and convenience, or because of its

of one nation, the so-called host state is constrained by design and agnostic by choice. Consequently, there is no “host state” regulation. Meanwhile, most so-called “home state” ethical rules do not purport to govern attorney conduct in alternative fora such as arbitration.<sup>69</sup> Even if “home state” ethical regulations purported to reach into arbitration, they would not be binding on opposing foreign lawyers or non-lawyer representatives, which most jurisdictions will permit to represent parties in arbitration.<sup>70</sup> The primary problem in international arbitration, therefore, is not competition among regulators, but an absence of regulation.

In the absence of authoritative regulation, attorneys show up believing that they are still bound by the ethical obligations imposed by their home jurisdictions, or at least they

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neutrality in relation to the dispute and to the parties.” Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny* 27, in *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau, ed., 1998). The New York Convention generally permits the nation where arbitration takes place to exercise an expanded role in reviewing arbitral awards. In an effort to attract more international arbitration, however, many nations have declined this opportunity and have instead legislated to constrain court review of awards from arbitrations taking place within their boundaries. The most prominent examples are Belgium (which prohibits national courts completely from overturning any international arbitral award even in the instance of arbitrator fraud) and Switzerland (which permits parties to elect such prohibition by agreement). See William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 *TUL. L. REV.* 647, 649 (1989).

<sup>69</sup> In the United States, only a few states have attempted to make their ethical rules directly applicable in arbitration. See, e.g., *Disciplinary Rules of the Code of Prof. Resp.*, N.Y. Jud. Law, Appendix (effective September 1, 1990) (McKinney Supp. 1991) (containing a single statement in the appendix to the effect that rules apply in ADR settings as well).

<sup>70</sup> See Brand, *supra* note 1, at 335 (noting that notwithstanding applicability state ethical rules to state-licensed attorneys, a bar opinion permits parties to international arbitration to be represented by non-state-licensed attorneys); Toby S. Myerson, *The Japanese System*, in *RIGHTS LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE* 69 (Mary C. Daly & Roger J. Goebel, eds., 1994) (noting that even traditionally restrictive Japanese law changed recently to permit non-Japanese-licensed attorneys to engage in international arbitrations in Japan). The problem is that, notwithstanding attempts to shoehorn ethical rules into the arbitration context, drafters of ethical norms simply did not directly address the extension of their application into the arbitration context. See Carrie Menkel-Meadow, *Ancillary Practice And Conflicts Of Interests: When Lawyer Ethics Rules Are Not Enough*, 13 *ALTERNATIVES TO HIGH COST LITIG.* 15 (1996) (“[T]he ABA Model Rules of Professional Conduct were not drafted with ADR in mind and efforts to fit ADR practice into the rules of more conventional advocacy will not always work.”); Vagts, *The International Legal Profession*, *supra* note 8, at 378 (noting that it is unclear whether the Model Rules apply in arbitration proceedings). In the setting of international arbitration, debate about the nature and extent to which national ethical norms apply is even more open-ended. See Thomas, *Disqualifying Lawyers in Arbitrations*, *supra* note 7 (“When an English barrister suggested a couple of years ago that an advocate in a private

come with advocacy techniques and professional habits formed by practicing in accordance with those rules.<sup>71</sup> The problem, of course, is that the ethical regulations of various countries are often significantly different, and, when thrust into the same proceedings, these differences can cause problems. The next section examines the extent of those differences.

## **B. The Degree of Divergence Among National Ethical Norms**

Roughly speaking, all the nations of the world agree on certain universal norms that inform all legal ethics. For our purposes, these universal norms can be distilled down to truthfulness, fairness, independence, loyalty and confidentiality. While all systems appear committed to these four ideals, I will demonstrate that this consensus at the core exists only in abstract generalities, which translate into radically different obligations for attorneys in individual systems.<sup>72</sup>

### **1. Truthfulness**

By most accounts, the primary if not sole purpose of adjudication is to discern truth.<sup>73</sup> Truth is universally acknowledged as the intended product of adjudication, but also as an

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commercial arbitration was not bound by the same duties owed by counsel to a court, the immediate (near unanimous) response was shock and indignation.”).

<sup>71</sup> Whether or not these ethical norms actually translate into binding obligations in international arbitration, as a practical matter, they are habits that lawyers generally adhere to in the context of arbitration, even when they conflict with the practices of opposing counsel.

<sup>72</sup> See Vagts, *International Legal Ethics*, *supra* note 59, at 378 (“National rules on professional ethics differ in critical ways, leaving confusion about how they should apply internationally.”). It is not necessary (or even possible) in this Article to offer a precise measurement of the extent of divergence between national ethical norms. The primary purpose of this comparison is to demonstrate that the differences are significant enough to require development of a code of ethics for international arbitration. To the extent that a more precise assessment of the differences becomes necessary or desirable, the project will inevitably involve extensive systematic research, such as used by Ugo Mattei to evaluate the similarities and differences in private law. See Mauro Bassani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 Col. J. Eur. L. 338 (1998).

<sup>73</sup> See Mirjan Damaška, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 289 (1998). The perception that “truth” is the all-important goal of adjudication is not always accurate. It is argued that some systems, such as the



essential element in the process. The importance of truth in the adjudicatory process is manifested in time-honored ethical prohibitions against perjury,<sup>74</sup> against attorney assistance in perjury<sup>75</sup> and against attorney misrepresentations of fact to the tribunal.<sup>76</sup> Apart from these extreme instances of misconduct, legal systems have developed different interpretations of what demands of truth require from counsel.<sup>77</sup>

The paradigmatic example of these differences, which will guide the discussion throughout this Article, is the treatment of pre-testimonial communication between counsel and witnesses.<sup>78</sup> Imagine an arbitration involving Germany and American parties, with counsel from

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United States, prioritize “justice” over “truth” in adjudication. See John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978) (challenging the view that the fundamental objective of the U.S. legal process is the discovery of truth).

<sup>74</sup> Prohibitions against perjury transcend both time and cultures. See Richard H. Underwood, *Perjury: An Anthology*, ARIZ. J. INT’L & COMP. L. 307 (1996) (explaining the ancient Roman laws against perjury and punishments meted out for violations) (citing 1 JAMES STACHEN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 41-42 (1969)); Richard H. Underwood, *False Witness: A Lawyer’s History of the Law of Perjury*, 10 ARIZ. J. INT’L & COMP. L. 215 (1993) (surveying laws against perjury in ancient Egypt, Mesopotamia, ancient India, Greece, the Ashanti society in Africa, medieval Europe and early America).

<sup>75</sup> The historical evidence of formal prohibitions against lawyers encouraging perjury is ample, although not as extensive as those directly against perjury. Ninth century Roman law punished with seven years of penance “he who leads another in ignorance to commit perjury,” Mesopotamian law punished with death anyone who threatened a witness, and ancient Indian laws prohibited coaching witnesses. See Richard H. Underwood, *False Witness: A Lawyer’s History of the Law of Perjury*, 10 ARIZ. J. INT’L & COMP. L. 215 (1993). Today, all legal systems prohibit, either through criminal laws or professional ethics, lawyers from abetting or encouraging perjurious testimony.

<sup>76</sup> See, e.g., CHARLES F. WOLFRAM, MODERN LEGAL ETHICS § 12.3.3, p. 641 (1986).

<sup>77</sup> This divergence should not be surprising when it is considered that meaning of “truth” in relation to adjudicatory decision-making is variable from culture to culture and has, even within particular cultures, evolved dramatically over time. See, e.g., J.S. Ghandi, *Past and Present: A Sociological Portrait of the Indian Legal Profession*, in LAWYERS IN SOCIETY: VOLUME I: THE COMMON LAW WORLD (Richard L. Abel & Phillip S.C. Lewis, eds. 1988) (describing the transition in India from precolonial notions that only the king or judge had the power and technical knowledge to find truth, with the modern notion of legal representation, which regards truth as the product of negotiation and participation by lawyers). In a more proximate example, the civil jury’s role in Medieval England was not so much to pass on our modern understanding of the “truth” of the events that transpired, even though they took an oath to that effect. Instead, juries of the 13<sup>th</sup> and 14<sup>th</sup> Centuries acted as quasi-witnesses, ministering what we would consider “justice” rather than discerning what we would consider “truth.” See Mirjan Damaška, *Rational and Irrational Proof Revisited*, 5 CARDOZO J. INT’L & COMP. L. 25, 29 (1997); Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYR. L. REV. 109, 181-2 (2000).

<sup>78</sup> See WOLFRAM, *supra* note 76, at 647-48; 3 J. WIGMORE, EVIDENCE §788 (J. Chadbourne rev. 1970). As this example demonstrates, much of the contest between national ethical norms is bound up in the language chosen

their respective countries. The German attorneys will show up believing that they are prohibited from communicating with witnesses about the facts of the case or upcoming testimony, and that such “misconduct” might be punishable by serious criminal penalties for witness “tampering.”<sup>79</sup> The U.S. attorneys, on the other hand, will arrive on the scene with the view that preparing a witness to testify is not only standard practice,<sup>80</sup> but also necessary to avoid committing

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to frame the issues. Characterizing the conduct as a practice of “witness preparation” makes the German perspective seem reactionary, while characterizing it as “witness tampering” makes the American perspective seem lawless. For a more full discussion of the way language affects comparative analysis and related problems, see Catherine A. Rogers, *Gulliver’s Troubled Travels, or The Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 171 n.110 (1998) (review essay). This problem is exacerbated in the context of discussing a subject such as professional ethics, where there exists substantial debate even within a particular legal community about the meaning of the value-laden terms that shape the dialogue. See David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799, 853 (1992); Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 U.M.K.C. L. REV. 93, 94 (1998).

<sup>79</sup> See, e.g., Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088-89 (1975) [hereinafter “Damaška, *Presentation of Evidence*”] (“‘Coaching’ witnesses [in inquisitorial systems] comes dangerously close to various criminal offenses of interfering with the administration of justice” as well as contrary to professional canons of ethics.); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 834 (1985) (The German lawyer “virtually never [has] out-of-court contact with a witness,” because, under the German rules of ethics, a lawyer “may interview witnesses out of court only when it is justified by special circumstances. He has to avoid even the appearance of influencing the witness and is, in principle, not allowed to take written statements.”); see also John Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763, 767 (1988) (noting that the prohibition is not absolute and communication with witnesses is permitted in cases of “unusual necessity”). While it may not be likely that communication with a witness in an arbitration will expose the attorney to the possibility of discipline at home since national ethical rules are not generally applicable in arbitration, attorneys incorporate their national ethical constraints into their habitual decision-making and are consequently likely to continue a practice until presented with a countervailing and controlling rule.

<sup>80</sup> See *Hamdi & Ibrahim Mango Co. v. Fire Assoc. of Philadelphia*, 20 F.R.D. 181 (S.D.N.Y. 1957) (acknowledging that it is a usual and legitimate practice for ethical and diligent counsel, in preparing their witnesses for either deposition or trial testimony, to confer with each witness before testimony is given). Similarly, in England barristers routinely interview client and expert witnesses, and solicitors interview fact witnesses as well as review potentially difficult questions that may come up on cross-examination. See WOLFRAM, *supra* note 76, at 648 & n. 92 (1986) (citing H. Cecil, *Brief to Counsel* 648 & n.92 (2d ed. 1972)). To be sure, the Anglo-American rule does not permit all manner of contact with witnesses. Limitations exist, and overly suggestive “witness preparation” could cross the line into subornation of perjury. See *id.* at 648; Joseph D. Piorkowski, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching,”* 1 GEO. J. LEGAL ETHICS 389, 390-91 (1987) (Note) (describing an attorney’s goals during witness preparation as aiding the witness to tell the truth, organize the facts, introduce the witness to the legal process, instill the witness with self-confidence, eliminate opinion and conjecture from the testimony, make the witness understand the importance of his or her testimony and teach the witness to fight anxiety against cross-examination). Because of perceived dangers, some courts prohibit lawyers from speaking to non-client witnesses during recesses in testimony. See WOLFRAM, *supra* note 76, at 648-49.

malpractice if not an ethical breach.<sup>81</sup> In the absence of a code of ethics that applies in international arbitration, attorneys have no reason to abandon the ethical practices, and no justification for disregarding the ethical strictures, of their home jurisdictions—even if they conflict with those of their opponents.

While pre-testimonial communication is one of the most obvious differences, it is only the protruding tip of a very large iceberg. Systems also impose very different obligations on attorneys with regard to client testimony. A growing number of U.S. ethics codes require attorneys to disclose client intentions to commit perjury, even if those intentions would otherwise be considered confidential communications.<sup>82</sup> Most European ethical codes, by contrast, include no such obligation, even though European attorneys are generally required to disclose unlawful conduct or potentially unlawful conduct by a client.<sup>83</sup>

In addition to diverging on the subject of attorney “complicity in perjury,” systems set very different boundaries for what constitutes “truthful” conduct by attorneys. In

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<sup>81</sup> Although not defined in U.S. codes as a formal ethical obligation, several courts have treated failure to prepare a witness as a breach of the duty of competent representation. *See, e.g.*, *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998) (characterizing witness preparation as an “ethical” obligation incumbent on attorneys); D.C. Bar Op. No. 79 (1979), reprinted in *District of Columbia Bar, Code of Professional Responsibility and Opinions of the District of Columbia Bar Legal Ethics Committee* 138, 139 (1991) (stating that an attorney who had the opportunity to prepare a witness but failed to do so would not be properly doing his professional job); *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (implying that an attorney has the right and the duty to prepare a client for deposition).

<sup>82</sup> *See Terry, Introduction to the European Community’s Legal Ethics, supra* note 10, at 47. Notwithstanding this apparent trend, there is relatively little agreement even within the United States about the scope of attorney obligations in the face of client perjury or the threat of client perjury. *See Philip J. Grib, A Lawyer’s Ethically Justified “Cooperation” in Client Perjury*, 18 J. LEGAL PROF. 145 (1993) (explaining and critiquing various positions on the ethical responsibilities in the context of client perjury).

<sup>83</sup> *See Terry, Introduction to the European Community’s Legal Ethics, supra* note 10, at 46-57. To the casual observer, this apparent exception for client perjury seems to be something of an anomaly even within Continental systems. Before demystifying this point, I will add further intrigue by noting that perjury by a party in a civil action was not even a crime until relatively recently and, even now, false testimony by a party is only a criminal offense in extraordinary circumstances (such as false accusation of an innocent party). *See MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS*

making arguments to a court, American attorneys are permitted “to urge any possible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.”<sup>84</sup> This room for creativity is bounded only by strategic considerations and the stricture against wholly frivolous arguments.<sup>85</sup> By contrast, in Continental systems, creative arguments that are not, in the attorney’s professional opinion, likely to prevail, would be considered professionally irresponsible, if not sanctionable.<sup>86</sup> Thus, while all systems are in theory committed to truth and impose ethical obligations on counsel accordingly, those obligations are widely divergent among various systems.

## 2. Fairness

Another fundamental and universal principle of adjudication is fairness. Fairness in adjudication is premised on the impartiality of the tribunal,<sup>87</sup> a concept that has been embraced

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130 & n.60 (1986) [hereinafter “DAMAŠKA, FACES OF JUSTICE”]. For an explanation of how this apparent lack of concern over attorney complicity in perjury is in fact a by-product of protections against perjury, *see infra* note 167.

<sup>84</sup> Model Code of Professional Responsibility, Ethical Consideration 7-4 (1980).

<sup>85</sup> Federal Rule of Civil Procedure 11 provides that the signature of lawyer warrants that a document filed with the court is well grounded in fact or law or, if arguing for a change in the law, that it is not interposed to harass or delay proceedings or for any improper purpose. *See* FED. R. CIV. P. 11; *see also* Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793 (1991); Neal H. Klausner, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300 (1986).

<sup>86</sup> Lawyers are expected to present only the applicable law to the judge and not to argue by analogy to other cases, as common in American courts. *See* Olga M. Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797, 798 (1988); Lauren R. Fran, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. LL. L. REV. 957, 973 (2000)(Note). In this respect, British barristers are regulated more like Continental attorneys than American attorneys. *See* CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES para. 610(b) (1993), reprinted in *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices: Appendix*, 7 GEO. J. LEGAL ETHICS 685, 892 (1994) (prohibiting barristers from asserting personal opinions about the facts or law. In addition to formal constraints, European fee-shifting statutes create significant financial disincentives, which also undoubtedly deter creative argument by counsel. *See* Werner Pfenningstorf, *The European Experience with Attorney Fee-Shifting*, 47 LAW & CONTEMP. PROBS. 37, 45-56 (1984).

<sup>87</sup> “Impartiality is part of the definition of a good judge” ARTHUR T. VANDERBILT, *JUDGES AND JURORS* 19 (1958). The U.S. symbol of justice, *Justitia*, is blindfolded to avoid the pitfalls of favoritism and demonstrate her impartiality. *See* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1727-28 (1987).

by all societies, from modern European nations to traditional African tribes and ancient Indian civilizations.<sup>88</sup> Impartiality is an attribute of adjudicators that in turn demands *audi alteram partem*, or equality of the parties.<sup>89</sup> For an adjudication to be fair, the tribunal must approach the case from an unbiased perspective and the parties must have equal opportunities to present their case and persuade the decision-maker.<sup>90</sup> These principles require prohibitions against obvious transgressions, such as bribing adjudicators to secure victory<sup>91</sup> or otherwise providing them with a direct stake in the outcome of the case.<sup>92</sup>

Outside of these obvious prohibitions, however, the concept of “fairness” and even the more particular requirement of an impartial decision-maker is subject to varying interpretations, which again result in divergent ethical requirements.<sup>93</sup> Some systems tolerate—even celebrate—behavior that other systems find incompatible with notions of fairness.<sup>94</sup> For

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<sup>88</sup> See V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 16-17 (1980). As told in the Sanskrit play *Mrichchakatika*, as far back as 485 B.C., courts in India honored this principle by not allowing the fact that a complainant was the king’s brother-in-law to influence the court’s integrity. See *id.* at 17.

<sup>89</sup> See *id.* at 16-17.

<sup>90</sup> For instance, in the United States, Model Rule 3.5, pertaining to “Impartiality and Decorum of the Tribunal,” provides that “[a] lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or] (b) communicate ex parte with such a person except as permitted by law.” Model Rules, Rule 3.5(a)-(b).

<sup>91</sup> In addition to being a violation of ethical codes, most countries have criminalized the payment of bribes to judges. Bribery of judges will also likely soon be the subject of an international convention. See Draft Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD/DAFFE/IME/BR(97)16/FINAL (Dec. 18, 1997), reprinted in 37 I.L.M. 1 (1998) (visited Mar. 4, 1999) (committing signatories to treat bribery of judges as a criminal offence).

<sup>92</sup> See WOLFRAM, *supra* note 76, at 604-06. In the United States, the principle has been held to preclude an old practice under which judges derived their income based on the number of convictions they presided over. See *Tumey v. Ohio*, 273 U.S. 510 (1927) (concluding that under this arrangement, the judge would have a “direct, personal, substantial, pecuniary interest” in the outcome of the case).

<sup>93</sup> See DAMAŠKA, FACES OF JUSTICE, *supra* note 83, at 1 (“[A]ll states subscribe to the view that judges should be independent . . . but the unanimity begins to break down as soon as one considers the implications of those views and their operational meaning in the administration of justice in various countries.”).

<sup>94</sup> In the context of international arbitrations, these contrasting notions of impartiality may lead to different notions about the proper nature and extent of questions posed by arbitrators to witnesses. See *In Matter of Arbitration between Cole Publishing Co., Inc. v. John Wiley & Sons, Inc.*, No. 93 Civ. 3641, 1994 WL 532898, \*2 (S.D.N.Y. Sept.29, 1994) (ruling on challenge to arbitral award that alleged arbitrator bias was evidenced by aggressive questioning of some witnesses and attempts to rehabilitate others, and that argued arbitrator acted more

example, rules of various systems governing *ex parte* communication between judges and parties (or their counsel) are far from congruent. In China, it is not only permissible but also probable that a judge will act as a mediator in the same case in which she presides as ultimate arbiter.<sup>95</sup> The Chinese judge elicits information from the parties in what—from an American perspective—are *ex parte* conversations.<sup>96</sup> The substance of these *ex parte* conversations may be (but is not necessarily) communicated to other parties.<sup>97</sup> Similarly, many Continental systems permit *ex parte* communications and do not presuppose that all parties will always be in the courtroom during fact-finding proceedings and rules expressly permit some contacts.<sup>98</sup>

In the United States, by contrast, fairness and impartiality are understood to entail almost absolute restrictions against *ex parte* communications, except in certain rare procedural contexts.<sup>99</sup> It is highly unusual for an adjudicating judge to meet separately with the parties to

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as an advocate and than an impartial moderator); *see also* DAMAŠKA, *FACES OF JUSTICE*, *supra* note 83, at 120 (noting that when a judge “grills a witness testifying in favor of one disputant, the other may think that the official is assisting his adversary”).

<sup>95</sup> *See* Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People’s Republic of China*, 15 U.C.L.A. PAC. BASIN L.J. 122, 127 (noting that the Chinese Civil Procedure Law requires that a judge to conduct mediation if the parties do not object).

<sup>96</sup> In China, courts are given an aggressive role in the fact-finding process, permitting them to find their own fact and expert witnesses. *See* Roderick W. Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 STAN. L. REV. 303, 327 (1986); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT’L ARB. 83, 107 (1997).

<sup>97</sup> *See* Ge, *supra* note 95, at 127.

<sup>98</sup> *See, e.g.*, CODE OF CONDUCT--GERMANY, § 8.3 (“A lawyer may contact or submit documents or exhibits to a judge without the knowledge of the lawyer(s) or the opposing client(s) in the case.”)(cited in Terry, *Introduction to the European Community’s Ethics Code*, *supra* note 72, at 18); *see id.* (noting that in many European countries “*ex parte* contact with the court on ‘non-fundamental’ issues is not prohibited”). The CCBE Explanatory Memorandum states with regard to Rule 4.2, “This provision applies the general principle that in adversarial proceedings a lawyer must not attempt to take unfair advantage of his opponent, in particular by unilateral communications with the judge. An exception however is made for any steps permitted under the relevant rules of the court in question.” Under the CCBE Code, therefore, the rules of the court govern the extent to which *ex parte* communications are permitted.

<sup>99</sup> The most common exceptions to the rule against *ex parte* communications are special proceedings for extraordinary relief (such as Temporary Restraining Orders), *in camera* inspections, and similar unusual procedural settings. *See* WOLFRAM, *supra* note 76, at 604-05.

extract confidential information about the case that might be relied on in making a decision, but need not be disclosed to the opposing party.<sup>100</sup> Thus, while all systems require fairness in the process, they differ in how they translate this ideal into regulations regarding communications between parties and judges.

In an interesting twist, notwithstanding the stringent U.S. rules prohibiting *ex parte* communications, domestic U.S. arbitration rules permit parties to communicate throughout arbitral proceedings with their party-appointed arbitrators, even about crucial issues involving strategy.<sup>101</sup> While Chinese and Continental systems tolerate some *ex parte* communication in adjudication, the approach adopted by U.S. domestic arbitration extends well beyond that level.<sup>102</sup> *Ex parte* communication with arbitrators, because of its obvious potential to disrupt proceedings and taint results, is one area that has attracted a great deal of attention to the lack of ethical regulation for lawyers in international arbitration.<sup>103</sup>

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<sup>100</sup> In a modern trend, many federal U.S. judges have departed from this strictly disinterested posture and adopted what Judith Resnik terms “managerial judging.” See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 390, 425-427 (1982) (demonstrating and criticizing this trend).

<sup>101</sup> Compare ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 225-26 (1991) (noting that “it is not unusual for there to be discussions with just one of the parties in respect of procedural matters such as availability for future hearings”), and AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canons III(B)(1)(permitting *ex parte* communications with any member of the arbitral tribunal “concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings”) and VII (permitting *ex parte* communications by party-appointed arbitrators as long as general disclosure is made); with IBA Rules of Ethics, Rule 5.3 (prohibiting “any unilateral communications regarding the case”). For extended discussion of these rules, see W. LAWRENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 13.07 (2d ed. 1990); M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9(4) J. INT’L ARB. 31, 41-42 (1992).

<sup>102</sup> See, e.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (1993) (finding no misconduct despite finding that party-arbitrator met with representatives and witnesses of appointing party before arbitration to plan strategy); *Lifecare International, Inc. v. CD Medical, Inc.*, 68 F.3d 429 (10<sup>th</sup> Cir. 1995). These cases involved domestic U.S. arbitrations, which means that these objections did not arise because of conflicting cultural perspectives on *ex parte* communication, but were challenges to the inherent fairness of proceedings when parties are communicating with arbitrators.

<sup>103</sup> See Vagts, *International Legal Ethics*, *supra* note 59, at 379 (using contrasting approaches to *ex parte* communication with arbitrators as basis for panel discussion of hypothetical case involving European and American lawyers in an arbitration in Geneva that was governed by Swiss law); Ambassador Malcolm Wilkey, *The*

### **3. Independence**

Attorneys the world over have been assigned a duty to maintain professional independence. The universality of this obligation is demonstrated in some interesting historical anomalies, such as the eighteenth-century Prussia's failure, despite significant efforts, to absorb advocates completely into the civil service machinery.<sup>104</sup> Similarly, even while insisting on communist market-control of most industries, including professional enterprises, the former Soviet Union made unique allowances for attorneys to work as self-employed professionals in cooperative colleges.<sup>105</sup>

Particularly in this area, the wrinkled nuances of language can be misleading.<sup>106</sup> The texts of both the U.S. and European code of professional responsibility appear to be similarly committed to the principle of attorney "independence."<sup>107</sup> However, the apparently

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*Practicalities of Cross-Cultural Arbitration*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 86 (Stefan N. Frommel & Barry A.K. Rider, eds., 1999) (describing differing approaches to *ex parte* communication as a problem in international arbitration that must be overcome).

<sup>104</sup> See Dietrich Rueschemeyer, Comparing Legal Professions Cross-Nationally: From a Professions-Centered to a State-Centered Approach, 1986 A.B.F. RES. J. 415, 445.

<sup>105</sup> See Lawrence M. Friedman & Zigurds L. Zile, *The Soviet Legal Profession: Recent Developments in Law and Practice*, 1964 WISC. L. REV. 32-77. There are of course examples of authoritarian regimes, such as Nazi Germany, under which attorneys were little more than tools of the government, actively involved—under threat of sanction or torture—in helping the government to obtain convictions. See Wilkins, *supra* note 78, at 860 & nn.270.

<sup>106</sup> As Professor Merryman explains:

[T]here is a very important sense in which a focus on rules is superficial because rules literally lie on the surface of legal systems whose true dimensions are found elsewhere; misleading because we are led to assume that if rules are made to resemble each other something significant by way of rapprochement has been accomplished.

John H. Merryman, On the Convergence (and Divergence) of the Civil Law and the Common Law, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 222-25 (Mauro Cappelletti ed., 1978); see also Ugo Mattei, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, 45 AM. J. COMP. L. 5, 5 (1997) (demonstrating how legal rules exist in the larger intellectual framework or legal taxonomy of the system); W. Michael Reisman, Autonomy, Interdependence and Responsibility, 103 YALE L.J. 401, 403 (1993) (observing how culturally defined perspectives make cross-cultural observation difficult).

<sup>107</sup> Compare CCBE Code of Conduct Rule 2.1.1 (1998), reprinted in Terry, *Introduction to the European Community's Legal Ethics*, *supra* note 10, at 66, with Model Rules of Professional Conduct Rules 5.4 & 5.5 (1983) and Preamble to the Model Rules of Professional Conduct.



similar linguistic commitment to attorney “independence” masks deeply divergent views about what this duty requires. In Europe, professional “independence” refers primarily to attorneys’ relationships with their clients and other attorneys.<sup>108</sup> The need for attorneys to be independent from their clients is the justification for prohibitions against attorneys being employed as in-house counsel<sup>109</sup> and against accepting clients on a contingency fee basis.<sup>110</sup> In an extreme example, English barristers are, and (until recently) attorneys in some civil law countries were, forbidden from forming law firms. The purpose of these bans was to prevent, in the event of a disagreement about a client’s interests, one partner’s independent professional judgment from being stifled by having to accede to the judgment of another.<sup>111</sup> Similarly, many civil law countries used to prohibit lawyers from being “employees” of a law firm to prevent obligations

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<sup>108</sup> See Terry, *Introduction to the European Community’s Legal Ethics*, supra note 10, at 40.

<sup>109</sup> “Four of the EC Member States—Italy, France, Belgium and Luxembourg—do not even allow in-house attorneys to be members of the bar.” Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing -- Or Something?*, 30 U.C. DAVIS L. REV. 483, 527 (1997). This vision of in-house counsel also explains why in many European countries, there is no such concept as “corporate confidentiality.” See Carol M. Langford, *Reflections on Confidentiality*, 2 J. INST. FOR STUDY LEGAL ETHICS 183, 185 (1999); see also Terry, *Introduction to the European Community’s Legal Ethics*, supra note 10, at 1 & Appendix C.

<sup>110</sup> From a European perspective, the percentage contingency fee is perceived as promoting excessive litigation and reducing the attorney’s independence and judgment. See Virginia G. Maurer, Robert E. Thomas & Pamela A. DeBooth, *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT’L L. & BUS. 272 (1999). While interesting for illustrative purposes, the contingency fees need not be addressed in a code for international commercial arbitration. See supra note 32. Contingency fees are a phenomenon designed primarily to help individuals with limited financial resources afford the costs of litigating predominantly in the tort and employment contexts. See Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425 (1998); Bradley L. Smith, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154 (1992). For this reason, as a practical matter, contingency fees are often used to fund international commercial arbitrations, although the potential is there. See Ted Schneyer, *Legal Process Constraints on the Regulation of Lawyers’ Contingent Fee Contracts*, 47 DEPAUL L. REV. 371 (1998) (noting the increasing use of contingency fees in business litigation, including defense work).

<sup>111</sup> See Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1493 (2000). Similar regulations have been adopted in some civil law countries, such as France. See *id.* (citing JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 113 (1969); Daly, *Dichotomy Between Standards and Rules*, supra note 6, at 1149. As Professor Schneyer correctly points out, the benefits from such extreme protection against “interference” with an attorney’s professional judgment by other lawyers is “as likely to enhance as diminish the quality of a lawyer’s work.” See Schneyer, *Multidisciplinary Practice*, supra note 91, at 1494.

in the master-servant relationship from interfering with the attorney’s professional judgment.<sup>112</sup>

While mandating that attorneys operate independent from their clients and other attorneys, many civil law systems regard attorneys as quasi-governmental agents. Sometimes, this semi-official status is made explicit, such as in Germany where attorneys are considered part of a concept called *öffentliche Rechtspflege* (administration of law)<sup>113</sup> and in Greece the “Lawyers’ Code” characterizes lawyers as “unsalaried Public Servants.”<sup>114</sup> Advocates’ collaborative role is also recognized and reinforced through a range of traditions, such as a host of “rights and privileges” enjoyed by Greek attorneys, including special access to public service or administrative offices at times closed to the lay public.<sup>115</sup> This link to the government is reinforced in many civil law countries by regulations that fix fee schedules, which prescribe particular fees for particular services. Micro-regulation of attorney fees by the government implies that attorneys are performing state-coordinated functions, not personal services in a predominantly private arrangement.<sup>116</sup> Similarly, geographic restrictions in Germany and France, which until recently admitted a lawyer only to a particular bar and a single court (for example the trial court in the bar of Paris or the first appellate level in Hamburg),<sup>117</sup> seemed aimed at ensuring that courts have as regular a roster of attorneys as they do of judicial personnel. Even the requirement that civilian lawyers appear in court wearing a robe can be

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<sup>112</sup> See Terry, *Introduction to the European Community’s Legal Ethics*, supra note 10, at 15.

<sup>113</sup> See Rudolf du Mesnil de Rochemont, *Federal Republic of Germany*, in TRANSNATIONAL LEGAL PRACTICE 127 (Dennis Campbell, ed., 1982).

<sup>114</sup> See Costa K. Kyriakides & Anthony B. Hadjioannou, *Greece* in TRANSNATIONAL LEGAL PRACTICE 155 (Dennis Campbell, ed., 1987).

<sup>115</sup> See id.

<sup>116</sup> See id.

<sup>117</sup> See Daly, *Dichotomy Between Standards and Rules*, supra note 6, at 1149. These geographic restrictions have recently been lifted under compulsion from the European Union. See id.

understood as a symbolic reflection of their quasi-official role.<sup>118</sup>

In the United States, by contrast, “independence” generally connotes separation of the legal profession from the government, which will be administering or, in the criminal context, actively participating as an adversary in legal proceedings. Professional self-regulation is seen as a way to position attorneys to act as a bulwark against government tyranny and to enable them to represent unpopular causes.<sup>119</sup> Some individual ethical rules nod toward the notion of attorney independence from client interests,<sup>120</sup> but the larger structure of U.S. codes contemplate that lawyers will have “virtually total loyalty to the client and the client’s interests.”<sup>121</sup> Some sectors of the U.S. academic and judicial community urge more circumspection by attorneys,<sup>122</sup> but it would be implausible even for reform-minded individuals to call for the same degree of independence envisioned for European attorneys. Instead, the

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<sup>118</sup> See Olga Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797 (1988)(Note).

<sup>119</sup> See MODEL RULES, pmb. at para.10 (stating that self-regulation “helps maintain the legal profession’s independence from government domination” and is “an important force in preserving government under law, for abuse of authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”); *but see* Wilkins, *supra* note 78, at 853-63 (noting that in the U.S. there are multiple connotations attributed to the concept of lawyer independence and its underlying purposes).

<sup>120</sup> There are some U.S. ethical rules that do aim at encouraging some attorney independence from the client’s objectives, such as Rule 1.5(d), which prohibits contingency fees in criminal and domestic relations cases, Rule 1.8(e), which prohibits lawyers from providing financial assistance in litigation, and Rule 1.8(j), which prohibits an attorney from acquiring a proprietary interest in a cause of action or the subject matter of litigation.

<sup>121</sup> See WOLFRAM, *supra* note 76, at 146 (describing an “entrenched lawyerly conception is that the client-lawyer relationship is the embodiment of centuries of established and stable traditions”). In the most strident articulation, the lawyer is charged with carrying out the “client’s directions regardless of the immorality of the client’s objectives or means.” *See id.* at 154. Although useful for illustrative purposes, these statements ignore interests even in the U.S. of having lawyers exercise their professional independent judgment to “assess both their client’s ‘true’ (as opposed to merely articulated) interests and the public purposes underlying relevant legal restrictions.” Wilkins, *Who Should Regulate Lawyers*, *supra* note 78, at 862.

<sup>122</sup> See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 1083-84 (1998) (arguing that lawyers should independently assess their clients’ claims and the purposes underlying applicable legal rules in order to determine what actions will likely produce a legally correct result). Some argue that the abdication of professional independence from the client is a more modern event. *See* Robert W. Gordon, *Independence of Lawyers*, 68 B.U. LAW REV. 1, 11-17 (1988)(arguing that the ideal of lawyers exercising independence from their clients “has real historical content); L. Ray Paterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 EMORY L.J. 909, 10 (1980).

notion of attorney independence is a point of divergence so profound, one scholar has concluded that the competing visions are irreconcilable.<sup>123</sup>

#### **4. Loyalty**

Loyalty is implicit in representation. This principle is self-evident and reaches back into early sources of our social morality<sup>124</sup> and the origins of advocacy. The occupation of the advocate grew out of the practice of parties invoking the assistance of a friend, whose loyalty was presumed, to bring special skills to bear on a client's cause.<sup>125</sup> At its most basic level, loyalty precludes an attorney from representing opposing sides in a single case. Although simultaneous representation of opposing clients<sup>126</sup> is universally prohibited and has been since at least the 11<sup>th</sup> Century,<sup>127</sup> there is little agreement about appropriate attorney conduct in this area.

The U.S. takes the most stringent view of client loyalty. U.S. codes regulate a

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<sup>123</sup> See Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 1 & Appendix C. Even within the U.S. system, as Professor David Wilkins explains, "No word in the lexicon of professionalism is more commonly invoked—and less commonly defined—than 'independence.'" See Wilkins, *Who Should Regulate Lawyers*, supra note 78, at 853. Moreover, the ways in which American lawyers and regulators define attorney independence is quite different from the independence problems facing lawyers in other countries, such as China. See RANDALL PEERENBOOM, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* (Lawyers Committee on Human Rights, 1998).

<sup>124</sup> MATTHEW 6:24 (King James) ("No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.") (quoted in Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. (1987)).

<sup>125</sup> See Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 33 (1953); Damaška, *Faces of Justice*, supra note 83, at 141; Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct* 3 (1957); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation* 48 Syracuse L. Rev. 1 (1998).

<sup>126</sup> It is difficult to say with regard to conflicts between current clients, whether the Model Rules or the CCBE Code is more restrictive. In the U.S., attorneys are prohibited under the Model Rules from engaging in a simultaneous representation if representation would be "directly adverse" or "materially limited by the lawyer's other interests or responsibilities. Model Rule 1.7(b). The CCBE Code prohibits a lawyer from advising, representing or acting on behalf of two of more clients if there is a "conflict" or a "significant risk of a conflict" between their interests. While, comparing the language of these two provisions might be futile, empirical research might allow comparison of the factual circumstances in which each rule is applied. For a description of how a law-in-action or social scientific approach can aid comparative analysis of seemingly identical rules, see Rogers, *Gulliver's Troubled Travels*, supra note 78, at 171.

<sup>127</sup> See H. COHEN, *HISTORY OF THE ENGLISH BAR* 233-34 (1929) (citing 1280 ordinance prohibiting lawyers conflicts of interest).

range of activities that might give rise to a conflict of interest, such as accepting client gifts,<sup>128</sup> engaging in business dealings with clients,<sup>129</sup> and receiving payment for services from another party.<sup>130</sup> European Codes appear to be silent on such matters, limiting their regulation of conflicts of interest to situations involving dual representation.<sup>131</sup> This omission is likely related to the fact that much attorney regulation in Europe, particularly with regard to conflicts of interest, remains informal.<sup>132</sup>

Another important area to consider in relation to attorneys' duty of loyalty is the degree to which attorneys are ethically required to defer their clients' decisions.<sup>133</sup> The U.S. Model Rules, instruct attorneys to "abide by a client's decisions concerning the objectives of representation . . . and [to] consult with the client as to the means by which they are to be pursued."<sup>134</sup> Under this formula, U.S. attorneys are obliged, subject only to their right to

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<sup>128</sup> While not a model of clarity, Model Rule 1.8 views client gifts with extreme suspicion, which reflects the long-standing skepticism in Anglo-American law of client-gifts to attorneys. *See* WOLFRAM, *supra* note 76, at 486.

<sup>129</sup> The Disciplinary Rules prohibit lawyers from entering into business transactions in which they have differing interests, unless the client consults after full disclosure. *See id.* at 480. Courts have expanded application of the rule to apply even when the lawyer was not performing legal services for the client and to require that the attorney advise the client to seek independent legal advice on the matter. *See id.* at 480 & n.80.

<sup>130</sup> Disciplinary Rule 5-107(A) "prohibits a lawyer from accepting compensation or other thing of value from a person other than the client for representing a client unless the client gives informed consent." *Id.* at 443.

<sup>131</sup> A particularly interesting example is in the contrasting U.S. and European regulation of contingency fee arrangements. Both systems view contingency fees as a potential menace to ethical conduct, but for radically different reasons. In the U.S., the ethical rules aim at ameliorating potential conflicts of interest between an attorney and client that may arise when they have a contingency fee arrangement. *See* WOLFRAM, *supra* note 76, at 164. In Europe contingency fees are almost completely prohibited, but not so much, as in the U.S. to protect clients against the potential conflicts. European systems prohibit contingency fees to avoid an arrangement that might undermine lawyers' professional independence from their clients. *See* Maurer, Thomas & DeBooth, *Attorney Fee Arrangements*, *supra* note 110 at 280.

<sup>132</sup> *See* Daly, *Dichotomy Between Standards and Rules*, *supra* note 6, at 1150 (noting that in some countries, professional ethics are handed down as an oral tradition, whose strictures address only the most obvious conflicts of interest).

<sup>133</sup> Another aspect of the duty of loyalty is the duty of professional competence. For reasons explained elsewhere, *see supra* note 32, this pillar of professional ethics need not be addressed in a code of ethics for international arbitration, but instead can be left to national or cross-border regulation.

<sup>134</sup> Model Rule 1.2.

withdraw, to defer to client decisions regarding matters that substantially affect the client’s rights and are required also consult with clients on other important matters of strategy.<sup>135</sup> This provision requires attorney loyalty not only to the client’s cause, but also to the client’s decisions on important matters. The CCBE Code,<sup>136</sup> on the other hand, appears to emphasize that attorneys protect clients’ interests more than that they abide by client instructions.<sup>137</sup> This difference is manifested in CCBE Rule 4.3, which requires that an attorney “defend the interests of his client honourably and in a way which [*the lawyer*] considers will be to the client’s best advantage under the law.”<sup>138</sup> This provision reflects an attorney prerogative over the client’s case, instead of an obligation to honor client decisions.<sup>139</sup> In some countries, this attorney prerogative extends so far that it permits substitution of counsel without either the knowledge or consent of the client.<sup>140</sup> Thus, while the duty of loyalty is universally acknowledged, the general principle has not been consistently translated in national contexts.

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<sup>135</sup> This obligation to consult requires that attorneys explain matters well enough that clients can participate intelligently in decisions about both the means and objective of representation. *See* WOLFRAM, *supra* note 76, at 165 (citing comment to Model Rule 1.4(a)).

<sup>136</sup> The Council of the Bars and Law Societies of the European Community, commonly known as the CCBE, has recently enacted the CCBE Code, which is a code of professional conduct that governs the conduct of attorneys in the European Community. *See* Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 15. Because the CCBE Code represents a compromise among predominantly civil law countries, and because most Member States in the European Union have adopted it to govern cross-border practice, it provides an important touchstone for any comparative discussion of ethics. For further discussion on the history and role of the CCBE *see infra* notes 242-50, and accompanying text.

<sup>137</sup> The CCBE Code does speak of the client’s instructions, for example in Rule 3.1, where it states that a lawyer can only handle a case for a client “on his instruction.” In context, however, the term “instruction” appears to be idiomatic for “retention,” and not a reference to interim decision-making by the client. The title of the subsection, for example, is “Acceptance and Termination of Instructions” and appears to use “matters” and “instructions” interchangeably when discussing requirements that an attorney have time and be competent before undertaking representation of a client.

<sup>138</sup> *See* Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 36 (emphasis added).

<sup>139</sup> *See id.* at 30 & n.114 (citing Austrian legal sources and anecdotal evidence from an Austrian attorney).

<sup>140</sup> *See id.* at 47.

## **5. Confidentiality**

Concomitant with the obligation of loyalty, it is universally acknowledged that lawyers are obliged to preserve client confidences.<sup>141</sup> The purpose of confidentiality obligations is to ensure privacy for communications between lawyers and clients, generating mutual trust and maximum disclosure, which will, in turn, enhance representation.<sup>142</sup> Once again, while there is general agreement about the goals of the duty of confidentiality, legal systems take rather different views about how extensive an attorney's obligations must be to fulfill these goals. In civil law countries (except France), the concept of "professional secret" protects only information communicated by a client to an attorney<sup>143</sup> and attorneys are not obliged to maintain as secret information they communicate to clients,<sup>144</sup> or communications they had with other attorneys.<sup>145</sup> By contrast, the common law notion of confidentiality, closely tied to the attorney-client privilege, is much broader and incorporates both communications from an attorney to a client and from a client to an attorney.<sup>146</sup> Under Islamic law, the principles of shari'a arguably impose an even higher duty of confidentiality, requiring protection not only of communications

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<sup>141</sup> See Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061 (1978).

<sup>142</sup> In the Anglo-Saxon legal tradition, this justification dates back to Wigmore. See Alison M. Hill, *A Problem Of Privilege: In-House Counsel And The Attorney-Client Privilege In The United States And The European Community*, 27 CASE W.J. INT'L LAW 145, 172 (1995).

<sup>143</sup> One exception, noted above, is that in-house counsel cannot be members of the bar and communications with them are not subject to professional confidentiality obligations. See Terry, *Introduction to the European Community's Legal Ethics*, *supra* note 10, at 37; see LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* 131 (1987).

<sup>144</sup> LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* 127-28. The civil law "professional secret" derives from a penal law that prohibits disclosing the "secrets" of another. See *id.* at 127.

<sup>145</sup> See *id.* at 128.

<sup>146</sup> See WOLFRAM, *supra* note 76, at 258-64. Notably, a few U.S. jurisdictions have adopted a rule similar to the civil law's, refusing to apply confidentiality protections to communications from a lawyer to a client.

between attorneys and clients but also protection of all information relating to representation.<sup>147</sup>

Thus, the term “confidentiality” does not come with a readily definable content.

Systems also diverge in how they demarcate the obligation of confidentiality when client wrongdoing or potential wrongdoing is involved. Even among the ethical codes of the fifty United States, there is significant disagreement about the extent of confidentiality obligations when a client has committed or is planning to commit criminal wrongdoing.<sup>148</sup> At an international level, the level of disagreement in this area has been described as the most significant threat to orderly transnational legal practice.<sup>149</sup> After years of studying the differences between national ethical codes, the Consultative Committee of Council of the Bars and Law Societies of the European Community, which drafted the predecessor code to the CCBE Code,<sup>150</sup> summarized the problem as follows:

While there can be no doubt as to the essential principle of the duty of confidentiality, the Consultative Committee has found that there are significant differences between member countries as to the precise extent of lawyer’s rights and duties. These differences are sometimes very subtle in character especially concerning the rights

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<sup>147</sup> M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, TEX. INT’L L.J. 289, 313-14 (2000). In practice, these heightened confidentiality requirements may not be any different from U.S. loyalty obligations.

<sup>148</sup> Take, for example, a lawyer who is licensed in both New Jersey and the District of Columbia and who discovers that a client has committed or intends to commit fraud. *See* Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, 8 GEO. J. LEGAL ETHICS 439, 440 (1995). Under the rules of the District of Columbia, our hapless attorney is required to remain silent, while the rules of New Jersey compel her to reveal the client’s fraud. Rule 8.5 attempts to resolve the problem with a conflicts of law rule. Ultimately, however, Rule 8.5 answer is unsatisfactory and has prompted calls for national ethical rules that will apply in all jurisdictions. *See* Mary C. Daly, *Resolving Ethical Conflicts in Multinational Practice—Is Model Rule 8.5 the Answer, an Answer or No Answer at All?*, 36 S. TEX. L. REV. 715, 720 (1995).

<sup>149</sup> *See* CAYTAS, TRANSNATIONAL LEGAL PRACTICE, *supra* note 4, at 3 (1992) (surmising that “transnational practice is most threatened by conflicting mandatory norms requesting or prohibiting with equal authority and determination [the] disclosure of client-related and therefore presumably confidential information”).

<sup>150</sup> For a discussion of the history of the CCBE Code and its precursors, *see infra* notes 301-303, and accompanying text.



and duties of a lawyer vis-à-vis his client, the courts in criminal cases and administrative authorities in fiscal cases.<sup>151</sup>

Over twenty years later, it appears that European regulators have still not made any real progress toward resolving the profound and difficult differences among systems in this area. The CCBE Code neglects to even acknowledge that there is a tension between obligations to disclose wrongdoing and obligations to maintain client secrets, let alone acknowledge that systems resolve the tension differently.<sup>152</sup>

Another area of regulatory conflict is in the extent of post-representation protection for client confidences. In the U.S., lawyers are disqualified from accepting employment of a new client whenever the interests of the new client and an existing or former client are “materially adverse” and the matters involved are “substantially related.”<sup>153</sup> These blanket, objectively defined categories leave little discretion to attorneys in evaluating the relative severity of a potential conflict. Instead, that discretion is placed in the hands of clients, who can waive a potential conflict through written consent.<sup>154</sup> In Europe, the realm of protection for clients is more circumscribed and the discretion to evaluate conflicts is apparently left to the lawyer. Under the CCBE Code, an attorney is forbidden from accepting a new client only if there would be a “risk” of breach of the former client’s confidences or if the lawyer’s knowledge of the former client would give an “unfair” advantage to the new client.<sup>155</sup> This formulation

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<sup>151</sup> See The Declaration of on the Principles of Professional Conduct of the Bars and Law Societies of the European Community (1977).

<sup>152</sup> See Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 28-29 (noting that the CCBE Code imposes seemingly inconsistent provisions, which suggest without expressly acknowledging that, although phrased in absolute terms, the obligation of confidentiality may have limits).

<sup>153</sup> See WOLFRAM, *supra* note 76, at 366-67.

<sup>154</sup> See *id.*

<sup>155</sup> See Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 1 & Appendix C. The strictures of U.S. rules may also more demanding with respect to vicarious conflicts. Under the Model Rules, a lawyer in a firm is barred from representing a new client with conflicting interests of a former client of another

leaves substantial discretion to the attorney to determine whether confidences can be maintained and or whether an advantage to a new client would be “unfair.”<sup>156</sup> It is easy to imagine that a European attorney could decide that even if two matters are related and adverse, the risk of a breach of confidence and unfairness is low. This willingness to vest attorneys with discretion on delicate issues involving their own conflicts may reflect that, prior to the adoption of the CCBE Code, in Europe conflicts were considered a matter of an attorney’s personal relationship with the client, as opposed to professional ethics.<sup>157</sup>

In addition to the duty to maintain client confidences, many systems impose on attorneys other confidentiality requirements. In continental systems such as the Italian, French and Portuguese systems, communications between lawyers, including opposing counsel, can be regarded as confidential.<sup>158</sup> Upon receiving a communication marked “confidential,” or in French “*sous la foi du Palais*,” the receiving attorney must maintain the communication as confidential and is even prohibited from sending copies to her own client.<sup>159</sup> In the U.S., as well as other common law systems such as Ireland and the United Kingdom, such an obligation to treat as confidential communications from opposing counsel could conflict with an attorney’s

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attorney in the firm, even if the former representation by another attorney occurred at another firm. See Schneyer, *The Regulation of Lawyers*, *supra* note 110, at 45.

<sup>156</sup> See *id.* at 55; Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT’L L. J. 1239, 1290 (1998). Notably, the CCBE Code does not permit party consent to potential conflicts, which in the United States is an important source of party autonomy in choosing to assume certain risks. See Terry, Introduction to the European Community’s Legal Ethics, *supra* note 10, at 31.

<sup>157</sup> See Justin Castillo, *International Law Practice in the 1990s: Issues of Law, Policy, and Professional Ethics*, 86 AM. SOC’Y INT’L L. PROC. 272, 283 (1992). European lawyers may have added incentives to interpret these restrictions narrowly because they do not have the opportunity to seek client waiver and their decision cannot be challenged by a motion for disqualification, as is the American practice.

<sup>158</sup> See Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, Appendix C, at 85. In Ireland and the United Kingdom, ethical codes refer only to an attorney’s obligation to keep a client informed. See *id.*

obligations to keep clients informed.<sup>160</sup> In sum, the area of attorneys’ duty of confidentiality once again demonstrates that the differences between and among national ethical regimes are vast. Resolving these differences cannot easily be accomplished on an *ad hoc* basis by individual attorneys and arbitrators.<sup>161</sup>

### **C. Divergent Ethical Obligations in International Arbitration Proceedings**

Knowing the divergences between national ethical obligations, sketched in Section A, it is easy to understand that they cannot peacefully co-exist in a single arbitral proceeding. They will be forced into reckless collisions because, in the absence of a code of ethics that applies in international arbitration, attorneys have no justification for disregarding the ethical strictures of their home jurisdictions. Adding to the conflicting ethical obligations, the lack of guidance and the absence of any mechanisms for enforcement create other obstacles for orderly resolution of disputes. This Section is organized around the three main goals of international arbitration—neutrality, effectiveness and party autonomy—and describes how divergent ethical assumptions and the absence of ethical regulation can threaten to destabilize these goals.

#### **1. Neutrality**

The primary accomplishment of international commercial arbitration is that it

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<sup>159</sup> *See id.*

<sup>160</sup> For a discussion of U.S. attorneys’ obligation to keep clients informed, *see supra* notes 134-138, and accompanying text.

<sup>161</sup> Charles N. Brower, a former judge on the Iran-United States Claims Tribunal, has identified in the context of evidentiary standards, the perils that await when arbitrators apply complex rules for arbitral proceedings in an *ad hoc* fashion. In Brower’s experience, the requirements imposed by arbitrators are often not clearly communicated to the parties (perhaps because they are evolving during the proceedings) and parties “unwittingly”

ensures neutrality. Most obviously and most importantly, international arbitration allows parties to avoid submitting their disputes to the national courts of their adversaries.<sup>162</sup> The primary reason why parties include an arbitration agreement in their contract is to insulate themselves from potentially biased national courts of their opponents.<sup>163</sup>

Another way international commercial arbitration assures neutrality is by blunting

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assume that their evidentiary submissions are sufficient. *See* Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW 47, 58 (1994).

<sup>162</sup> It is generally presumed that judges (or juries) will be more sympathetic to the interests of parties who share their nationality and may in fact be hostile toward or biased against foreign parties. It is often mistakenly supposed that the only significant threat of bias comes from the courts of developing nations, which may lack a sense of judicial independence or may be subject to corruption. In fact, bias against foreign defendants is alive and well in virtually all countries, including the United States. This potential for bias was recognized during the drafting of the Constitution, and led to crafting of the diversity clause which extends the jurisdiction of presumably less-biased federal courts to matters between American citizens and foreign nationals. *See* The Federalist No. 80 (Hamilton); 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Philadelphia, Lippincott 2d ed. 1876) (Madison). Notwithstanding this effort by the Founders, “recurring surges of nativism and xenophobia have plagued this nation’s history and suggest the potential for unfair treatment of noncitizens in the courts. Bias against noncitizens unfortunately remains to this day.” Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Non-Citizens*, 21 YALE J. INT'L L. 1, 35-43 (1996); *but see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996) (concluding, based on analysis of data of federal court civil litigation involving foreign parties, that foreign parties fare better than their domestic counterparts).

<sup>163</sup> *See, e.g.*, Gerald Aksen, *Arbitration and Other Means of Dispute Settlement*, in INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 287, 287 (David N. Goldsweig & Roger H. Cummings eds., 2d ed. 1990) (citing distrust of opponent’s national courts as primary motivation for resorting to arbitration). International arbitration has been extolled for a host of reasons in addition to its neutrality and effectiveness, including increased cost-savings, speed, and confidentiality. *See* James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83 (1997). Experience has taught, however, that international arbitration is often unable to satisfy expectations of cost savings and increased efficiency. *See* John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A World Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U.J. INT'L L. & POL. 361 378 (1986); *see also* William W Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647, 659 (1989) (“In the real world, business managers and their lawyers often compromise on a governing law without a great deal of research on how the chosen legal system will affect the outcome in the spectrum of possible controversies.”). A recent survey of participants in international arbitration bears this hypothesis out. Of those surveyed, 72% identified “neutrality” and 64% identified enforceability as “highly relevant to their decision to arbitrate.” *See* CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 45 (1996) (cited in Drahozal, *Commercial Norms*, *supra* note 9, at 95 n.83) (2000)). Other popular reasons were expertise available through arbitration (37%) and the unavailability of appeal (37%). *See id.*

what parties perceive to be the sharp edges of foreign national procedural arrangements.<sup>164</sup> Parties from different cultures and legal traditions often have radically different conceptions about what a legal dispute is, what the resolution process should entail, and what the role of lawyers should be in that context.<sup>165</sup> For example, Continental parties are jarred by the prospect of being compelled by a U.S. court to give to an opposing party documents containing secret research and development information, and being subjected to the seeming barbarism of cross-examination.<sup>166</sup> Meanwhile, U.S. parties are dismayed that under most Continental rules they cannot call on an opposing party to testify, even about basic matters such as the parties' intent at the time of contracting.<sup>167</sup> U.S. parties also find it remarkable that they cannot ultimately control which witnesses will testify in support of their case, they cannot conduct private investigations into facts of the case,<sup>168</sup> and they are powerless to prevent all forms of "inadmissible hearsay"

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<sup>164</sup> See William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION (Thomas E. Carbonneau, ed., 1998); see also Vagts & Park, *supra* note 1, at 621 ("International commercial arbitration provides a neutral playing field on which transnational economic law is enforced.").

<sup>165</sup> See William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 661 (1989) ("Wide variations exist in concepts of fairness. Like the notion of justice, fairness is usually encrusted with emotional and philosophic overtones."); Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny* 27, in LEX MERCATORIA AND ARBITRATION (Thomas E. Carbonneau, ed., 1998) ("Contrastive procedural traditions provide for different concepts of justice and, as a result are difficult to reconcile. Arbitration's legitimacy as a mechanism for transnational adjudication depends upon how fair the governing procedures are or are perceived to be by the constituent parties.").

<sup>166</sup> See Patrick Thieffry, *European Integration in Transnational Litigation*, 13 B.C. INT'L & COMP. L. REV. 339, 356 -57 (1990) ("U.S.-style procedural rules, the absence of which U.S. litigants tend to criticize in European courts, are precisely those considered to be the most outrageous by European litigants in U.S. courts.").

<sup>167</sup> Under the German code, for example, a party is not under an unqualified obligation to answer interrogatories and may not be compelled to testify. See K. Riechenberg, *The Recognition of Foreign Privileges in United States Discovery Proceedings*, 9 N.W.J. INT'L L. & BUS. 80, 88 (1988). "In most continental jurisdictions, a litigant's statement is not a recognized means of proof of his allegations. In others, judges are expected to order formal interrogations of a party only as a means of last resort[.]" Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 842 (1997). Similarly, under Islamic law, an interested party's testimony carries no weight. See Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW 47, 50 (1994).

<sup>168</sup> See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

from being relied on by a Continental judge.<sup>169</sup>

Modern international arbitration practice has tempered these most steely aspects of national practice and created a forum in which all participants can feel relatively comfortable.<sup>170</sup> Most often, direct examination is submitted by the parties in the form of witness statements or declarations.<sup>171</sup> This practice gives parties substantial control over what testimonial evidence will be presented in support of their case. Cross-examination of witnesses who submit statements is generally accepted as a legitimate fact-finding technique, but it is practiced with less vigor than in U.S. courtrooms.<sup>172</sup> During cross-examinations, arbitrators

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<sup>169</sup> For reasons that will become clear later, interposing any objections in a civil law proceeding is regarded as a direct challenge to the judge's authority and competence. See MIRJAN DAMAŠKA, *EVIDENCE LAW ADRIFT* 86 (1997). While categories such as hearsay do not preclude the admission of evidence, judges in civil law jurisdictions accord less weight to second-hand and indirect evidence that might be excluded in the U.S. system. See Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 500 (1987) (tracing the development of hearsay and other exclusionary rules to the development of the jury system).

<sup>170</sup> See Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 31 (Stefan N. Frommel & Barry A.K. Rider, eds. 1999) (noting an increasing awareness among both arbitrators and practitioners of "an emerging 'harmonised procedural pattern' in international arbitration"); Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 89 & n.4 (1995); Marianne Roth, *False Testimony in International Commercial Arbitration: A Comparative View*, 7 N.Y. INT'L L. REV. 147, 151 (1994); Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, in 1985 MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES 163 (1985).

<sup>171</sup> See Berthold Goldman, *The Application of Law; General Principles of Law—The Lex Mercatoria* in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 124 (Julian D.M. Lew, ed., 1986). See Rau & Sherman, *supra* note 170, at 118 ("[I]nternational arbitration hearings are often something of an amalgam of the two traditions, with witness testimony frequently presented in affidavit or summary-statement form, and, when live testimony is presented, with limited cross-examination.") (footnotes omitted); Christian Borris, *The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process* 1, 13-14 in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS (Stefan N. Frommel and Barry A.K. Rider eds. 1999).

<sup>172</sup> See Andreas F. Lowenfeld, *Introduction: The Elements Of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 654 (1997) ("By now, cross-examination by counsel is pretty well accepted in international arbitrations, and for the most part the continental lawyers have learned how to do it. Moreover, and almost as important, arbitrators have learned how to administer cross-examination."); Julian D.M. Lew & Laurence Shore, *International Commercial Arbitration: Harmonizing Cultural Differences*, 54 DISP. RES. J. 33, 34 (1999) (noting that when cross-examination is permitted in arbitrations, attorneys are encouraged, through strict time limits, to focus their questioning on the most important issues). Even with these accommodations, lawyers from different countries approach cross-examination with different purposes and techniques. English Barristers are "accustomed to conducting a painstaking cross-examination of the witnesses statement," and American attorneys cross-examine on materials from depositions and direct testimony in an effort to undermine the witness's credibility. See *id.* at 34.

routinely interject questions of witnesses, but more for the purpose of clarifying and filling in gaps in testimony, than developing the initial content of testimony.<sup>173</sup> Limited discovery is often allowed, including depositions,<sup>174</sup> and evidentiary objections are making an appearance in many arbitrations.<sup>175</sup> These hybridized procedural practices have recently been synthesized into specific rules by the International Bar Association, which can be incorporated into the parties' contract.<sup>176</sup>

Although procedures in international arbitration have evolved into hybridized neutrality, ethical norms are not as easy to hybridize. Even when attorneys are compelled to abandon the procedural practices of their national courts, the gravitational pull, if not the legal

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By contrast, Continental practitioners focus more on questions that might elicit new information, than on raising questions about the witness's credibility. *See id.*

<sup>173</sup> *See* Rau & Sherman, *supra* note 170, at 96 & n.47 (citing DAVID RENE, *ARBITRATION IN INTERNATIONAL TRADE* 296 (1985)); Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* 161 (Stefan N. Frommel & Barry A.K. Rider, eds., 1999); Ambassador Malcolm Wilkey, *The Practicalities of Cross-Cultural Arbitration*, in *CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS* 81 (Stefan N. Frommel & Barry A.K. Rider, eds., 1999).

<sup>174</sup> Some countries have national laws that limit the nature of and manner in which discovery can be pursued in arbitrations. For example, Article 184 of the Swiss law on Private International Law requires that the arbitral tribunal itself take evidence. Bundesgesetz uber das Internationale Privatrecht vom 18 Dezember 1987, 1988 Bundesblatt [BB] I 5 (Switz.). Similarly, Section 1036 of the German Civil Procedure Code forbids arbitrators from ordering parties to disclose information and requires that they seek national court assistance in conducting discovery. *See* Section 1036 Zivilprozessordnung (F.R.G.). Foreign law in this note derives from cites and translations in Charles S. Baldwin, IV, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 *TEX. INT'L L.J.* 451 (1996).

<sup>175</sup> *See id.* at 103. In arbitration, like in bench or judge trials, evidentiary objections are less important because there is no jury. *See* ANDREAS BUCHER & PIERRE YVES TSCHIANZ, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 92 (1989) (arguing that rules of evidence lose most of their meaning and importance in arbitration).

<sup>176</sup> *See* International Bar Association's Supplemental Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, <http://www.asser.nl/ica/iba.htm>. The IBA Rules are part of a larger debate about the future of arbitration. Some believe that there will be, or should be, more specified rules of procedure and evidence, while others urge commitment to flexibility. *See* Howard M. Holzman, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures* at 13, in *INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY*" (Richard B. Lillich & Charles N. Brower, eds. 1993). Notably, the move toward culturally harmonized procedural rules in arbitration mirrors a similar effort in domestic litigation. Geoffrey Hazard, along with a host of expert advisors, head up the ALI project to develop transnational rules of civil procedure that national courts could use when adjudicating international disputes. *See*

obligations, of their national ethical norms remain.<sup>177</sup> The ensuing problems are obvious. How can a proceeding be fair if only one party is preparing witnesses while the other is studiously avoiding such contact? How can a proceeding be neutral if one party is meeting with its appointed arbitrator to strategize, while the other is not? How can a proceeding be just if one attorney is required to disclose information that the opposing counsel is obliged to maintain as secret? It is something of a mystery that catastrophe has not come in answer to these and other questions.

The least likely explanation for the apparent quietude is that these questions do not affect international arbitration.<sup>178</sup> More likely, the visibility of clashes between conflicting national ethical norms is obscured by a range of factors, most significantly the fact the arbitration process is private. Most arbitral awards are complied with voluntarily<sup>179</sup> and reports on these cases are not generally available.<sup>180</sup> Of those cases that do end up being contested at the

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ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, Discussion Draft No. 2 (April 12, 2001).

<sup>177</sup> See *supra* note 69 (describing the ambiguities and disagreement over whether national ethical norms apply or apply with equal force in arbitration).

<sup>178</sup> One indicator of the difficulty in verifying the existence of ethical conflicts is that several experts, including former presidents of the ICC Court of Arbitration, have confirmed that “the problem sometimes arises” that one party is communicating with the party arbitrator, while the other is not. See Wilkey, *The Practicalities of Cross-Cultural Arbitration*, *supra* note 103, at 86. Notwithstanding these personal admissions, a search of all U.S. case law revealed no cases in which this problem has been presented as a basis for challenging an international award.

<sup>179</sup> For example, as of 1984, the ICC boasted a 90% voluntary compliance rate. See Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM.J. TRANSNAT’L L. 579, 606 (1985). This statistic may have already fallen victim to the new culture of more international arbitration system, in which informal agreement is less likely to effectively bind the parties.

<sup>180</sup> Legal research regarding individual arbitration cases is limited because arbitration awards are rarely rendered with reasoned opinions, let alone published. See *id.* Some limited publication is done by the ICC with the parties’ names expunged and court review of arbitral awards provides a glimpse at a subset of awards. An accurate assessment of the impact of conflicting national ethical norms in international arbitration would require investigation of not only those cases that reach the award stage, however, but also the significant percentage of arbitral cases that settle before award. Indeed, discovering midway through proceedings that one party has been



enforcement stage, ethical misconduct cannot really be raised unless it was so disruptive of the proceedings that it could be characterized under one of the narrow exceptions permitted by the New York Convention.<sup>181</sup> Even if these limitations on reporting do not completely obscure ethical conflicts in arbitration proceedings, they slow down their revelation. The problem of ethical conflicts is relatively new, caused by the recent expansion in the ranks of participants in international arbitration. The absence of significant complaints may simply reflect the lag time while reporting catches up with the current problems.

It is also probable that ethics collide under the surface of proceedings, hidden from plain view, even that of the participants. For example, an attorney can legitimately withhold from discovery information that is otherwise relevant if that information is “confidential.” But what happens when the parties have different understandings of what “confidential” means? One party may be producing materials that the other party is maintaining as confidential.<sup>182</sup> In an adversarial proceeding, an American party asserting a more expansive definition of confidentiality is unlikely to inquire whether production by the other side of apparently confidential materials is inadvertent or intentional. Moreover, the European party is unlikely to detect the American party’s expansive approach to withholding, and is even less likely to detect inappropriate withholding, because the European party is not accustomed to

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communicating throughout with its party arbitrator may inject enough uncertainty about enforceability and the possibility of retrial to produce higher rates of settlement than would occur in untainted proceedings.

<sup>181</sup> For a description of the grounds under the New York Convention for setting aside or refusing to enforce an arbitral award, see *infra* notes 203-205, and accompanying text.

<sup>182</sup> This problem demonstrates the intersection of ethical rules with evidence rules. The interconnectedness of rules of civil procedure, evidence and ethics suggest that the enactment of ethical norms for international arbitration must coincide with the means by which procedural and evidentiary rules are made applicable in arbitral proceedings. See *infra* Section II.D.1.

discovery.<sup>183</sup>

Another major factor masking the full impact of conflicting ethical norms in arbitration may be clandestine techniques by which arbitrators presumably regulate proceedings before them. In the absence of articulated norms and express enforcement mechanisms, arbitrators likely assess the conduct of attorneys based on private—and untested—standards informed by the arbitrators’ legal and cultural backgrounds. For example, a Continental arbitrator faced with creative arguments by an American attorney may conclude that the American attorney is inherently untrustworthy and may discount or disregard arguments by that attorney.<sup>184</sup> Meanwhile, an American arbitrator may perceive restrained arguments from Continental counsel as either poor lawyering or a fundamental lack of conviction about the strength of the client’s case. Similarly, an arbitrator from a civil law system may discount testimony by a witness, or discredit a party’s case entirely, upon discovering that the witness discussed the case with counsel prior to testifying.<sup>185</sup> An American arbitrator may have the opposite reaction if a witness flounders during routine cross-examination questions for which an American the witness would normally have been primed.

Even if they remain unspoken, such perceptions of apparent misconduct (or ineptitude) inevitably affect arbitrators’ decisions on the merits, computations of damage awards,

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<sup>183</sup> Because of similar differences in the parties’ expectations and assumptions, one party’s pre-testimonial communication with witnesses or on-going *ex parte* communication with a party arbitrator may go undetected. As these examples demonstrate, ethical rules are intertwined with and will benefit from development of more fixed rules for procedure and evidence.

<sup>184</sup> This example has been identified as a recurring problem in international tribunals. See Vagts, *The International Legal Profession*, *supra* note 8, at 260.

<sup>185</sup> “German judges are given to marked and explicit doubts about the reliability of the testimony of witnesses who previously have discussed the case with counsel.” Kaplan, von Mehren, & Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1201 (1958).

and assessments of costs and fees.<sup>186</sup> Under older notions of international arbitration as a sort of “rough justice,”<sup>187</sup> these informal constraints may have been sufficient to instill a sense of justice in the proceedings, but they are inconsistent with international arbitration’s modern role as a transnational adjudicatory system. These informal sanctions violate the most fundamental notions of procedural fairness by imposing punishments for violations of unknown rules and without any opportunity to be heard.<sup>188</sup> Such reactions to perceived attorney misconduct may also be sanctioning an innocent party. Clients pay substantive awards and costs and fees, but the misconduct may belong wholly to the attorney.

## **2. Effectiveness**

Another essential goal of international commercial arbitration is effectiveness,<sup>189</sup> which, like the concept of neutrality, has distinctive connotations in the context of international arbitration. At a procedural level, effectiveness refers to the ability of parties to determine where

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<sup>186</sup> Most arbitral rules permit arbitrators to award or apportion costs and fees between the parties based on the relative merit of their cases or their conduct during arbitral proceedings. See John Yukio Gotanda, *Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations*, 21 MICH. J. INT’L L. 1, 1 (1999). For further discussion of arbitrator power to award costs and fees, see *infra* note 472, and accompanying text.

<sup>187</sup> See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law through Arbitration*, 83 MINN. L. REV. 703, 745 (1999) [hereinafter “Ware, *Privatizing Law through Arbitration*”] (“There is a long tradition of arbitrators deciding on the sole basis of their sense of justice, rather than any set of rules.”); see also Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT’L L.J. 33, 39 (1984).

<sup>188</sup> One scholar, in proposing solutions to the clash of legal cultures in international arbitration, has suggested that the problem could be solved by heightened sensitivity on the part of arbitrators and increased communication during the process. See Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 161 (Stefan N. Frommel & Barry A.K. Rider, eds., 1999) (suggesting that the arbitral tribunal “must know how to distinguish different cultural origins in the evaluation of their respective testimonies”). Even if, under the best circumstances, arbitrator sensitivity could ameliorate bias in the decision-making process, but it cannot obviate the inequity of having parties abide by differing rules during the presentation of evidence.

<sup>189</sup> See THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 1-22 (1989) (discussing the pressures created by globalization and impracticability of traditional justice to respond to those needs).

their dispute will be resolved and to ensure that the final award will be enforceable.<sup>190</sup> Without an arbitration clause, even the simplest international transaction can give rise to competing litigation in two or more different countries. Forum selection clauses<sup>191</sup> and abstention doctrines<sup>192</sup> may reduce the likelihood that multiple suits will be brought all the way to judgment, but the range of possible venues creates tremendous uncertainty about where the dispute will ultimately be resolved.

In addition to reducing uncertainty, arbitration also solves many complications that arise when an international dispute is adjudicated in national courts. Add a foreign party to an otherwise ordinary contract dispute, and seemingly inconsequential aspects of domestic procedure are transformed into complex operations involving multiple international conventions and treaties. To imagine a typical U.S. case, a plaintiff must first affect service on a potential foreign defendant under the cumbersome means required by the International Convention on

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<sup>190</sup> See W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 1215 (1997) [hereinafter “Reisman, International Commercial Arbitration”] (“[A]rbitral awards as a whole enjoy a higher degree of transnational certainty than judgments of national courts.”); see also Saul Perloff, *The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration*, 13 U. Pa. Int’l Bus. J. 323, 324 n.11 (1992).

<sup>191</sup> Forum selection clauses can mitigate the uncertainties involved in where a dispute will be resolved. See Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L.J. 51 (1992). However, if the clause is not honored by either the designated forum, which must agree to accept jurisdiction, or by another forum, which must decline the otherwise legitimate exercise of jurisdiction, the clause will be of little or no effect. See REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 190, at 91-107 (citing British and American cases that take contrasting approaches on the dismissing or staying cases based on pending foreign litigation).

<sup>192</sup> U.S. courts have inherent power to dismiss or stay an action in favor of foreign litigation presenting the same claims and issues. See *In re Houbigant*, 914 F. Supp. 997, 1003 (S.D.N.Y.1996). In determining whether to do so, courts consider the adequacy of relief in the alternative forum, concerns of judicial efficiency, the convenience of the parties and witnesses, the possibility of prejudice and the temporal sequence of the actions. See *Continental Time Corporation v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982). However, federal courts are reluctant to decline jurisdiction solely on the basis of concurrent proceedings in another jurisdiction. Instead, the default rule is that “[p]arallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously.” *China Trade and Development v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir.1987) (quoting *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C.Cir.1984)) (internal quotation marks omitted); see also *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (federal court will abstain only in “exceptional” circumstances).

Service Abroad.<sup>193</sup> If successful, the plaintiff must then convince the U.S. court that it has the power to exercise jurisdiction over the matter and should not decline jurisdiction under the doctrine of *forum non conveniens*,<sup>194</sup> even though none of the contract negotiations or performance occurred on U.S. soil. Assuming a U.S. court asserts jurisdiction, the tempestuous discovery procedures for domestic litigation will seem pacific by comparison to obtaining evidence from overseas. A plaintiff in an international dispute must navigate the quasi-diplomatic channels of the Convention on the Gathering of Evidence Abroad<sup>195</sup> instead of the relatively straightforward approach of the Federal Rules of Civil Procedure.<sup>196</sup> In the unfortunate event that foreign law governs the contract, the plaintiff will have to employ experts on foreign law to advise the court.<sup>197</sup> Finally, even if the plaintiff prevails in this exhausting U.S. action, it must still face the dubious prospect of enforcing a foreign judgment, most likely without the aid of a convention or treaty.<sup>198</sup>

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<sup>193</sup> See CONVENTION ON SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, Nov. 15, 1965, 20 U.S.T. 362, 658 U.N.T.S. 163, *reprinted following* Fed. R. Civ. P. 4 (1992); *see also* Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1474-85 (1991) (Book Review).

<sup>194</sup> Under the doctrine of *forum non conveniens*, a court that otherwise has jurisdiction may decline to exercise it if the disputes seems better suited for adjudication in a foreign tribunal. In determining whether to exercise this discretionary doctrine, courts consider a number of factors, such as the relative ease of access to sources of proof, the need to apply foreign law, the ability and cost to compel unwilling witnesses, the enforceability of a potential judgment, the availability of a fair trial in a foreign tribunal and the local interest in having localized controversies decided at home. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>195</sup> See CONVENTION ON TAKING EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS, Opened for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

<sup>196</sup> *See* Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1488-96 (1991) (Book Review).

<sup>197</sup> *See* COMPARATIVE LAW: CASES-TEXT-MATERIALS 72-73 (Rudolf B. Schlesinger, *et al.*, eds., 6<sup>th</sup> Edition) (1998).

<sup>198</sup> *See* REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 190, at 121 (“[A]rbitral awards as a whole enjoy a higher degree of transnational certainty than judgments of national courts.”); *see also* Saul Perloff, *The Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration*, 13 U. PA. INT’L BUS. J. 323, 324 n.11 (1992). A new draft Convention has been proposed, which would establish international standards and greater predictability in the enforcement of foreign judgments. *See* Edward Lau, *Update on the Hague Convention on the Recognition & Enforcement of Foreign Judgments*, 6 ANN. SURV. INT’L & COMP.

Arbitration solves most of these problems. By putting the substantive decision-making in the hands of private adjudicators, international arbitration avoids the issues of national sovereignty and international comity that complicate domestic court adjudication of matters involving foreign nationals.<sup>199</sup> International arbitration does, however, rely on national courts to enforce the arbitration agreement and the arbitrators' award.<sup>200</sup> The necessary role of national courts as enforcers and overseers is in tension with the all-important goal that arbitration proceedings be insulated from national legal systems to retain their neutrality.<sup>201</sup> The modern system of international arbitration resolves this tension by striking “an exceedingly fine balance between arbitral autonomy and minimum competence for national judicial review.”<sup>202</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>203</sup> limits national court review of arbitral awards to narrowly defined grounds, which exclude even clear errors of law.<sup>204</sup>

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L. 13 (2000). Because enforcement is intimately related with the basis for jurisdiction used by the court that issued the judgment, the proposed Convention involves a difficult reexamination of the basis for jurisdiction of courts, which in the United States implicates questions of constitutional magnitude. See Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOKLYN J. INT'L L. 111 (1998). For in-depth treatment of the complexities of jurisdiction over international disputes, service abroad, and other aspects that add to the complexities of international litigation, see generally GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS (1989), and Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456 (1991) (Book Review of same).

<sup>199</sup> See BORN & WESTIN, INTERNATIONAL CIVIL LITIGATION, *supra* note 198, at 439-97 & 546-50.

<sup>200</sup> See REISMAN, SYSTEMS OF CONTROL, *supra* note 57, at 113.

<sup>201</sup> The risk is that if too much power is vested in national courts under the guise of review and enforcement functions, national courts will wrest from arbitral tribunals the real power of decision. See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (hereinafter the “NEW YORK CONVENTION” or the “CONVENTION”). Over 100 countries are signatories to the New York Convention. See Andrew T. Guzman, *Capital Market Regulation In Developing Countries: A Proposal*, 39 VA. J. INT'L L. 607, 645 n.102 (1999) (citing ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 343 (1993)).

<sup>204</sup> These grounds for review are limited to what might be considered the “most basic notions of morality and justice.” Park, *Safeguarding Procedural Integrity in International Arbitration*, *supra* note 68 at 701. Specifically, Article V of the New York Convention provides:

This balance can be upset by the lack of adequate ethical guidance and regulation. If arbitration's neutrality can be threatened by lawyers' adherence to ethical rules that conflict, its effectiveness can be hampered by an inability to respond to ethical misconduct. As the field of players expands and conflicts between national ethical norms become more frequent and apparent, these conflicts will less be less amenable to informal regulation by arbitrators. If the arbitration system cannot resolve these conflicts or offer recourse in the face of misconduct, parties may take their ethical complaints to national courts.

If, for example, it were discovered that one counsel had participated in the arbitration notwithstanding an impermissible conflict of interest, or that an one party had been strategizing with its party arbitrator unbenounced to the other, it is unlikely that the injured party would simply accept an award rendered.<sup>205</sup> Instead, disgruntled parties are likely to attempt to

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Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, [if there is] . . . proof that:

The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing some indication thereon, under the law of the country where the award was made; or

The party against whom the award is involved was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

For a detailed discussion of the meaning and effect of these provisions, see REISMAN, *SYSTEMS OF CONTROL*, *supra* note 57, at 111-13.

<sup>205</sup> At the enforcement stage, under Article V of the New York Convention, the party might allege that it was not permitted an equal opportunity to present its case or that enforcement of an award tainted with unethical conduct by opposing counsel would offend the public policy of the state in which enforcement is sought. *See, e.g., Fizzroy Engineering, Ltd. v. Flame Engineering, Inc.* 1994 WL 700173 (N.D. Ill. 1994) (suggesting that a conflict of interest could be grounds for refusing to enforce an award under Article V of the New York Convention).

involve national courts either in the situs during arbitral proceedings or during the enforcement proceedings. In many countries, there is considerable ambiguity over the applicable norms and the role of courts during the pendency of arbitration.<sup>206</sup> Because national laws often authorize courts to interfere “in aid of arbitral proceedings,” parties may be able to persuade national courts to intervene to resolve ethical conflicts or rule on charges of ethical misconduct. This approach may be preferable for aggrieved parties than waiting until to the enforcement stage, when court review is limited to the clear grounds dictated by the New York Convention.<sup>207</sup> Either of these tactics will undermine one of the primary objectives of arbitration—which is to insulate disputes from national courts.<sup>208</sup>

Moreover, in the absence of international ethical norms or express agreement by the parties, national courts would have no choice but to apply their own national ethical rules to determine whether the conduct at issue was proper. If courts scrutinize awards using their own

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<sup>206</sup> To date there is considerable discord among national laws about whether arbitrators can order interim relief and whether interim orders are enforceable under the New York Convention. For those instances when arbitrators cannot effectively order interim relief, such remedies must be sought by national courts. This result can mean that national courts get unwittingly sucked into the merits of a dispute, since many forms of interim relief involve substantial inquires into the merits. Difficult questions arise about the collateral estoppel effect of national court findings of fact that are made in granting or refusing to grant interim relief.

<sup>207</sup> To date, courts have demonstrated extreme restraint when asked to invalidate or refuse enforcement of an award even allegedly tainted with misconduct even by an arbitrator. In one of the most striking of such examples, a British court refused to remove an arbitrator or vacate an interim award notwithstanding the fact that the arbitrator had failed to disclose his position on the board of directors of the company that lost out to a party to the arbitration in a bitter bidding struggle for the very contract that was at issue in the arbitration. This result is striking because, while omitting this directorship from the C.V. provided to the parties in the selection process, the arbitrator included on his C.V. circulated at the same time for other purposes. See Judgment from the Court of Justice, Queens Bench Division, *AT&T v. Saudi Cable Company* (November 30, 1999), published at [http://www.newLawonline.com/cgi-bin/nlo.dll/jZxrxZmKZmo/2991017801\\_j.htm](http://www.newlawonline.com/cgi-bin/nlo.dll/jZxrxZmKZmo/2991017801_j.htm); see also *Arizona Electric Power Cooperative, Inc. v. Berkeley*, 59 F.3d 988 (1995) (rejecting public policy challenge to arbitration award granting attorneys fees to attorney accused of unethical conduct); *Diotronik Mess-und Therapiegeraere GmbH & Co. v. Medford Medical Instrument Co*, 415 F.Supp. 133, 139 (refusing to apply public policy defense to claim that party “knowingly withheld evidence” and “engaged in a calculated attempt to mislead the arbitrators” by omitting reference to another agreement). Courts have been similarly reluctant to set aside awards based on allegations of misconduct by parties or witness. See Marianne Roth, *False Testimony in International Commercial Arbitration: A Comparative View*, 7 N.Y. INT’L L. REV. 147 (1994) (surveying British, Swiss and U.S. court decisions that invoke the public policy exception in extreme cases of egregious and obvious perjury).



national ethical norms (which are not even binding of the allegedly offending opposing attorney), they will undermine the certainty and neutrality of the process. On the other hand, if they refuse to investigate alleged misconduct to avoid interfering with arbitration, they will leave victims of misconduct with no recourse and perpetrators of misconduct with no constraints.

### **3. Party Autonomy**

If litigants go to national courts as penitents to the clergy, then parties to arbitration are at once the anointing pontiff and the benefactors who build the church, as well as the penitents seeking absolution. Arbitration is a flexible medium that the parties can mold and shape to fit their needs.<sup>209</sup> The parties create arbitral jurisdiction, select the arbitral tribunal,<sup>210</sup> determine the powers of the tribunal,<sup>211</sup> and have the opportunity to set the procedures to be followed by the tribunal.<sup>212</sup> This *ex ante* control over the process is widely regarded as the

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<sup>208</sup> See Thomas, *Disqualifying Lawyers in Arbitrations*, *supra* note 7, at 563.

<sup>209</sup> See Jack J. Coe, Jr., *International Commercial Arbitration Principles and Practice in Global Context* 59 (1997).

<sup>210</sup> Most arbitral rules permit each party to select a “party arbitrator,” subject to objections by the opposing party about conflicts of interest. Once selected, the two party arbitrators then select a third arbitrator who will act as the “chairperson” of the tribunal. The power to select the arbiter of the dispute is one of the most distinguishing features of arbitration and arguably the one that provides comfort enough for parties to relinquish their right to bring claims in their own courts. See REISMAN, *INTERNATIONAL COMMERCIAL ARBITRATION*, *supra* note 190, at 541-72; see also MANI, *supra* note 77, at 16-17 (describing control over the composition of the tribunal as the “royal road” that has lured sovereign nations into international adjudication).

<sup>211</sup> Because the power of arbitrators derives from the arbitration agreement, arbitrators can only perform those powers delegated to them in the arbitration agreement. See REISMAN, *INTERNATIONAL COMMERCIAL ARBITRATION*, *supra* note 190, at 1174-54.

<sup>212</sup> For example under the ICC Rules, “primacy is to be given to the will of the parties” when agreement can be reached with regard to procedural choices. See CRAIG, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION*, *supra* note 101, at § 8.08, at 146 & § 16.01, at 269 (citing Article 11 of the ICC Rules). For further discussion regarding procedures in arbitration, see *infra* note 304-328 and accompanying text. Some institutions’ rules grant arbitrators authority to formulate appropriate procedural rules. See, e.g., Rules for the ICC Court of Arbitration article 11. See also, Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT’L L. 9, 23-24 (1986). “Arbitrators may be empowered to fill gaps [in arbitration agreements] either by the parties themselves, or by the properly applicable law.” William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647 (1989) (citing Nicklisch, *Agreement to Arbitrate to Fill Contractual Gaps*, 5 J. Int’l Arb. (1988)).

inducement for parties to forsake their right to appeal the substance of arbitral awards.<sup>213</sup> For this reason, party autonomy is a premise as essential to the system as neutrality and effectiveness. Party autonomy and control in international arbitration may be threatened, however, by the lack of ethical regulation.

When, as suggested above, perceived misconduct is resolved by arbitrators through clandestine and unreviewable decisions,<sup>214</sup> parties lose all control over the standards used to regulate the proceedings. Even when arbitrators resolve conflicts between ethical norms expressly,<sup>215</sup> their decisions may still disrupt the parties' expectations. Clients enjoy certain prerogatives that are corollaries of the attorney obligations.<sup>216</sup> Parties form business plans and adjudication strategies based on the prerogatives established by their home jurisdiction's ethical rules, which they have no reason to abandon in the absence of notice that those prerogatives have been displaced in the context of international arbitration.

The arbitral tribunal may resolve this dilemma by choosing from among different ethical standards at some point in the proceedings, assuming the tribunal has such power.<sup>217</sup> In resolving the conflict mid-proceeding, however, the arbitral tribunal will disrupt the expectations with which one or both of the parties prepared for arbitration or conducted pre-arbitration negotiations. Examples will help illustrate. The duty of confidentiality creates not only an

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<sup>213</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 44 (1994) (describing party autonomy as “[o]ne of the most fundamental characteristics of international commercial arbitration”).

<sup>214</sup> See *supra* notes 135-38, and accompanying text.

<sup>215</sup> Under most arbitral rules, arbitrators have the power to fashion or choose rules to govern the procedure if the parties have not otherwise agreed. See Rau & Sherman, *supra* note 170, at 97.

<sup>216</sup> Cf. L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695 (1981) (“The function of a code of legal ethics is twofold: to define the rights and duties of lawyers and to define the rights and duties of persons acting through the agency of a lawyer as clients.”).

<sup>217</sup> For a discussion of arbitrator powers to regulate attorney conduct, see *infra* Part III.B.2.

obligation on attorneys to maintain client confidences, but also an expectation in clients that their confidences will be maintained.<sup>218</sup> Because confidentiality obligations differ from jurisdiction to jurisdiction,<sup>219</sup> arbitrators may be called on choose a rule if it comes to light that the parties are following different rules.<sup>220</sup> The most obvious example is communications with an in-house attorney in preparation for litigation, which the attorney would clearly have a duty to maintain as confidential under U.S. rules, but not under most European regimes.<sup>221</sup>

Similar problems arise when a conflict of interest issue presents itself in an arbitration. Again using the example of a U.S.-European arbitration, an arbitral tribunal might be asked to evaluate a motion to disqualify based on an alleged conflict of interest that would be *prima facie* impermissible and waivable by client consent in the U.S., but would be considered under many European regimes as a purely private issue between an attorney and client.<sup>222</sup> In choosing between these standards (again, assuming for the moment that arbitrators have the power)<sup>223</sup> arbitrators will likely disrupt the expectations of one of the parties.<sup>224</sup> If the tribunal

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<sup>218</sup> In recognition of the need to protect party expectations of confidentiality in arbitration, the rules of the Venice Court of National and International Arbitration has introduced an innovative provision that requires that parties treat evidence in arbitrations as confidential. *See* Article 37.1 of the VENCA Arbitration Rules, located at <http://www.venca.it/rules.htm#37> (“evidence [in arbitrations] shall not be used or disclosed to any third party for any purpose whatsoever by a Party whose access to that information arises exclusively as a result of its participation in the arbitration and such use or disclosure is permitted only by consent of the Parties or the order of a court having jurisdiction.”). While this provision represents an important new attentiveness to the need to protect confidential information, it does not address consequences for unauthorized disclosures.

<sup>219</sup> *See supra* Section I.A.4.

<sup>220</sup> *See* Geoffrey C. Hazard, *Ethics*, NAT’L L.J., March 30, 1992, at 13. The risk that an American party might be forced to disclose information provided to an in-house counsel is somewhat diminished by the fact that European parties are less accustomed to discovery and, as a consequence, less aggressive in their discovery requests.

<sup>221</sup> *See supra* notes 141-146, and accompanying text.

<sup>222</sup> For a discussion of the substantive differences in the European and American regulation of conflicts of interest, *see supra* 92-98, and accompanying text.

<sup>223</sup> *See* Jonathan T. Molot, How Changes in the Legal Profession Reflect Changes in Civil Procedure, 84 VA. L. REV. 955, 1010 (1998).

<sup>224</sup> *Bidermann Indus. Licensing Inc. v. Avmar N.V.*, 570 N.Y.S.2d 33 (1st Dep’t 1991). For commentary, *see* Thomas, *Disqualifying Lawyers in Arbitrations*, *supra* note 7, at 564. *See also* Image Technical Servs., Inc. v.

adopts the U.S. ethical standard and disqualifies counsel, the Continental party who must find new counsel will regard the decision as disrupting their representation and denying them their counsel of choice. Meanwhile, if the tribunal adopts the more European approach and permits the allegedly conflicted counsel to remain, the complaining party will regard the proceedings as manifestly unfair. An established code of ethics will resolve these conflicts up front, sharpen parties' ability to understand the consequences of their choice to arbitrate and permit them to direct the procedures for the resolution of their disputes.

#### **D. Conclusion**

The professional status of international practitioners is in part what confers legitimacy, real and perceived, on international commercial arbitration system. The rituals and formalities that signal the existence of state power behind national adjudicatory processes<sup>225</sup> are generally eschewed in arbitration. Instead, the legitimacy of international arbitration derives from party consent, which is orchestrated by international lawyers.<sup>226</sup> It is the international lawyer who selects the rules, laws, sites and arbitrators on behalf of the client.<sup>227</sup> Considering that international lawyers wield dramatically more power in the international commercial arbitration system than their counterparts do in domestic litigation, it is particularly alarming that there is no express regulation of their conduct.<sup>228</sup>

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Eastman Kodak Co., 820 F.Supp. 1212 (N.D. Cal. 1993) (applying forum law as to the disqualification of counsel on account of their prior representation of a party to the litigation in various countries).

<sup>225</sup> See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 850 (1984) (describing the importance of ritual and formality that pervade the adjudicatory process and legitimate decisions rendered).

<sup>226</sup> See *supra* section I.C.

<sup>227</sup> See *id.*

<sup>228</sup> See *supra* notes 1-57 and accompanying text.

Instead, ethical conduct in international commercial arbitration is a *jurisprudence confidentielle*, “a confidential or secret theory and practice of law, known to a few key lawyers who sometimes perform legal functions in accord with it.”<sup>229</sup> Until now, the absence of express guidance and mechanisms for regulating attorney conduct has been masked by the implicit consensus among practitioners, information deficiencies and the pragmatic techniques arbitrators undoubtedly employ. The size of the gulf between inconsistent ethical obligations is foreboding and the consequent threat to arbitral neutrality is unmistakable, even if difficult to detect. Articulated ethical norms can help not only to get all participants in arbitration playing by the same rules, but also to provide an independent yardstick by which arbitrators can expressly assess attorney conduct and by which the arbitration community can understand and critique those assessments.<sup>230</sup>

## **II. Deriving the Content of International Ethical Norms**

With the need for a code ethical norms for international arbitration established, this Part turns to the question of how the substantive content of those norms should be derived. There is a range of possible approaches. A code of international ethical norms could be developed through negotiated compromise or a neutral methodology that chooses from among the competing national norms. It is also possible that parties could be allowed to select ethical norms using the same methods by which substantive law for arbitration is selected. The common element in these approaches is that they view ethical norms as free-standing precepts, which are independently modifiable and interchangeable. Instead of these approaches, I propose adopting what I will call a *functional approach* to understanding why systems have adopted particular

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<sup>229</sup> W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 12 (1979).

ethical norms and to developing new norms for international commercial arbitration.

Section A of this Part defines the *functional approach*, which is premised on the link between ethics and role. This *functional approach* illuminates, in Section B, why different national systems have adopted conflicting ethical norms—those systems have assigned to attorneys different functional roles. Based on the reasons why national systems differ, in Section C, I describe why none of the alternative solutions for developing international norms would yield satisfactory norms for use in international arbitration. Instead, as I will address in Section D, the *functional approach* requires that we identify the specific role that attorneys do and should perform in the international commercial arbitration system, and select ethical norms that best facilitate their role in that context.

#### **A. The Theoretical Underpinnings of the *Functional Approach***

The nature of legal ethics seems to defy precise definition. A review of the vast body of U.S. scholarship on the subject reveals two predominant and competing definitions. The first treats legal ethics as “the law of lawyers,” while the second treats “ethics *as* ethics.”<sup>231</sup> Under the first approach, legal ethics are simply a variety of law. Ethical codes are unique, according to this view, only by virtue of the fact that they are promulgated by the profession (as opposed to legislatures) and enforced through judicial agencies or bar associations (as opposed to

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<sup>230</sup> Cf. Edward Brunet, *Questioning the Quality of ADR*, 62 TUL. L. REV. 1, 5 (1987) (commenting generally on the function or articulated norms that allow disputants to assess the neutrality of arbitral decisions).

<sup>231</sup> While many commentators have identified these two distinctive approaches, this particular characterization belongs to Thomas Shaffer, a strong proponent of the ethics-as-ethics approach. See THOMAS L. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 14 (1991) (emphasis in original).

prosecutors).<sup>232</sup> Proponents of this view argue that in following ethical rules, lawyers are not making “ethical” decisions.<sup>233</sup> They are simply complying with the law that governs their particular professional conduct. In their “differentiated” professional role, attorneys can pursue their clients’ objectives without regard to their personal moral views or countervailing social interests, and still comply with their professional ethical codes, and mere compliance with the code deems their conduct “ethical.” In the most strident articulations of this approach, lawyers’ work is described as intentionally “amoral.”<sup>234</sup>

The second approach rejects the ethics-as-law view, arguing that moral behavior in any capacity (including that of the professional lawyer) necessarily includes personal judgments about competing interests.<sup>235</sup> Proponents of this second approach argue that lawyers should make these sorts of personal judgments and be held accountable for them no less so than other members of society.<sup>236</sup> They should not be permitted to avoid moral condemnation on the

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<sup>232</sup> See Steven Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 IND. L.J. 101, 104 (1992) (“A code [of ethics] is law, and our codes . . . establish particularized rules, regulations, and standards that are legalistic in the rigidity of their application.”). This position of course assumes away the all important issue of interpretation, which is necessarily predicate to deciding whether or not to abide by ethical rules and can, in the context of ethical rules in particular, involve nuanced decision-making. See Handwritten comments made by Ted Schneyer on prior draft.

<sup>233</sup> See *id.* at 105 (1992) (“Confronted with a code, the individual has only one ethical choice: to abide or not to abide.”).

<sup>234</sup> One of the most forceful defenders of this position is Stephen Pepper. See Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 A.B.F. Res. J. 000, 613. Pepper argues that the amoral role of the advocate is morally justified by the societal values promoted by the advocacy system as a whole, which he defines as autonomy, equality and diversity. See *id.*

<sup>235</sup> See Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U.L. REV. 63, 73 (1980) (quoted in Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534.)

<sup>236</sup> This view is primarily attributable to moral philosophers who have taken up the subject of attorney ethics. See, e.g., Wasserman, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 12 (1975); Wasserman, *Roles and Morality*, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS (D. Luban ed. 1983); David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1999) (rejecting a law-centered theory of ethics in favor of a morality-centered theory of legal ethics); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 1 (1998); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); David Luban, *The Adversary System Excuse* in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS (1980), Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); ALAN

ground that, as lawyers, they need only comply with the minimum requirements of ethical codes. The ethics-as-ethics approach rejects “role differentiation” as an unsavory justification for behavior by attorneys that (arguably) would be morally objectionable to an “ordinary person.”<sup>237</sup>

Both of these approaches err in their understanding of the relationship between role and ethical decision-making. The ethics-as-law approach suggests that the role of lawyer obviates completely the need for legal professionals to engage in ethical decision-making, while the ethics-as-ethics approach denies that the role of the lawyer as professional advocate should affect ethical decision-making at all. Both of these approaches overlook the basic premise that no one is ever an abstract moral agent.<sup>238</sup> “[M]oral agency is embodied in roles” assigned to actors, who are “mutually inter-defined in terms of relationship.”<sup>239</sup> Situation-specific obligations cannot be analyzed outside the context of a specific role. For example, in determining whether a person has a moral obligation to feed a certain child, it matters whether the person is the child’s parent, neighbor, babysitter, or a complete stranger (and even then perhaps whether the child is on the street in front of the person’s house or in a far off land).<sup>240</sup>

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GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90 (1980) Bayles, *supra* note 237, at 65 (cited in Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534.). For a more recent exploration of these issues, ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999).

<sup>237</sup> See, e.g., Michael Bayles, *Professionals, Clients and Others*, in PROFITS AND PROFESSIONS: ESSAYS IN BUSINESS AND PROFESSIONAL ETHICS 66 (1983); see also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975). Ted Schneyer has already effectively demonstrated how many aspects of this criticism rests on empirical misconceptions and intentional ignorance about the degree of discretion conferred on lawyers by ethics rules. See Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534-43; Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11 (1991).

<sup>238</sup> See Alasdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, 2 PHIL. EXCHANGE 37, 6 (1978) (cited in Schneyer, *The Regulation of Lawyers*, *supra* note 110, at 35-36).

<sup>239</sup> See *id.*

<sup>240</sup> This example is borrowed from Ted Schneyer’s provocative and insightful work in the field. See Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534; see also, VINCENT LUIZZI, *A CASE FOR LEGAL ETHICS* (1993) (arguing that lawyers’ norms are forged within a social practice and derived from role conceptions (the lawyer as advocate, negotiator, advisor, etc.) rather than from vague starting



The ethical obligations of individuals in each of these situations differ because they perform different functions in their roles in relation to the child. Role, therefore, far from being a set of ethical blinders, is essential to ethical decision-making.

On the other hand, role cannot, in most instances, distill complex ethical quandaries down to a single undeniable and controlling rule or algorithm, such that compliance with the rule would obviate the need for any personal ethical reflection. The functions performed by a moral agent establish a particular range of choices that would further fulfillment of that person's role and help identify the factors to be taken into account in making ethical decisions.<sup>241</sup> In professional contexts, ethical codes crystallize a critical fraction of that range into a mandatory framework. Resolution of the other issues, which occupy what remains of that range after the mandatory rules are carved out, is left to the personal judgment of the professional.<sup>242</sup> Ethics-as-law proponents are therefore misguided when they suggest that existence of a code wholly obviates the need for individual ethical decision-making.<sup>243</sup> Codes make certain choices impermissible and frame the inquiry for other choices.

These observations lead to an important distinction: Ethical codes do not

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points such as John Rawls' "original position") (cited in Ted Schneyer, *My Kind of Philosopher: A Lawyer's Appreciation of Joel Feinberg*, 37 ARIZ. L. REV. 10 (1995))."

<sup>241</sup> The differences between the multiple jurisdictions of the United States suggest that a range of possible options are presented even when procedural arrangements are substantially similar. Indeed, the diversity in ethical rules among the fifty states might be more pronounced if most states had not derived their codes primarily from a model code. See WOLFRAM, *supra* note 76, at 68-69 (tracing history of state codes from original codes). It is also possible that a system could adopt a dysfunctional rule, particularly if rule-making becomes hostage to special interests.

<sup>242</sup> The very act of interpreting ethical rules is itself an exercise in personal ethical decision-making.

<sup>243</sup> See Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 Iowa L.Rev. 901 (1995) (arguing that modern articulations of legal ethics cast them as positive law, which constrains choices and strategies for avoiding morally undesirable consequences).

*establish* the role of a professional.<sup>244</sup> They guide and facilitate performance of an already-established professional role. The starting point for any ethical regime, therefore, is to define the role of the agent. In the case of lawyers, the role of the advocate rests on an inherent contradiction.<sup>245</sup> On the one hand, advocates occupy a quasi-official role as agents in the process of justice. This role imposes on them certain obligations to courts, the legal profession and the public at large. On the other hand, they are retained by one party to ensure victory over the other.<sup>246</sup> In this capacity, advocates owe to their clients duties that may well be at odds with their other obligations to courts, the profession and the public.<sup>247</sup> The interrelationship between these

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<sup>244</sup> For this reason, criticisms by moral philosophers that legal ethics *establish* the “Standard Conception” of the role of the lawyer are misguided. These criticisms are more appropriately understood either as an objection to the role that social and political institutions have assigned to the lawyers, as an objection to the code drafters’ selection of a particular rule within the permissible ambit or, perhaps, that the rule chose in a dysfunctional rule. If critics are in fact complaining about the role assigned to a professional through social and political institutions, their call must be to reform those institutions. Simply rewriting ethical codes will be futile and may even confuse matters if the underlying roles are not reexamined.

<sup>245</sup> See Eric E. Jorstad, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 YALE L.J. 1089, 1990 (1990) (Note) (characterizing the fundamental question underlying the ethics of advocacy as “How does a litigator mediate between the state’s interest in the litigation and the private parties’ struggle for power through the law?”). This insight is given its most potent expression by Professor Post, who postulates that lawyers are despised because they are our own “dark reflection.” Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 386 (1987). “We use lawyers to express out longing for a common good, and to express our distaste for collective discipline. When we recognize that the ambivalence is our own, and that the lawyer is merely our agent, we use the insight as yet another club with which to beat the profession.” *Id.* See also William Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40 (1989) (acknowledging the conflicting duality of an attorney’s role); L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 EMORY L.J. 909, 969 (1980) (noting that attorneys have primary obligations to clients, but also obligations as officers of the court). Indeed, the most strident debate in legal ethics today is whether (and how) lawyers’ obligations to society and the legal system should be enhanced, with a corresponding contraction in lawyers’ obligations to clients. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Marvin Frankel, *The Search for Truth: An Umpirical View*; H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea*, 123 U. PENN. L. REV. (1975) (questioning both the plausibility and desirability of Judge Frankel’s proposed expansion of lawyers’ obligations to tribunal).

<sup>246</sup> See Wilkins, *Who Should Regulate Lawyers*, *supra* note 78, at 815-18.

<sup>247</sup> The contradictory role of the lawyer advocate is arguably responsible for much of the public anti-attorney animus that has accompanied the profession in its march through the ages. For example, in a poll conducted by the *National Law Journal*, forty-two percent of those surveyed disapproved of lawyers because either they “manipulate the legal system without any concern for right or wrong” and they “file too many unnecessary lawsuits.” *What American Really Thinks About Lawyers*, NAT’L L.J., Aug. 18, 1986, at S-3 (cited in Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 380 (1987)). Meanwhile, a combined total of sixty-nine percent of those surveyed identified as the most positive aspects of lawyers either their ability to elevate their clients as their “first priority” or their ability to “cut through red tape.” As

competing obligations can be conceptualized as a ven diagram, composed of two overlapping circular zones. At the centers of each sphere are four of the core ethical obligations that were taken up in Part I—fairness and truthfulness in the middle of the one sphere, and loyalty and confidentiality in the other.<sup>248</sup>

The systems of the world agree on the core principles of legal ethics and the general structure of the ven diagram because these features derive from the fundamental features of the advocate's role that is common in every system.<sup>249</sup> An advocate may be defined as a representative of a party who is retained to bring professional expertise to aid in the party's presentation of its case before a neutral tribunal.<sup>250</sup> Outside of these fundamental features of advocacy, however, and contrary to popular belief, the professional advocates of the world perform very different functions in relation to other actors (judges, opposing counsel, clients and

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Post observes, these statistics demonstrate that “lawyers are applauded for following their clients’ wishes and bending the rules to satisfy those wishes . . . [and] at the very same time condemned for using the legal system to get what their clients want, rather than to uphold the right and denounce the wrong.” See Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 380 (1987); see also Marvin Mindes, *The Lawyer as Trickster or Hero*, ABF Research Journal (circa 1977-83).

<sup>248</sup> See *supra* Part I.A. For the moment, I will leave obligation of independence to one side.

<sup>249</sup> Originally, with the rise of Greek and Roman civilizations, lawyers were not permitted in court and litigants were left to rely on their own deftness in presenting their cases. See MARK M. ORKIN, LEGAL ETHICS: A STUDY OF PROFESSIONAL CONDUCT 3 (1957); FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 92-97 (James F. Colby, ed. 1915). Even then, however, litigants sought aid behind the scenes from professional orators, who would prepare speeches to enhance litigants’ presentation of their cases. See ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 32-33 (1953) (describing Greek speechwriters, called *logographos*, who for a fee would draw up a speech based on their knowledge of Athenian law and their understanding of the passions and prejudices of Athenian juries). Eventually, because success belonged to the side who presented the better case, trained experts were allowed in court proceedings and were employed by anyone who wanted to secure victory at trial. See *id.* at 33; DAMAŠKA, FACES OF JUSTICE, *supra* note 83, at 141; see also Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 7-8 (1998) (noting that most scholars point to the reign of Edward I (1272-1307) as the time in which the legal profession was borne).

<sup>250</sup> The term “advocate,” and its counterparts in other Western European languages (*i.e.*, the French *avocat* and *avoué*, the Italian *Avvocato*, the Spanish *abogado*, the Swedish *advokat*, or the Polish *adwokacka*) have common calling historical origins. See LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES 88 (1987).

witnesses) in their respective adjudicatory systems.<sup>251</sup>

As a consequence of these different roles assigned to advocates, outside of the nucleic centers of the ethical obligations represented in the ven diagram, national systems diverge on how expansively they construct the diameter of each surrounding sphere, and in how they engineer the overlap between them. If a system envisions the lawyer's role as primarily that of agent to the client, that system will cast an expansive sphere of obligation to the client, which overshadows the attorney's obligations to the court and society. Other systems may conceive of the attorney as principally an instrument of the state, and thus construct an almost the reverse relationship between the spheres,<sup>252</sup> while still others may treat attorneys as occupying a role between instrument of the state and instrument of the client, and draw the spheres as roughly equivalent.<sup>253</sup>

The blueprints for the role of the legal advocate in the decision-making structure and in relation to other actors are the procedural arrangements of a legal system.<sup>254</sup> While all

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<sup>251</sup> These often-stark disparities in role become readily apparent even at the level of linguistic translation of the term "lawyer." Notwithstanding the supposed universality of the term, "[t]he question 'who is a lawyer?' is posed by efforts to make comparisons across categories not corresponding to formal divisions on the national level." Philip S.C. Lewis, *Comparison and Change in the Study of Legal Professions* 27-79, in *LAWYERS IN SOCIETY, VOLUME THREE: COMPARATIVE THEORIES* 32 (Richard L. Abel and Philip S.C. Lewis, eds. 1989) [hereinafter "*LAWYERS IN SOCIETY, VOLUME THREE*"]; see also Kelly Crabb, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 *COLUM. L. REV.* 1767, 1770 & n.13, 1779-82 & nn.62-82 (1983) (Note) (describing the various national designations for persons who perform legal functions).

<sup>252</sup> Highly authoritarian and socialist regimes envision that lawyers, like all workers, are devoted primarily to the good of society and only minimally to clients, since more vigorous advocacy on behalf of a client might conflict with the "collective good." See *supra* notes 182, and accompanying text; see also WOLFRAM, *supra* note 76, at 5 (describing the diminished obligations lawyers in soviet countries owe to their clients); ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 141-42 (1992) (noting that the criminal defense lawyer in China is "not the agent or spokesman for the defendant", but rather has an obligation to the state to assist in the defendant's moral reformation) (cited in R. Randall Kelso, *A Post-Conference Reflection on the Lawyer's Duty to Promote the Common Good*, 40 *S. TEX. L. REV.* 299, 301 (1999)).

<sup>253</sup> As will be explained in the following section, this layout might describe the role assigned to lawyers in civil law systems. See *infra* Section II.B.

<sup>254</sup> See Resnik, *Tiers*, *supra* note 18, at 839 (arguing that procedure has normative content reflected in the features of procedural models and the structure for decision-making). Other factors that affect the role of the

advocates represent their clients in courtroom proceedings, procedural rules, along with rules of evidence, dictate the specific activities through which the lawyer will perform that obligation. Procedures, in turn, are chosen to reflect and promote the values that underlie the larger legal culture of a society. They emerge out the “culture” of a society, or “those beliefs about how to properly relate to each other that are deeply held, widely shared, and persistent over time.”<sup>255</sup> Institutions for dispute resolution, and the roles assigned to actors in those institutions, are “both an expression of a culture’s values and a mechanism for maintaining those values.”<sup>256</sup> As Professor Damaška explains:

[D]ominant ideas about the role of government inform views on the purpose of justice, and the latter are relevant to the choice of many procedural arrangements. Because only some forms of justice fit specific purposes, only certain forms can be justified in terms of the prevailing ideology.<sup>257</sup>

If cultural values motivate procedural choices, procedural choices determine the advocate’s role in adjudication, and advocate’s role shapes the boundaries of ethical norms, then national ethical regimes can ultimately be understood as reflecting procedurally-determined and culturally-bound differences in the values of national systems.

## **B. The *Functional Approach* in Comparative Perspective**

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attorney are rules of evidence and cultural traditions that remain abstract social norms. For an interesting discussion of how modern trends in U.S. civil procedure, which diminishes the role of judge in applying the substantive law to facts, may have contributed to excesses in attorney advocacy, see Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955 (1998).

<sup>255</sup> A legal culture may be defined as “those beliefs about how to properly relate to each other that are deeply held, widely shared, and persistent over time.” See Oscar G. Chase, *Legal Processes and National Character*, 5 CARDOZO J. INT’L & COMP. L. 1, 8 (1997) (citing GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES* 25 (1980)). Unlike a geographically defined community, the arbitration community, the participants in the system is

<sup>256</sup> See *id.* at 9.

<sup>257</sup> DAMAŠKA, *FACES OF JUSTICE*, *supra* note 83, at 11.

This Section presents a comparative “proof” of the theory laid out in the last section in order to illuminate the seemingly enigmatic reasons for the differences among national ethical regimes that were discussed in Part I and to illustrate the explanatory potential of the *functional approach*. The thesis of the *functional approach* is that ethical regimes are tied to roles performed by actors (judges, advocates, witnesses and parties) in different systems. Consequently, a comparative proof must begin with an inquiry into the inter-relational roles established by various adjudicatory systems.<sup>258</sup>

In any adjudicatory apparatus, the judge<sup>259</sup> is the primary determinant from which counsel, witnesses and parties are cast in their respective roles.<sup>260</sup> In continental systems, such as those in Germany and Italy, the judge can be described as the engine of the adjudication machine. The judge is the one who schedules, sets the agenda for and presides over a series of hearings, any one of which may ultimately decide the case.<sup>261</sup> During the episodic hearings that characterize civilian proceedings, it is the judge, acting on recommendations from the parties,

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<sup>258</sup> For pragmatic reasons, I have limited my comparative analysis to the distinctions between roles of the attorney in the U.S. system on the one hand, and in Continental civil law systems on the other. While this focus undoubtedly poses some inherent limitations, these two prototypes or (in Max Weber and Mirjan Damaška’s parlance) “ideal types” are useful for the purpose of demonstrating the ability of the *functional approach* to explicate the reasons behind different ethical regimes. See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 83, at 9. The limited focus of my comparative analysis reflects primarily limitations of my knowledge, not a judgment that norms for international commercial arbitration need only consider European and American perspectives. To the contrary, especially given the expanding role of arbitration in developing nations, it is particularly important that legal systems outside of Europe and the United States be incorporated into the discussion. See, generally, Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419 (2000) (investigating the disciplinary bias of international commercial arbitration in light of complaints by developing countries that it favors the economic interests of the North); John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, Aug/Oct Dis. Res. J. 32 (2000) (explaining that there “remains a huge task” to convince developing nations that they can expect a fair hearing before international arbitration tribunals).

<sup>259</sup> Although I will use the term “judge,” it is worth noting Professor Damaška’s observation that, when comparing adjudicatory regimes, the term “judge” can be misleading since it is not a term that is universally assigned to the decision-maker of an adjudication. The most obvious exception is the jury. See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 83, at 54.

<sup>260</sup> The contrasting role of the judge in civil and common law systems has been called the “grand discriminant” between the two systems. See Langbein, *supra* note 124, at 830.

who decides which witnesses and documents will be presented, and the order of such proof.<sup>262</sup> Most strikingly to common-law trained lawyers, the civilian judge conducts the actual interrogation of witnesses. In the ordinary civil law case, there is little or no questioning by the parties through their lawyers.<sup>263</sup> The judge is expected to take an active role in both clarifying the issues and encouraging settlement. To this end, the civil law judge is expected to express views as to the merits of the case as it proceeds and to move from an initial position of impartiality to one that favors one party over the other.<sup>264</sup>

While continental judges have broad managerial powers, they are expected to apply the law in an almost mechanical way, remaining a controlled instrument of the legislature.<sup>265</sup> “At least according to the internal folklore, judicial interpretation of [civil] codes

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<sup>261</sup> See *id.* at 831.

<sup>262</sup> As John Langbein describes, in the German system,

The very concepts of “plaintiff’s case” and “defendant’s case” are unknown. In our system those concepts function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier. By contrast, in German procedure the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case.

See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). Although the German judge is obviously much more active than the U.S. version, the “inquisitorial” role of the German judge in civil proceedings can be, and has been, dramatically overstated. See Ronald J. Allen, *Idealization and Character in Comparative Legal Scholarship*, 82 NW. L. REV. 785 (1988) (criticizing Langbein for overstating the role of the judge in German civil proceedings).

<sup>263</sup> Conventional wisdom among German advocates is that a lawyer should be wary of putting more than three questions to a witnesses because more risks implicating that the judge did not do a satisfactory job in initial questioning. See Chase, *National Character*, *supra* note 257, at 4-5. While the conventional wisdom is not always followed, it demonstrates the gravitational force of the judge’s power over fact gathering.

<sup>264</sup> See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 83, at 138 (noting that Continental decision-makers are expected to conduct pre-hearing review of the files and are not presumed to come to the case with a “virgin mind”); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985) (noting that “[a]s the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the likely outcome . . . and sometimes encourage[s] a litigant to abandon a case that is turning out to be weak or hopeless, or to recommend settlement”).

<sup>265</sup> See JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER—AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW* 184 (1999).

does not involve the judges in a process of law creation.”<sup>266</sup> This perception of judges as the appliers (rather than makers) of law is both evidenced and reinforced by the formulaic, bureaucratic style of civil law judicial opinions, which never include dissents and usually take the form of a string of phrases sounding in a detached tone and connected by “whereas’s.”<sup>267</sup> A judicial opinion, with its rhythmic recitals and studied detachment, is the voice of the judicial institution obedient to legislative commands, not the personal judgment of an individual adjudicator.

In relation to a judge who is gathering facts, shaping issues and dutifully applying the law, the role of the civil law attorney is primarily that of “guide” to the court.<sup>268</sup> The role of guide is, in many respects, collaborative. Some nations make this collaborative role explicit. As explained above, in civil law countries, lawyers are sometimes referred to as unsalaried public servants, enjoy special access to public buildings and are required to wear robes that resemble those of judges.<sup>269</sup>

In contrast to these continental arrangements, the American system is built on a model of party contest before a “judicial *tabula rasa*.”<sup>270</sup> The American judge (or jury) is supposed to obtain only through the party dialectic all evidence that must be evaluated and legal

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<sup>266</sup> See Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP.L. 347, 379-80 (1994); see also MERRYMAN *supra* note 242, at 187 (“The work of the judge is . . . simple: he is presented with a body of principles built into a carefully elaborated systematic structure, which he applies to a body of specific norms whose meaning is readily understood and whose application is comparatively easy. The applicable norms need only to be identified and applied[.]”).

<sup>267</sup> See RENE DAVID & JOHN E.C. RIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 142 (3d ed. 1985).

<sup>268</sup> See *id.*

<sup>269</sup> See *supra* notes 113-118, and accompanying text.

<sup>270</sup> See DAMAŠKA, FACES OF JUSTICE, *supra* note 83, at 138.



arguments that must be analyzed<sup>271</sup> and they are expected to remain completely neutral until it is time to render the final judgment.<sup>272</sup> As a consequence of the relatively passive role of decision-makers, the attorneys are given an active role in managing the proceedings. The attorney in U.S. litigation gathers evidence, shapes the issues for trial and presents evidence at trial, including examining and cross-examining witnesses. Because the judge only rules on pre-trial motions that are brought by the parties, the attorneys act not as guides, but primarily as clients' strategists, evaluating and advising when and how various procedural tactics should be used.

While U.S. judges (and juries) are comparatively passive in their fact-finding role, it is readily acknowledged that U.S. judges make law.<sup>273</sup> Parties go to court, therefore, not only seeking resolution of an individual dispute, but potentially changes in the law.<sup>274</sup> When judges have the power to make law, the role of the advocate expands from that of strategist who can represent the client's cause under existing law, to that of lobbyist, who can urge potential changes in the law.

Understanding the different roles that the two systems have assigned to advocates in relation to courts and their clients, the seemingly opaque reasons for the divergences in their ethical regimes become clear. When attorneys are cast in the role of guide to the court, the

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<sup>271</sup> Professor Reitz characterizes the difference between U.S. and German judges is that U.S. judges "view themselves as umpires between the contending parties, rather than government officials responsible for determining the truth of the allegations." Reitz, *supra* note 17, at 992.

<sup>272</sup> *See id.*

<sup>273</sup> *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962) (arguing that judges make law even though they are not elected or constrained in the same way legislatures are).

<sup>274</sup> *See generally* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that the structure of the courts and the nature of the common law makes them better suited to resolve some policy issues than the legislature); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 *HARV. J.L. & PUB. POL'Y* 219 (1997) (suggesting that courts provide less expensive access to government than direct lobbying of the legislature).

sphere comprised of obligations relating to fairness and truth must expand, protruding over a shrunken sphere of obligation to the client. Attorney independence from the client becomes necessary to keep attorneys focused on their role as guide. In the U.S. system, meanwhile, where attorneys are cast as strategists and lobbyists for their clients, the sphere of obligation to clients must be more imposing to accommodate the expansion of this role. Consequently, the obligations to the state and the system are partially overshadowed,<sup>275</sup> and independence shifts to become a mechanism primarily aimed at maintaining independence from the state.

These models are the frameworks in which the specific content of national ethical rules is located. Beginning with the rule about pre-testimonial communication, if witnesses are presented by one party as part of its case,<sup>276</sup> it seems perfectly reasonable, subject to certain limitations, to permit attorneys to discuss the case with witnesses before they testify. In fact, it is really necessary in order for the litigants to be able to prepare their case.<sup>277</sup> On the other hand, the reason why Continental systems preclude attorneys from speaking to witnesses is that the court is assigned the role of fact gathering and the advocate's function is primarily to guide the court in that process.<sup>278</sup> In that context, an attorney would be intruding on the province of the

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<sup>275</sup> See Daly, *supra* note 6, at 1291 (noting that “the Preamble to the [U.S.] Model Rules emphasizes a lawyer’s obligation to the client” in contrast to “the Preamble to the CCBE Code . . . [which] emphasizes a lawyer’s obligation to society.”).

<sup>276</sup> The U.S. system stops short of treating witnesses as classical Rome did, expecting them not only to describe facts of the case, but also to express solidarity with and advocate on behalf of one party. See Mirjan Damaška, *Rational and Irrational Proof Revisited*, 5 CARDOZO J. INT’L & COMP. L. 25, 28 (1997). While U.S. witnesses do not technically “belong” to one party, U.S. attorneys approach litigation with a “proprietary concept of evidence.” See Damaška, *Evidentiary Transplants*, *supra* note 167, at 845. The formal status of witnesses as neutral has little practical effect, except that it is used as a basis for opposing efforts by parties to prevent their opposition from speaking to non-party witnesses. See WOLFRAM, *supra* note 76, at 647.

<sup>277</sup> As noted above, several U.S. courts have recognized that failure to prepare a witness is a breach of an attorney’s ethical obligations. See *supra* note 81.

<sup>278</sup> See Langbein, *supra* note 124, at 864; see also Reitz, *supra* note 17, at 994 (stating that “American courts could only adopt the German rule discouraging pretrial contact with witnesses by changing our cultural definition of the lawyer’s role”).

court if the attorney tried to discuss with the witness the facts of the case.<sup>279</sup>

The U.S. system’s prohibition against *ex parte* communications is framed in more absolute terms because the decision-maker is expected to be a blank slate on which the parties, in heated contest, draw their dispute. The system permits no stray renderings by one party that might unfairly alter the tableau. On the other hand, when advocates act as “guide” to the court as in civil law systems, there is less concern that extra-judicial information will endanger the validity of the result, and hence more relaxed ethical standards regarding *ex parte* communication in civil law systems.<sup>280</sup> Under similar reasoning, toleration of *ex parte* communication in the domestic U.S. arbitration may reflect an acknowledgement that so-called “party arbitrators” are not expected to be completely impartial, but were in fact chosen because of their supposed predisposition toward one party.<sup>281</sup> If party arbitrators are expected to be predisposed in favor of the selecting party and to act more akin to a party’s advocate on the tribunal than a neutral umpire, the prospect of party communication with the party arbitrator is

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<sup>279</sup> Relatedly, the reason why there is no apparent obligations for an attorney to report client perjury or intent to commit perjury is that continental systems distinguish sharply between the role of party and that of witness. Parties to an action are rarely permitted to testify because this from the dubious choice between testifying against their own interest and perjuring themselves. It is likely the rarity of party testimony that is responsible for the lack of attention to attorney obligations regarding client perjury.

<sup>280</sup> Compare WOLFRAM, *supra* note 76, at 604-06 (purpose of prohibition against *ex parte* communications with judge is to prevent communicating party from gaining unfair advantage), with John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (describing how under German procedure the judge is not expected to be simply an impartial adjudicator, so there is little concern that improper influence will be exerted on or by the parties or that information communicated *ex parte* will endanger the validity of the result).

<sup>281</sup> In a case finding that *ex parte* contact was not improper, the Eleventh Circuit explained: “An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial.” See *Lorzano v. Maryland Casualty Co.*, 850 F.2d 1470 (11<sup>th</sup> Cir. 1988). The requirement of an impartial tribunal is assured by tiebreaker arbitral chairperson, although opinions differ about the desirability or propriety of predisposed party arbitrators. See Desiree A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 765 (1995) (arguing against the legitimacy of *ex parte* contact with party arbitrators).

not terribly objectionable.<sup>282</sup> Such communication may even be regarded as necessary to ensure that the party-arbitrator fulfills her assigned role.<sup>283</sup>

To be an appropriate “guide” to a continental judge, civilian lawyers must maintain a certain degree of independence from their clients so that their professional judgment remains unclouded by the client’s objectives.<sup>284</sup> In-house representation and attorneys compensated through contingency fees, whose livelihood is tied to the client’s success, are incompatible with this requirement of professional detachment from the client’s cause. On the other hand, an attorney who acts independently of the client need not be as strictly regulated with regard to conflicts of interest. If the lawyer’s role is limited to aiding the court in finding legislatively determined answers, obligations of disclosure to the court take on a greater importance and stricter restraints on creative arguments are inevitable. Additionally, when assigned a collaborative role with the court, opposing counsel become attenuated co-collaborators. Confidential information exchanges between co-collaborators may require some

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<sup>282</sup> Some U.S. cases attempt to apply the notion of the judge as a blank slate in challenging arbitral awards when arbitrators have attempted to gather facts on their own by, for example, visiting the site of a dispute. This standard of complete ignorance is perhaps unrealistic in arbitration, where the decision-makers are often chosen because of their experience with or knowledge of a particular industry. *See Carteret County v United Contractors*, S.E.2d 816 (1995) (holding that arbitrators are not considered biased simply because they are members of the same profession as one of the parties).

<sup>283</sup> Under this interpretation, objections to *ex parte* communications with arbitrators may be misdirected at the symptom instead of the cause. *Ex parte* communications are tolerated because the arbitrator is presumed to be partial, it is not the *ex parte* communications that cause partiality. Accordingly, the solution for those who object to arbitrator partiality must include not only prohibitions against *ex parte* communications, *see Kennedy, Predisposed with Integrity*, *supra* note 281, at 789, but also strictures that apply during the selection process.

<sup>284</sup> In European systems, this requirement of independence is elevated to the same level of importance as judicial impartiality. Article 2.1.1 of the CCBE Code provides “Such independence is as necessary to trust in the process of justice as the impartiality of the judge.” *See Terry, Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 15. “Professional independence” is sometimes touted as a core value in American legal ethics, but the “regulatory history of ‘independent judgment’ is so thin that the value is dismissed in some quarters as a professional ‘shibboleth.’” Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1499-1502 (2000) (contrasting emphasis in Europe on independence from clients and U.S. emphasis on preserving independence from 3<sup>rd</sup> parties who would interfere with lawyer’s judgment on behalf of client).

protection, while the need to protect information or advice disseminated from the quasi-official attorney to the client is less obvious.<sup>285</sup> Moreover, if questions of confidentiality come up only infrequently in civil law proceedings, and primarily in response to questions from a judge,<sup>286</sup> there is less concern in leaving attorneys with discretion about when information can be disclosed.<sup>287</sup>

By contrast, when advocates are cast in the role of strategist and lobbyist for the client, it is less plausible and less desirable for them to maintain a detached independence from the client. Instead, client confidences take on a new level of importance and necessarily heightened loyalty obligations make even attenuated conflicts of interest impermissible, at least in the absence of client consent. In their role as lobbyist, creative argumentation is not only permissible but necessary, and their independence from state institutions, including the courts, becomes all the more important. Communication with the client is essential and withholding important communications from an opposing party would interfere with representation.

Ultimately, these differing roles assigned to attorneys reflect the larger cultural values of the societies that produced them. Using very broad brushstrokes to illustrate the opposing scenes, it has been argued that the greater authority of civil law judges reflects in

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<sup>285</sup> Notably, in the Anglo-American tradition, the attorney-client privilege was originally thought to belong to the barrister rather than the client. See Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1071 (1978). A barrister was “considered not merely an ‘officer’ of the court but a member of it[.]” It would be not only inconvenient for them to testify (as they were the persons charged with presenting arguments and evidence in court), but also a violation similar to asking a modern judge to disclose matters learned in camera. See *id.*

<sup>286</sup> “Comparatively few issues regarding the ethical duty of confidentiality are ever raised because the judges’ oral questioning and the affidavits are more circumscribed than lawyers’ questioning of witnesses in the United States.” See Daly, *Dichotomy Between Standards and Rules*, *supra* note 6, at n.184.

<sup>287</sup> See *supra* Section II.A.2.

German society a greater acceptance of authority and less tolerance for uncertainty.<sup>288</sup> Meanwhile, the expanded control of parties in U.S. proceedings, and the consequent role of the U.S. attorney as strategist and lobbyist, are said to be linked to the American commitment to individualism and an exaltation of due process over efficiency and even fact-finding accuracy.<sup>289</sup> Thus, while legal ethics are often regarded as universal by virtue of their intimate relationship to moral philosophy, they are in fact vitally linked to the cultural values of the systems that produced them.<sup>290</sup>

### **C. The Implausibility of Methods Other Than the *Functional Approach***

With an understanding of the relationship between ethics, procedure and systemic cultural values, it becomes apparent why other proposed or possible methods for deriving ethical norms for international arbitration are unlikely to succeed. A code of ethics for international arbitration must be linked to the values of the international arbitration system and the procedures that reflect those values. Other approaches treat ethical norms as autonomous principles, independent from the procedural arrangements and cultural values of the systems from which they derive.

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<sup>288</sup> See Oscar G. Chase, *Legal Processes and National Character*, 5 CARDOZO J. INT’L & COMP. L. 1, 19 (1997) (arguing that the inquisitorial legal process reflects a legal culture in Germany, which is more comfortable with authority).

<sup>289</sup> By maximizing the role of partisans who have obvious incentives to distort the truth in favor of their personal interests, including permitting parties to be witnesses on their own behalf, the U.S. litigation model arguably prioritizes litigants’ right to a “day in court” over the accuracy of the ultimate result. See DAMAŠKA, *FACES OF JUSTICE*, *supra* note 83, at 11; Chase, *Legal Processes and National Character*, 5 CARDOZO J. INT’L & COMP. L. 1, 19 (1997) (arguing that the inquisitorial legal process reflects a legal culture in Germany, which is more comfortable with authority, while the American system, in keeping with the American legal culture, emphasizes party autonomy over the process as an expression of individualism and a commitment to due process); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 10 (1983)(arguing that “the dominant ethic [of American Society] is competitive individualism” and linking that ethic to U.S. legal institutions and processes).

<sup>290</sup> Notions of moral philosophy as universal are also flawed. “[E]very moral philosophy offers explicitly or implicitly at least a partial conceptual analysis of the relationship of an agent to his or her reasons, motives,

## **1. Negotiated Compromise**

The most common method for deriving international legal rules is negotiated compromise aimed at harmonizing national rules. Increasingly, however, it has been recognized that these processes can be ineffectual. In areas that implicate value choices (such as human rights and, as explained above, attorney ethics) these formal negotiation processes breakdown because is not possible because to “reason” which system’s values are “better.” On questions of values, “reason is silent; conflict between rival values cannot be rationally settled.”<sup>291</sup> Instead, when delegates with competing values bargain over whose rule or what hybridized rule should control, the norms produced frequently reflect the relative power of the negotiators or the anomalies of compromise.<sup>292</sup> When development of international norms is left to the “lawyer-bureaucrat, attached to the policy-making machinery” such norms are “no longer mediated through the development of a conceptual framework [that] is in tune with the changes of international reality.”<sup>293</sup> The result of these struggles is often a resort to the lowest-common denominator or compromise at the level of individual norms that undermines the rationality of the whole.<sup>294</sup>

We do not need to speculate whether this problem could manifest itself in the

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intentions and actions, and in so doing generally presupposes some claim that these concepts are embodied or at least can be in the real social world.” ALASDAIR MACINTYRE, *AFTER VIRTUE* 23 (2<sup>nd</sup> ed. 1984).

<sup>291</sup> See MACINTYRE, *AFTER VIRTUE* *supra* note 290, at 26.

<sup>292</sup> See Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* 12 (1995).

<sup>293</sup> See *id.* (criticizing international legal norms developed by the “lawyer-bureaucrat, attached to the policy-making machinery” because such norms tend to be more informed by political expediencies than technical precision); see also Nicholas Onuf, *Law-Making and Legal Thought*, in *LAW-MAKING IN THE GLOBAL COMMUNITY* (Nicholas Onuf, ed., 1982) (discussing the impact of the shift in development of international law from scholars to bureaucrats).

<sup>294</sup> See *id.* at 12.

context of negotiated international ethical norms because we have direct historical examples. In 1956, the International Bar Association (“IBA”) adopted the IBA International Code of Legal Ethics (“IBA Code”).<sup>295</sup> While called a “Code” and referring to “Rules,” the IBA Code is more accurately characterized as an aspirational statement of “professional culture.”<sup>296</sup> For example, on the subject of conflicts of interest, lawyers are admonished only to “preserve independence in the discharge of their professional duty.”<sup>297</sup> In this norm, the IBA Code does not attempt to resolve, or even acknowledge, that systems have distinctly different notions of what constitutes a conflict of interest or even different definitions of what the term “independence” means.<sup>298</sup> There were similar problems with the successor to the IBA Code, the 1977 Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community.<sup>299</sup> The Perugia Principles contained only “eight brief ethical pronouncements,” which were essentially an obscure “discourse on the function of a lawyer in society” and “the nature of the rules of professional conduct.”<sup>300</sup> Again, they did not even acknowledge or attempt to resolve the difficult conflicts between national ethical norms.

The CCBE Code is in many ways a horse of a different color. Unlike its predecessors, it contains more specifics and it grapples with many difficult areas of conflict

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<sup>295</sup> Reprinted in *Law Without Frontiers: A Comparative Survey of the Rules of Professional Ethics Applicable to the Cross-Border Practice of Law* 361-62 (Edwin Godfrey, ed. 1995).

<sup>296</sup> See Daly, *Dichotomy Between Standards and Rules*, *supra* note 6 at 1120.

<sup>297</sup> See *id.*

<sup>298</sup> See *supra* notes 81-93, and accompanying text. One notable accomplishment of the IBA Code, perhaps even directly attributable to its vagaries, is that it received endorsements from representatives such unlikely places of Syria, Iraq, Iran, Egypt, Jordan, Israel, Lebanon, Pakistan, and Turkey, although admittedly these endorsements may have been influenced by the post-colonialist forces. M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, *TEX. INT’L L.J.* 289, 294 (2000).

<sup>299</sup> See *The Declaration of on the Principles of Professional Conduct of the Bars and Law Societies of the European Community* (1977).

<sup>300</sup> See Daly, *Dichotomy Between Standards and Rules*, *supra* note 6, at 1120.



between national ethical regimes. While undoubtedly a laudable accomplishment, the idea of replicating the CCBE Code on an international scale is ominous. Even though the CCBE applies to only a relatively homogeneous group of European countries,<sup>301</sup> and even though it was effectively the third effort at an international code of ethics, it took more than eight years of work to complete.<sup>302</sup>

Looking to its substance, the CCBE still ducks some of the most difficult questions that continue to plague regulation of cross-border practice, but which must be resolved definitely by any code of ethics for international arbitration.<sup>303</sup> Moreover, because the CCBE Code regulates cross-border practice,<sup>304</sup> as opposed to practice before international tribunals, in many instances when its drafters found harmonization of ethical norms impossible, they relied on choice-of-law provisions, although not always successfully.<sup>305</sup> In one telling example, the CCBE

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<sup>301</sup> The following countries are member states of the CCBE: Belgium, Denmark, France, Germany, Greece, Ireland, Italy Luxembourg, Netherlands, Portugal, Spain and the United Kingdom. See Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 1 & Appendix C. In addition to the member states, there are several observer countries: Austria, Cyprus, Finland, Norway, Sweden, Switzerland and the Czech Republic. See John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673 (1991-92). All of the CCBE countries can be described as western-style democracies, with free market economies, strong industrial bases, high per capita income levels and relatively well educated populations. See Chase, *National Character*, supra note 257, at 7; see also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276 (1997) (acknowledging that the nations of Western Europe “share a common core of social, political and legal values”).

<sup>302</sup> See Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 5-9. An indication of the inherent difficulties in developing an international set of ethical rules for international arbitration is a recent announcement by the Arbitration Institute of the Stockholm Chamber of Commerce that, after years of work, it placed on hold its ethics project because the project “encountered a lot of problems.” See *Stockholm Institute's Ethics Project on Hold*, 12 MEALEY'S INT'L ARB. REP. 12 (1994).

<sup>303</sup> See Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 19 & 25.

<sup>304</sup> Although these rules have not been entirely satisfactory, it is not certain if the reason is the inherent nature of conflicts-of-law rules in ethics, or because these particular rules are unclear. See *id.*, at 678; see also Lauren R. Frank, *Ethical Responsibilities and the International Lawyer Mind the Gaps*, 2000 U. ILL. L. REV. 957, 963-64 (Note).

<sup>305</sup> See Carsten R. Eggers & Tobias Trautner, *An Exploration of the Difference Between the American Notion of “Attorney-Client Privilege” and the Obligations of “Professional Secrecy” in Germany*, 7 SPG INT'L L. PRACTICUM 23, (1994); Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 28. In the area of attorney advertising, even reaching agreement on a choice-of-law rule, as opposed to a substantive provision, seems to have eluded the drafters of the CCBE. Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are*

Code attempted to harmonize conflicting rules about whether an attorney who receives a communication from opposing counsel marked “confidential” has an obligation to withhold it as confidential or may have an obligation (or a desire) to communicate the information to her client.<sup>306</sup> Instead of adopting a definitive rule resolving the conflicting approaches, the Article 5.3 of the CCBE Code simply instructs that if an attorney wants correspondence handled confidentially, she should clearly state such. If the addressee is not able to withhold the correspondence from the client, she must return it without revealing its contents.<sup>307</sup> Other examples of unresolved conflicts, such as in the area of confidentiality in the face of client wrongdoing, are less obvious. For example, Rule 3.3 of the CCBE Codes states in absolute terms that attorneys are obliged to maintain client confidences, even though Rule 4.4 of the Code seems to suggest an exception in its prohibition against attorneys presenting misleading information to a court.<sup>308</sup> The CCBE Code simply ignores the vast disagreement that exists regarding the limits on the duty of confidentiality, presumably because agreement was improbable.<sup>309</sup>

In contrast to some of the shortcuts that the CCBE Code took, either successfully or not,<sup>310</sup> any ethical code drafted for international arbitration must directly confront and resolve

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*Removed but Barriers Remain*, 29 GEO. WASH. J. INT’L L. & ECON. 381 (1995) (noting that the CCBE’s general principle on personal publicity does not designate which jurisdictional rule applies when inconsistencies arise between the rules of the host state and the home state).

<sup>306</sup> For a discussion of the contrasting national rules applying to attorney communications marked confidential, see *supra* notes 114-15, and accompanying text.

<sup>307</sup> See Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 39.

<sup>308</sup> See *id.* at 32

<sup>309</sup> See *id.*

<sup>310</sup> For regulation of cross-border practice, conflict of law rules may in fact be appropriate, as long as they are clear in their application. For example, a conflict of law rule regarding attorney solicitation of clients could state that the rules of the jurisdiction where the would-be client resides govern if the solicitation would occur in that jurisdiction. Such a conflict-of-laws rule simply resolves competing claims to prescriptive jurisdiction, to which the

areas of conflict.<sup>311</sup> These areas will undoubtedly be magnified when radically contrasting systems, such as Zimbabwe,<sup>312</sup> the United States,<sup>313</sup> China<sup>314</sup> and Saudi Arabia<sup>315</sup> get thrown into the mix. No matter how profound the differences, however, a code of ethics for international arbitration will only be useful if it ensures that all participants in an arbitration proceeding are abiding by the same rules.

In the area of legal ethics, traditional negotiated compromise is unlikely to produce workable code because negotiators will inevitably come to the project with divergent assumptions about the functional roles of participants in adjudication. Using the *functional approach* will not obviate the need for negotiation and compromise altogether. It will, however, force such negotiations to focus on the relationship between role and legal ethics, instead of

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jurisdiction which has an interest in protecting the prospective client and regulating activities occurring within its borders.

<sup>311</sup> One possible alternative to drafting a code for international arbitration is to relegate the matter to the parties, leaving them to choose applicable ethics as they choose substantive law. The pitfalls of this approach are taken up *infra* in sub-section 3.

<sup>312</sup> See Shalakany, *Arbitration and the Third World*, *supra* note 258, at 422-24 (describing special needs of developing countries in international arbitration).

<sup>313</sup> Even though the United States is considered part of the amorphous Western Legal Tradition, “[t]he lawyer, American style, is a unique phenomenon.” Goebel, *supra* note 17, at 520-22 (quoting H. DEVRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 7 (1976); WOLFRAM, *supra* note 76, at 6 (“[T]he practices and philosophies of lawyer practicing in other legal cultures very often bear little resemblance to those of lawyers in the United States.”).

<sup>314</sup> See Roderick W. Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 *STAN. L. REV.* 303, 327 (1986); RANDALL PEERENBOOM, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* (Lawyers Committee on Human Rights, 1998).

<sup>315</sup> See, generally, M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, *TEX. INT’L L.J.* 289 (2000) (arguing that debate over cross-border legal practice must address the cultural and legal concerns of systems in the Middle East and exploring the numerous clashes between Islamic teaching and modern western legal practice); Azizah Y. al-Hibri, *Faith and the Attorney-Client Relationship: A Muslim Perspective*, 66 *FORDHAM L. REV.* 1131 (1998) (arguing that integrated Muslim view of the world, which denies the severability of the divine from the secular, limits Muslim lawyers’ ability to pledge loyalty to client and may restrict Muslim lawyers’ ability to engage in some types of representation); Ahmed Sadek El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?*, in *INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE* 47-48 (1998) (noting that, despite the long history and current popularity of arbitration in Arab nations, the Arab legal community remains hostile toward transnational arbitration because of biased treatment by “Western” arbitrators).

letting them remain an unacknowledged contest between competing adjudicatory values.

## **2. The “Most Restrictive” Approach**

An alternative approach, proposed by a noted scholar in the area of international ethics, is that the “most restrictive” national ethical norm be chosen as the benchmark norm for an international code of ethics.<sup>316</sup> The theory of the approach is that if the “most restrictive” norm is adopted, then compliance with international norms would not offend any nation’s domestic ethical norms. This approach suggests—to take the example of pre-testimony communication with witnesses—that we could draw a scale and mark as *zero* as the point at which perjury is perfectly tolerated and *ten* as the point representing a complete ban on any pre-testimonial communication. On such a scale, the U.S. rule would presumably be located somewhere near the *four* while the German rule somewhere near the *nine*. The international norm, according to this view, should be set at nine or above, so that in complying with the international norm, all systems’ rules would be satisfied.

No matter how superficially appealing, the “most restrictive” approach is flawed in its conception and unworkable in application. The approach necessarily begins from the erroneous premise that professional obligations are the product of bipolar choices between more and less permissive alternatives. In pictorial terms, it conceives of each ethical norm as existing on its own linear scale, independent from other norms and from the larger system in which it operates. As demonstrated by the *functional approach*, this conception is wrong. The apparently “more lackadaisical” U.S. approach to pre-testimonial communication with witnesses

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<sup>316</sup> This proposal has been advanced by Professor Roger Goebel, not in the context of international arbitration per se, but as a means for developing ethics for cross-border practice. See Goebel, *supra* note 17, at 520-22. The intuitive appeal of this approach is undoubtedly linked to familiar calls for attorneys to adhere to the “highest” moral and ethical standards.

does not indicate a greater tolerance for perjurious activities. Instead, it reflects the role of the attorney as gatherer of facts and presenter of evidence and the related need to conduct extrajudicial investigations, including speaking with potential witnesses. Similarly, the apparently more relaxed European approach to *ex parte* communication does not reflect lack of concern about the possibility that parties might exercise unfair influence on the decision-maker. It reflects, instead, the attorney's role as "guide" to the court in which *ex parte* communications are less of a threat and may in fact aid the judge in more efficient decision-making. While the "most restrictive" approach has an implicit allure,<sup>317</sup> the simplicity of this methodology comes only by ignoring, at great peril, the complexity of ethical norms and their relationship to the larger systems of adjudication in which they operate.

### **3. Law and Economics Approach**

Legal ethics has recently been receiving a great deal of attention from the Law and Economics community in the United States.<sup>318</sup> Moreover, economic concerns have motivated drafting of the CCBE Code and current focus international ethical norms as it has become apparent that professional licensing can be a barrier to international trade and the free

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<sup>317</sup> Even the Declaration of Perugia attempted to resort to a "most restrictive" provision when dealing with the problematic tension between maintaining client confidences and attorney obligations to disclose unlawful conduct by a client. *See supra* note 299 at § IV, 3. Notably, when instructing that an attorney should follow the "strictest rule," the Consultative Committee had to go on to explain "that is, the rule that offers the best protection against breach of confidence" because the meaning of the term "strictest" was not self-evident. *See id.* Notably, this approach was dropped from the CCBE Code, in part perhaps because this "strictest rule" approach left attorneys with no protection should their adherence to the "strictest rule" get them in professional or criminal trouble in another jurisdiction.

<sup>318</sup> *See, e.g.,* George M. Cohen, *Legal Malpractice Insurance, Loss Prevention, and Professional Ethics*, 4 CT.INS.L.J. 305 (1997-1998) (presenting comparative economic institutional analysis of legal malpractice insurance); Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L.J. 579 (1992) (presenting economic analysis of conflict of interest rules); Jonathan R. Macey & Geoffrey Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105 (1995) (presenting economic analysis of rules of professional responsibility); Charles Silver & Lynn Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST. L. REV. 733 (1997) (presenting economic analysis of professional responsibility rules regarding aggregate settlement rules).

movement of persons and services.<sup>319</sup> Based on the undeniable link between ethics and economic concerns, Law-and-Economics scholars might propose that the best approach to developing an international code of ethics is to identify the “most efficient” rule.<sup>320</sup>

Notwithstanding correlative economic issues in attorney regulation, using “efficiency” as the normative ideal against which to measure competing ethical rules would not obviate the difficult and substantive questions that confront drafters of an international code of ethics. In commercial contexts, efficiency describes the rule that would promote productivity, reduce transaction costs, increase acceptance in the marketplace and, as a consequence (at least theoretically), produce increased prosperity for all.<sup>321</sup> Outside of regulation of the commercial aspects of the legal services market, the object of “efficiency” is not self-evident.<sup>322</sup> Before determining whether an rule is more or less efficient, the scholar must operationally define the term: More or less efficient *at what?* This question can be difficult to answer in a cross-cultural

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<sup>319</sup> Some are concerned that the World Trade Organization may attack certain ethical rules as barriers to trade. See Daly, *Dichotomy Between Standards and Rules*, *supra* note 6 at 1117.

<sup>320</sup> At this point, I am examining what Law and Economics might have to say about the development of the content of the substantive ethical rules. Part III is also likely to attract interest from Law-and-Economics scholars (although I use legal process analysis) both because it is based on assessments of comparative institutional competence and because it proposes tailor-made default rules that are adopted into parties’ contracts and are subject to party modification. See Jefferey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 *Yale J. Int’l Law* 1, 45 (1999) (arguing that most U.S. Law and Economics analysis argues for the abolition of most forms of government regulation of commercial activity and may be most helpful in the international context for its institutional choice theories); Jonathan R. Macey & Geoffrey Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 *IOWA L. REV.* 965, 972 (1997) (arguing that, assuming an absence of significant externalities, “the government’s role should ordinarily be to supply reasonable ‘gap-filling’ or default terms that the parties would likely have agreed to if they had bargained over the issue *ex ante*.”).

<sup>321</sup> See Richard Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 *U. CHI. L. REV.* 1167, 1170 (1997). It is no accident that the economic analysis of American ethics has approached ethical issues through the lens of the market for legal services. When Law and Economics first considered the problem of professional responsibility, its efforts dealt only with private contracting mechanisms for reducing agency costs. See George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 *FORDHAM L. REV.* 273, 274 (1998). Even when Law and Economics turned to “core” legal rules of professional responsibility, its focus was relatively limited to particular rules. See *id.* at 275.

<sup>322</sup> Even within commercial contexts, the term “efficiency” suffers from inherent ambiguities that draw into question the claims of its enthusiasts. See, e.g., GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 156

context because of the conflicting goals of different adjudicatory systems. For example, in evaluating rules regarding pre-testimonial communication with witnesses, to determine whether the American or German approach is more or less “efficient,” the scholar must adopt normative objectives to define efficiency, such as more efficient at accurate fact-finding or more efficient at maximizing party participation in proceedings.<sup>323</sup> Once down this road, however, the scholar is in the position of examining what values ethical norms should advance. A Law and Economics approach might be useful at some level, but only after the value choices for ethics in international commercial arbitration have already been identified through the *functional approach*.

#### **4. The Choice of Laws or Conflict of Laws Approach**

Another possibility, which might be considered as an alternative to developing a new code of ethics for international commercial arbitration, is to treat ethics as a matter to be resolved either by conflicts of law rules or by a choice of law decision to be made by the parties. These approaches have some notable forerunners within the international arbitration system itself. Parties usually select substantive national law that will govern their dispute.<sup>324</sup> In the absence of such a choice by the parties, arbitrators employ a conflicts-of-law analysis or the doctrine of *lex loci arbitri*<sup>325</sup> to select one nation’s laws to govern. Moreover, conflict-of-laws

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(1996); Mark G. Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of “Law and Economics,”* 33 J. LEGAL EDUC. 274 (1983).

<sup>323</sup> See *supra* notes 288-289, and accompanying text.

<sup>324</sup> See, generally, REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 65, at 691-753. Notably, however, business managers and their lawyers often compromise on a governing law without giving a great deal of thought or investing much research into how the chose legal system may affect the outcome of possible controversies. See William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 659 (1989).

<sup>325</sup> The *lex arbitri* is the law of the place where the arbitration occurs. See William W. Park, *Lex Loci Arbitri and International Commercial Arbitration*, 32 INT’L & COMP. L.Q. 21, 22 (1983).

techniques are used in the U.S.'s Model Rule 8.5<sup>326</sup> and the CCBE Code<sup>327</sup> to resolve multi-jurisdictional conflicts in cross-border practice. These methods are appealing because they facilitate identification of a single controlling rule through selection a national ethical regime in its entirety. The need to haggle or brood over the content of rules is avoided by simply transplanting those of a national system. Like other potential approaches, however, the appeal of a conflict- or choice-of-laws approach is illusory.

Given the unique features of international arbitration, certain national ethical norms may be particularly inapt if transplanted. For example, national rules that place communications from an attorney to a client outside the realm of confidentiality protections may be pernicious in proceedings that follow an American litigation model with aggressive discovery, particularly since the discovery of such documents would make attorneys more likely to be called as witnesses.<sup>328</sup> To avoid such problems, the rules chosen must, according to the *functional approach*, reflect and facilitate performance of the inter-relational roles assigned to actors in an adjudicatory setting.

The importance of the fit between ethical norms regulating advocates and the procedural arrangements of the system in which they are appearing is implicitly acknowledged

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<sup>326</sup> See Mary C. Daly, *Resolving Ethical Conflicts in Multinational Practice—Is Model Rule 8.5 the Answer, an Answer or No Answer at All?*, 36 S. TEX. L. REV. 715 (1995). Model Rule 8.5 attempts to resolve the often-prickly conflicts a U.S. attorney with a multi-jurisdictional practice may confront.

<sup>327</sup> See Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 19.

<sup>328</sup> In a distinct but related area, arbitrators are distinct from judges in that they are not expected to be a “blank slate” but are in fact chosen for the substantive knowledge and they generally continue to practice as part of a firm. These features of the arbitrator make simply transplanting judicial ethics regarding conflicts of interest untenable. See, e.g., *Ploy Software Int'l Inc. v. Su*, 880 F. Supp. 1487, 1492-95 (D.Utah 1995) (discussing complications of applying conflicts rules when small groups of skilled lawyers—in this case, specializing in a relatively small area of the computer industry—act as both litigators and mediators) (cited in Carrie Medow Menkel, *The Trouble with the Adversary System in a Post-Modern Multicultural World*, 38 WM. & MARY L. REV. 5, 44 (1996)).



by the Model Rules and the CCBE Code. Both codes instruct that with questions pertaining to conduct before a court in a foreign jurisdiction, the rules of the applicable tribunal govern.<sup>329</sup> Even though it is unlikely that these rules were intended to apply to international arbitration,<sup>330</sup> they are premised on an assumption that adjudicatory tribunals do have (or should have) their own ethical norms and that attorneys appearing before them should be bound by them.<sup>331</sup>

Particularly staunch advocates of party choice may insist that the participants in arbitration are able to undertake the analysis necessary match the ethical rules with the procedures they have chosen. Parties in arbitration are “repeat players” who presumably have the resources to investigate and select the national ethical norms that they want to govern their arbitral proceedings.<sup>332</sup> The sophisticated character of these parties has lead some scholars to speculate that elaborate negotiations produce sophisticated arbitration agreements that are designed circumnavigate onerous national laws and map out customized adjudicatory procedures.<sup>333</sup> In spite of significant literature that predicts that repeat players will bargain for procedures that optimize their strategic positions, such opportunism in drafting has not, at least

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<sup>329</sup> See Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 19 (CCBE Code); Roger Goebel, *The Liberalization Of Interstate Legal Practice In The European Union: Lessons For The United States?*, 34 INT'L LAWYER 307 (2000) (same), .

<sup>330</sup> It is not clear whether or how Model Rule 8.5 applies in arbitration and, as noted above, supra, note 6, Rule 8.5 expressly disavows application in the international context. Vagts, *International Legal Ethics*, supra note 59, at 379.

<sup>331</sup> CCBE Rule 4.1, which requires lawyers who appear before a court or tribunal in a Member State to comply with the rules of conduct applied in that court, is analogous to Rule 3.4(c) of the Model Rules, which prohibits knowing disobedience of rules of a tribunal, except for an open refusal based on an assertion that no rated obligation exists. See Terry, *Introduction to the European Community's Legal Ethics*, supra note 10, at 36-37. Similarly, the CCBE Code permits the tribunal exercising jurisdiction to determine the level of *ex parte* communications that are permissible, which implies an expectation that tribunals can and do regulate such aspects of attorney conduct.

<sup>332</sup> See Marc Galanter, *Why the "Haves" Com Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 125 fig.3 (1974).

<sup>333</sup> See Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, DUKE L.J. 1279 (2000) (arguing that parties agree to arbitrate for the specific purpose of avoiding mandatory national laws and that arbitrators have incentives to disregard national law in favor of the parties' agreement).

yet, become the practice in drafting arbitration agreements. Often, arbitration agreements are an afterthought thrown into a contract by corporate attorneys who have little experience with arbitration and are hoping that the possibility of a dispute is distant and improbable.<sup>334</sup> Even when experienced negotiators are involved, the time-cost of negotiating individual rules is prohibitive. As a consequence, arbitration agreements almost never include provisions regarding procedure<sup>335</sup> and are less likely to include more particularized provisions regarding ethics.<sup>336</sup>

With regard to rules of procedure and evidence, this problem has been solved by the IBA Supplemental Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, which is a prefabricated set of default rules that parties can incorporate into their contract. For the same reasons that party autonomy is served better by the IBA Supplemental Rules than it is by the opportunity to negotiate individual rules, a prefabricated code specially tailored to international arbitration will serve parties' interests better than permission to choose one nation's law.<sup>337</sup> The *functional approach* is a coherent

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<sup>334</sup> Other factor that keep rampant opportunism in check may be that, unlike consumer or employment arbitration in the U.S., the parties are equally matched. For numerous, often humorous, examples that of poorly drafted arbitration clauses, see CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 101, at 422. While undoubtedly selected from a large sample pool, in my experience, even arbitration clauses drafted by Fortune 100 companies suffer from significant defects and could not accurately be described as anything approaching a masterful orchestration of the elements of dispute resolution.

<sup>335</sup> See Holzman, *Balancing the Need for Certainty and Flexibility*, *supra* note 150, at 10 (citing study by Stephen Bond (former ICC President) of nearly 500 arbitration clauses submitted to the ICC, in which only one referred to specific procedures).

<sup>336</sup> Leaving selection of ethical rules to choice-of-law analysis has the added problem that, in the absence of express choice by the parties, it would be left to the unpredictable and potentially detrimental choice of law rules:

The usual rule that conflict of laws rules of the forum determine the applicable law may be of doubtful validity when the place of arbitration bears no relationship to the parties or the subject matter of the dispute. Furthermore, arbitrators from different nations and with different legal training and traditions may find it difficult to agree on the conflict of laws rules that should be applied. That difficulty is compounded by the unsettled state of conflict of laws rules in many legal systems.

Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 1, 22-23 (1986).

<sup>337</sup> Even though under the *functional approach* ethical norms are linked to procedural rules, this approach does not necessarily require that arbitration forego procedural flexibility by adopting specific procedural rules. Just

methodology that can identify and shape norms for such a code, and the proposal in Part III suggests a mechanism by which such a specialized code can be easily incorporated into parties' agreements.

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as the IBA evidentiary rules are modifiable by the parties, I am proposing “default” ethical rules, which are set to the fundamental aims of international commercial arbitration but can be modified by the parties. *See infra* notes 367- , and accompanying text.

#### **D. The *Functional Approach* as a Prescriptive Tool**

So far, this Article has used the *functional approach* to illuminate the link between ethics and role and the consequent differences among national ethical regimes. The *functional approach* can also be a prescriptive tool for developing ethical norms for international arbitration. While I propose that actual drafting of ethical codes be undertaken by various arbitral institutions, this Section will illustrate the methodology for developing those norms.

##### **1. The *Functional Approach* in International Arbitration**

As a prescriptive methodology, the aim of the *functional approach* is not to resolve conflicts between different national ethical norms, but to develop norms that are suited to the international commercial arbitration system. To that end, the *functional approach* requires identification of the inter-relational roles of actors in the international commercial arbitration system and selection of ethical norms consistent with these roles. This task, in turn, requires examination of the procedural arrangements and underlying cultural values of the international commercial arbitration system.

This prescription seems difficult to follow because there are few defined procedural rules in international arbitration. Institutional arbitral rules only provide skeletal procedures for commencing arbitration and selecting arbitrators.<sup>338</sup> Beyond these basics, arbitral rules are generally silent with regard to the actual proceedings, including such fundamentals as whether hearings will be held. How can these sketchy outlines of procedural rules guide us in

understanding the role of attorneys in arbitration and the ethical obligations that are consistent with that role? It is similarly perplexing to contemplate how to ascertain the “cultural values”<sup>339</sup> of the international arbitration community. International commercial arbitration exists between cultural boundaries and is intended to fuse multiple, diverse legal traditions. It is an *ad hoc* system of dispute resolution, without geographic borders or a discernable citizenry. Indeed, dynamic changes in the ranks of participants are one of the major sources of pressure for development of an established ethical regime. How can the cultural values of this amorphous system inform development of ethical norms?

Notwithstanding the open texture of the international commercial arbitration system, there is substantial guidance for the development of ethics. While there are few defined procedures, there are the regularly used hybridized procedures,<sup>340</sup> which I will demonstrate below reflect an appropriate balance of power between parties and arbitrators that in turn suggest a range of possibilities for the content of ethical norms in arbitration. Moreover, even in the absence of a defined social, political or geographic unit, the normative goals of the international arbitration system are relatively well defined. As described in Part I, international commercial arbitration aims to provide neutral and effective means of dispute resolution that allows the parties substantial autonomy.<sup>341</sup> Based on these normative goals and the hybridized procedures, the *functional approach* can be used to derive ethical norms for the international commercial arbitration system.

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<sup>338</sup> See John M. Townsend, Overview and Comparison of International Arbitration Rules, 624 PLI/Lit. 817 (2000).

<sup>339</sup> For a definition of “cultural values,” see *supra* note 255.

<sup>340</sup> See *supra* notes 170-175, and accompanying text.

<sup>341</sup> See *supra* Sections I.C.1&2.

Just as the role of the judge was the starting point in analyzing in national systems, the role of the arbitral tribunal is the starting point for analyzing the roles of players in the international arbitration system. The most striking feature of arbitrators is that, as a consequence of the balance struck by the New York Convention, they are vested with what amounts to broad, virtually unreviewable decision-making power.<sup>342</sup> This power is striking in contrast to their judicial counterparts.<sup>343</sup> Even clear mistakes of law in arbitral awards are virtually immune from appellate review.<sup>344</sup> Arbitrator decisions cannot draw legislative responses that, in national systems, are used to counterbalance judicial activism. Other types of indirect controls that constrain national judges—such as pre-established rules of evidence and procedure—are often left to the arbitrators to decide. Finally, unlike judicial decisions, there are no minimum requirements for the form of arbitral awards, which means awards are also insulated from the constraining force of public scrutiny.<sup>345</sup>

Arbitrators are endowed with these extensive powers to ensure that their decisions

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<sup>342</sup> Arbitrator discretion in applying the law takes both legitimate and illicit forms. Justifiably, a great deal of discretion derives from ambiguities about the proper law to be applied, including the proper rules for choosing the proper law. See Park, *National Law and Commercial Justice*, *supra* note 23, at 667. Indeed, arbitrators must walk something of a tightrope between applying the parties' chosen law and avoiding offense to mandatory law of a jurisdiction that might be able to refuse enforcement. It is also possible for parties to enhance arbitrator discretion. If the parties, instead of a body of national law, choose the flexible *lex mercatoria* or customary "law merchant," or an equitable doctrine such as *amiable compositeur*, which permits arbitrators to resolve the matter based on notions of fundamental fairness. Another, less legitimate, form of discretion comes from the fact that arbitral decisions are not subject to substantive review.

<sup>343</sup> In continental proceedings, the judge enjoys significant fact-finding power, but See COMPARATIVE LAW: CASES –TEXT-MATERIALS 472 (Rudolf B. Schlesinger, *et al.*, eds., 6<sup>th</sup> Edition) (1998). In the United States, lower court legal decisions are subject to *de novo* review on appeal and factual determinations, while afforded significant deference, are also subject to appeal.

<sup>344</sup> Comparison of the relative power of judges vis -à-vis arbitrators in this context is limited to the confines of a specific case because arbitrators are only appointed for a single case. At a more systematic level, the power of arbitrators is more circumscribed than judges because their decisions are not binding in other cases and their jurisdiction is dependent on the existence of national courts.

<sup>345</sup> Public scrutiny of judicial opinions acts as a constraining force on judges. See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 69-70 (1962) (describing how courts are constrained by a range of social and cultural factors, including public opinion); see also GERALD N. ROSENBERG, THE HOLLOW HOPE (1991). By

are neutral (independent of national courts) and effective (generally enforceable), but party autonomy is another important pillar under girding the system. Parties exercise control through their ability to draft arbitration agreements, to select arbitrators, and to agree upon procedures. These powers, however, have significant practical and (because they end when arbitral proceedings are beginning) temporal limitations.<sup>346</sup> If parties are limited to these powers, once the arbitration begins, party control would virtually cease.

The hybridized procedures that are habitually used by parties in modern international arbitration practice<sup>347</sup> ameliorate this problem. By vesting parties and their counsel (not arbitrators) with substantial control over the fact-finding process,<sup>348</sup> the hybrid procedures create a role for parties' counsel that counterbalances the vast power arbitrators have in the final decision.<sup>349</sup> They establish inter-relational roles that reflect and reinforce the tri-partite normative values of the system, which in turn the contours of the ven diagram that represents the competing obligations on attorneys. The considerably expanded discretion an arbitrator has in

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contrast, some arbitral institutions, such as the AAA recommend that arbitrators not provide the parties with a reasoned award that may provide a basis for future challenge.

<sup>346</sup>Parties often select governing law and place of arbitration in their agreement, but rarely agree on procedures in during the drafting process. While parties theoretically retain the power to agree to procedural rules that will control proceedings as a practical matter, after the dispute has arisen and as the parties are preparing the adjudicatory strategies, agreement on procedures is difficult to find. See Lucy F. Reed, *Drafting Arbitration Clauses*, 648 PLI/Lit 607 (2001).

<sup>347</sup> See *supra* notes 144-150, and accompanying text.

<sup>348</sup> See *supra* Section I.B.3.

<sup>349</sup> See *supra* Part I.B. As a historical matter, the hybrid practices commonly used in arbitration are probably attributable to a range of forces. On the one hand, they may represent what experience has taught are the most effective means of compromising between competing interests among participants, or the product of competitive pressures within the market of international commercial arbitration, amplified by the entrance of American lawyers on the scene. See DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 55, at 23 (describing the “Americanization” of arbitral proceedings and attributing it to the “symbolic capital brought to the process by American attorneys). Whatever the historical source of these hybridized procedures, they have the effect of creating a balance, which is probably at least part of what has led to their universal acceptability. This need to counterbalance arbitrator power is also evidenced in the general formalization of the international arbitral process,

applying the law suggests that parties in arbitration appeal to that discretion, while the relatively indeterminate nature of arbitration emphasizes the importance of strategy. On the other hand, international arbitrators are at once presumed to have more specialized industry knowledge than judges and less experience and support resources (in the form of clerks, libraries and formal legal training, particularly if they were trained in a system different from the law they are being asked to apply). Moreover, while the open texture of arbitration suggests that attorneys will need to actively guide parties so that they can make intelligent decisions, it also means that international attorneys have much more power and influence in the system than they do in domestic litigation. Together, these features suggest that the attorney's sphere of obligation to the client must be expanded over that of the classic civil law system, but not nearly to the dimensions of the U.S. system.

As a consequence of augmenting the sphere of obligations to the client over those of the typical civil law system, the importance of attorney-client communications is expanded and the logic of confidential communications between opposing counsel is less compelling. When attorneys are engaging in lobbying and strategizing, instead of acting in a more collaborative role, *ex parte* communications are less tolerable.<sup>350</sup> On the other hand, given the limits of post-award review and the probability that arbitrators are not trained in the specific law being applied, efforts to lobby must be more tightly constrained than they are in the United

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particularly the reduction of the hybrid procedures to a formal, structured body of rules and the calls for publication of arbitral awards.

<sup>350</sup> As noted above, see *supra* notes 234-35, and accompanying text, the American tolerance for *ex parte* communication with arbitrators may reflect not so much the role of attorneys, but the role of arbitrators as parties' advocates on U.S. arbitral tribunals. Finalizing attorney ethical norms regarding *ex parte* contact will therefore also require examination and clarification of the arbitrator's role. Certainly one factor to consider is that, even if the risk of taint from *ex parte* communications is lower in international arbitration than in U.S. litigation, the non-appealability of arbitral awards makes the potential consequences dire if that risk is realized.



States. To this end, it has been suggested that attorneys in arbitration should have a higher duty of disclosure to the arbitral tribunal than is required in the U.S. litigation system.<sup>351</sup> In the specific example of pre-testimonial communication, written witness statements necessarily imply that counsel are piecing together their clients' case and the availability of cross-examination requires some minimum degree of witness preparation, such as informing the witness about likely challenges to her credibility.<sup>352</sup> Any ethical norm regarding attorney contact with witnesses must therefore accommodate some communication.

While it is possible here to provide the general contours of a code of ethics for international commercial arbitration, the fashioning of particular rules will require more detailed study of not only arbitral institutions and players, but also of national ethical norms that will be displaced. In the final Part, I propose that this study be undertaken by arbitral institutions so that, as discussed in the following Section, that drafting process can take account of the various forms of international arbitration and the differing the roles and normative goals present in those forms.

## **2. Differentiating Among Arbitral Regimes**

While it is possible to discuss generally the elemental goals of arbitration, they are not always adopted in the same combination as the prototypal arbitration discussed so far. Consequently, the hybridized procedures are not always followed. For example, occasionally parties still agree to have the arbitrator act as *amiable compositeur*,<sup>353</sup> which necessarily means an expansion of arbitrator power and would be consistent with a diminished role for parties and

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<sup>351</sup> See C. Thomas Mason III, *Lawyers' Duties of Candor Toward the Arbitral Tribunal*, 998 PLI/CORP. 59 (1997); see also Deborah L. Rhode, *Institutionalizing Ethics*, CASE W. L. REV. 665, 707-09 (1994) (arguing for higher disclosure obligations in U.S. litigation).

<sup>352</sup> See Damaška, *Evidentiary Transplants*, *supra* note 167, at 847 (arguing that if civilian systems introduced cross-examination fairness would require at least some "minimum degree" of witness preparation).

their counsel in the gathering of facts, bringing of motions and presentation of evidence. In other instances, departure from the hybridized procedures is institutionalized, meaning that particular arbitral institutions, particularly trade arbitration institutions, have adjusted the balance between the roles of the arbitrators and parties and their counsel to suit their unique clientele.

One good example is the arbitration regime adopted by the Liverpool Cotton Association (“LCA”).<sup>354</sup> The LCA provides expedited adjudication of a narrowly defined range of disputes that arise out of contracts for the sale and delivery of cotton, most frequently involving disagreements over the quality of cotton delivered.<sup>355</sup> In proceedings under the LCA Rules, an institutional board (not the parties) appoints two arbitrators who are knowledgeable about the industry to inspect the cotton in question. If the two fail to agree, the third arbitrator acts as an umpire. The role of the parties is usually marginal—submitting samples of the cotton in dispute—and the control of arbitrators expansive. The arbitral regime includes in its structure a nine-member Official Appeal Committee, which provides some control over arbitrators.<sup>356</sup> This appellate body avoids resort to national courts relied on in standard international commercial arbitration. This system of intentionally diminished party control and increased arbitrator power in fact-finding may suggest that the ven diagram drawn to represent the relative spheres of obligation in this context bear more similarity to civil law systems, with a decreased sphere of obligation to the client to reflect the diminished role of attorneys in presenting the

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<sup>353</sup> See *supra* note 35.

<sup>354</sup> The Liverpool Cotton Association has a venerable history and is widely regarded as the institution that inspired trade associations throughout England to establish arbitration mechanisms. See J. COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 19-20 (1918).

<sup>355</sup> See Stephen Craig Pirrong, *The Efficient Scope of Private Transactions-Cost-Reducing Institutions: The Successes and Failures of Commodity Exchanges*, 24 J. LEGAL STUD. 229, 235 (1995).

<sup>356</sup> See <http://www.lca.org.uk/PDF/Rules.pdf>

client's case.

In a contrasting example, in international arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (“ICSID”), party autonomy and control arguably receive a higher priority than in standard commercial arbitration. ICSID arbitration, which is administered by the World Bank, is a system designed to accommodate nation-states as parties.<sup>357</sup> The unique need for deference to parties that are sovereign nations, and corresponding limitation in the role of the arbitrator, is evident in several features of the ICSID arbitration system. For example, ICSID arbitration rules limit arbitrators’ power to choose the applicable law<sup>358</sup> and, under recent and somewhat questionable precedents, require automatic reversal by the ICSID appellate panel any time there has any minor technical defect in the award.<sup>359</sup> In the ICSID arbitration system, the role of the advocate is weighted much more heavily with client interests than obligations to the tribunal, perhaps suggesting that the ven diagram illustrating ethical obligations in this system should be closer to the American model than that of standard international commercial arbitration.

These and other specialized applications in international arbitration highlight the need for flexibility in any regime for ethical regulation. If a code of ethics cannot accommodate the changing and varied forms of international arbitration, the value of a specialized code is diminished. The project of the next Part is to describe a regime that can accommodate these

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<sup>357</sup> See REISMAN, SYSTEMS OF CONTROL, *supra* note 57, at 48-49.

<sup>358</sup> Unlike other arbitral rules, which permit arbitrators to choose the governing law in the absence of party agreement, Article 42(1) the ICSID rules mandates that, in the absence of party agreement, the arbitrators apply the “law of the Contracting State party to the dispute (including its conflict of laws) and such rules of international law as may be applicable.” See REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 190, at 258.

<sup>359</sup> The adoption of this “hair-trigger” rule appears to have been motivated, at least in part, in an effort to limit the discretion involved in appellate review, but it arguably also aims at constraining the original arbitral

shifting needs, while still providing clear guidance.

### **E. Conclusion**

In addition to the substantive insights it holds for developing ethics for international arbitration, the *functional approach* demonstrates the overwhelming importance of comparative analysis to the development of international legal rules.<sup>360</sup> The process of comparing reveals not only the true extent of similarities and differences among systems, but also the reasons for those differences. In the absence of comparison, the link between procedure, adjudicatory values and professional legal ethics would remain obscured by the myopia of our limited cultural perspective.<sup>361</sup> Discerning the anatomy, not just the external form, of legal rules will facilitate the production of international norms that not only appear at a superficial level to resolve conflicts, but that actually serve the needs of the international arbitration community.

### **III. Making Ethical Norms Binding and Enforceable in International Arbitration**

Up until this point, this Article has addressed the means of developing the content of ethical norms for use in international commercial arbitration. This Part now turns to the question of who will undertake that task and how the other necessary sub-tasks will be

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tribunal. For a discussion of the problems caused by this “hair-trigger” rule, and efforts to reform it, see REISMAN, *SYSTEMS OF CONTROL*, *supra* note 57, at 57-83.

<sup>360</sup> As Professor Carozza explains in the area of international human rights: “comparative analysis can help forge common understandings by giving specific content to the scope of broad, underdetermined international norms, but it can also reveal the contingency and particularity of the political and moral choices inherent in the specification and expansion of legal norms that are too easily assumed to be ‘universal.’” See Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1219 (1998). For further reading on the use of comparative law in international lawmaking, see David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545.

<sup>361</sup> See Daly, *Dichotomy Between Standards and Rules*, *supra* note 6, at 1149; Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 47.

accomplished.<sup>362</sup> The first Section of this Part undertakes the constructive project of proposing a regime for integrating into the system of international commercial arbitration ethical norms derived from the methodology proposed in Part II. Because the proposed regime contemplates significant new powers for arbitrators and would permit contractual modification of arbitral ethical norms, it implicates deeper concerns about the limits of private adjudication and the government monopoly on rule-making in the realm of professional legal ethics. These concerns will be taken up in Section B.

### **A. A Regime for Implementation and Enforcement**

Parties consensually bind themselves to arbitrate disputes pursuant to rules that are usually administered by arbitral institutions, and national courts enforce arbitral agreements or awards rendered by arbitral tribunals, pursuant to the New York Convention. Attorney conduct, meanwhile, is regulated at a national level not only by ethical codes enforced by local bar associations, but by a range of other institutions,<sup>363</sup> including civil and criminal statutes,<sup>364</sup> malpractice claims, market pressures and influence from peers.<sup>365</sup> In this web of integrated institutions, there are a number of possible ways that ethical norms could be “promulgated” and enforced. This Section proposes a regime that would integrate ethical regulation into the existing

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<sup>362</sup> These sub-tasks include making ethical norms binding on the parties and their counsel, interpreting the rules, detecting violations, determining guilt for violations, fashioning remedies and sanctions, and enforcing those sanctions. See Schneyer, *The Regulation of Lawyers*, *supra* note 110, at 38.

<sup>363</sup> See *id.* at 35-36.

<sup>364</sup> For example, in the United States, much conduct that is regulated in ethical codes is also regulated by statute. See, e.g., CAL. BUS. & PROF. CODE § 6068(e) (West 1990) (prohibiting an attorney from disclosing client confidences after representation has ended).

<sup>365</sup> For analysis of how norms that are not reflected in formal jurisprudence can still effectively regulate behavior, see W. Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417 (1985); W. Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and the Public Order*, 12 DENV. J. INT’L L. & POL’Y 165 (1983); see also ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4-6, 137-55 (1991).

framework of the international arbitration system and preserve the balance inherent in that system.

### **1. Arbitral Institutions as Promulgators**

If the aim of an ethical code for international commercial arbitration is to tailor ethical obligations to the features of the arbitral proceedings, the entities in the best position to formulate the specific rules are the arbitral institutions themselves, meaning for example the ICC, the LCA, ICSID, the Stockholm Chamber of Commerce, and VENCA. Many of the same reasons for why ethical rule making in the United States is left to bar associations and the judiciary (as opposed to ordinary legislative processes) support entrusting rulemaking in this context to arbitral institutions (as opposed to the treaty process or national institutions).<sup>366</sup>

As the drafters and administrators of arbitral rules, which regulate the initiation and general conduct of arbitration, arbitral institutions have specialized knowledge of those rules and their functions,<sup>367</sup> as well as the most direct experience in dealing with the ethical issues that

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<sup>366</sup> In the international context, there is no obvious counterpart to the local bar associations, which in most Western Countries assume primary responsibility for regulating attorney conduct. As discussed earlier, the IBA Code of Ethics is more a general list of professional maxims than a code to guide attorney conduct and the IBA is a voluntary organization, not a licensing body. *See supra* notes 242-44, and accompanying text.

<sup>367</sup> Although they are usually silent with regard to the specific course of arbitral proceedings (*i.e.*, whether there will be hearings, the form and procedures for submitting evidence, etc.), every set of arbitral rules includes some basic procedural rules, such as those prescribing the procedures for submitting initial pleadings and appointing of arbitrators. These fundamental procedural rules are, however, default rules, meaning that they are presumed to be the rules that would have been negotiated, were the costs of negotiating arms-length for every contingency sufficiently low and which can be changed through party agreement. *See, e.g.*, Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 248 (1997) (arguing that the FAA is merely a “set of ‘default rules’ intended to reflect the traditional historical understanding concerning the binding effect of arbitral awards); Rau & Sherman, *supra* note 170, at 89 & n.4 (arguing that silence in arbitral rules and national arbitration legislation set certain default rules). For further discussion on the nature of default rules in contract, see generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97-100 (1989) (discussing allocation of contractual default rules).

arise in arbitration.<sup>368</sup> Given their direct financial interest in attracting parties to their institution,<sup>369</sup> they have a strong incentive to select rules that will ensure the integrity of arbitrations conducted under the auspices of their institution.<sup>370</sup> As a consequence, arbitral institutions have an institutional competence superior to that of local bar associations or national courts in knowing which ethical norms will comport with their institutional rules.<sup>371</sup>

Vesting rule-making authority in arbitral institutions will also satisfy the need to preserve both the independence of the legal profession and the independence of the arbitral system. In the U.S., the judiciary and the legal profession are charged with rule-making authority to ensure their independence from the other political branches. If ethical rules were enacted in treaty form like the CCBE Code, they would, under U.S. constitutional process, be a product of legislative and executive decision, which, again under U.S. conceptions, could cast a shadow on the independence of the legal profession.<sup>372</sup> Moreover, arbitral practice must be insulated from national institutions. If enacted through a treaty, an arbitral code of ethics would become binding on parties though national legislative enactment and national institutions would

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<sup>368</sup> Some institutions have direct experience in evaluating ethics-based complaints against arbitrators. For example, the ICC Rules provide that complaints of alleged misconduct by arbitrators be submitted in writing to the Secretary General of the Court of Arbitration, with a statement specifying the factual grounds for challenging the arbitrator. If the ICC Court accepts the challenge the Court would then replace the arbitrator. See CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 101, at § 13.06 p. 235.

<sup>369</sup> See Drahozal, *Commercial Norms*, *supra* note 9, at 95.

<sup>370</sup> Their interest in the integrity of the legal process is often pointed to as one of the reasons why judges, as opposed to elected legislatures, is cited as one of the justifications for the unusual role of the judiciary in ethical rule-making.

<sup>371</sup> See *supra* Part II.D.2. for a discussion of how the arbitral rules of different institutions might alter the ethical norms they produce.

<sup>372</sup> At least in the U.S., this shift of rule-making authority to other branches would be objectionable as it would undermine the independence of the legal profession.

be charged with primary responsibility for enforcement.<sup>373</sup> Having local bar associations or courts inject their evaluations of attorney conduct into arbitration proceedings would bring national institutions into arbitral proceedings in a way that the New York Convention was designed to prevent.

Moreover, if a single set of ethical norms is engraved in treaty form, they would not be able to respond to the varied and dynamic needs of the parties to international commercial arbitration.<sup>374</sup> For example, the drafters of the treaty may, as suggested in Part II, adopt an international ethical norm that permits some forms of witness communication based on an assumption that arbitrations commonly adopt hybridized procedures.<sup>375</sup> Meanwhile, if instead of opting for the hybridized procedures, parties in a particular arbitration adopt procedures modeled after the German system, with arbitrators controlling the questioning of witnesses and no real cross-examination, the rule adopted by the treaty would be awkward, if not counterproductive.<sup>376</sup> For these reasons, the institution best suited to promulgate ethical norms for international commercial arbitration is to assign the task to arbitral institutions.

## **2. Arbitral Rules as Implementers**

The determination of *who* will promulgate the new code of ethics for international

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<sup>373</sup> When nations accede to the New York Convention, they usually implement it through adoption into their domestic law. For example, in the United States the provisions of the New York Convention are incorporated into the provisions of the FAA. *See* Ostrowski & Shany, *Chromalloy*, *supra* note at 29.

<sup>374</sup> For a discussion on the importance of flexibility and party autonomy in arbitration, *see supra* Part I.B.3. Theoretically, it is possible to promulgate in treaty form a set of ethical rules that is general enough not to do great collide too violently with procedural choices (for example leaving including multiple options) and that can be contractually modified. The question becomes, though, whether a document so general and so flexible is really a treaty or whether there is anything to be gained by putting it into treaty form.

<sup>375</sup> *See supra* Parts I.B.1. & II.B.

<sup>376</sup> Similarly, a single code of ethics would not be flexible enough to accommodate the variations in purposes and approaches of various arbitral institutions. *See supra* Part II.D. For precisely these same reasons,



commercial arbitration portends answers to many other questions about *how* the rules will be promulgated and enforced. If arbitral institutions are developing the ethical norms, the obvious method for putting them into practice is to incorporate them into or append them onto existing arbitral rules. When parties agree to submit disputes to a particular arbitral institution or according to the rules of a particular institution, the arbitral rules, and by extension the new ethical rules, will become incorporated by reference into the parties' contract.<sup>377</sup> Incorporating ethical rules into the parties' contract has two important consequences. First, like other contract terms (including arbitral rules), arbitral ethics would be modifiable by the parties, at least within certain limitations that will be taken up later.<sup>378</sup> Parties will have an opportunity to modify the default ethical norms either at the time the underlying contract is drafted or, as often happens with procedural rules, early in the arbitral proceedings. This approach preserves the goal of party autonomy, which would be lost if arbitral rules were set in treaty form, while also assuring continued neutrality (by getting the parties playing by the same rules) and effectiveness (by providing guidance and measurement functions). This power to modify is necessary if ethical norms are to provide meaningful guidance when parties can contractually modify the procedural arrangements that affect the application of ethical norms.

The other important consequence of making ethical rules part of the parties' contract, is that, like the terms of the arbitration agreement, ethical rules will become separate

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most efforts to develop more standardized rules of procedural and evidence for international arbitration have intentionally eschewed the treaty as an implementing device.

<sup>377</sup> See Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 631 (1989). For example, a typical arbitration clause choosing ICC arbitration would state "The parties agree that any dispute arising out of on in connection with this agreement shall be settled by binding arbitration according to the Rules of the International Chamber of Commerce."

<sup>378</sup> For a discussion of the limitations on the parties' power to modify, see *infra* section III.B.1.

contractual obligations, breach of which can give rise to separate claims for liability.<sup>379</sup> This contractual nature of arbitral ethical rules will suggest mechanisms for enforcement that treat breaches similar to other violations of the arbitration agreement.

### **3. Arbitrators as Enforcers**

Another necessary innovation required for effective regulation of attorneys in international arbitration is that arbitrators must be empowered to impose sanctions for misconduct that occurs during the proceedings. This sub-section will address the need for such a power, leaving for the latter section of this Part discussion of the potential opposition to such a power.

In comparison to national bar associations, arbitrators have superior institutional competence to act as the first line of enforcement. Like their judicial counterparts, arbitrators enjoy certain “information advantages” because of their direct role in the arbitral process.<sup>380</sup> During the ordinary course of proceedings, arbitrators have an opportunity to observe and evaluate an attorney’s conduct in context.<sup>381</sup> Moreover, arbitrators have a stake in the integrity of the process. Arbitrators develop reputations in part based on their ability to control proceedings and render fair and expedient results. These reputations will affect whether arbitrators are selected to serve on future panels, which means arbitrators have a strong incentive

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<sup>379</sup> It has been suggested that “the agreement to arbitrate is, in effect, an agreement to comply with the arbitrator’s decision whether or not the arbitrator applies the law.” See Ware, *Privatizing Law through Arbitration*, *supra* note 187, at 711. This is something of an overstatement in that there is no claim or cause of action for failure to “comply” with an arbitrator’s award, although arguable there is one for breach of the arbitral agreement. If the parties agreed that to abide by an arbitral award, the agreement would be more akin to a “confession of judgment” than an arbitration agreement.

<sup>380</sup> See Wilkins, *Who Should Regulate Lawyers*, *supra* note 78, at 835 (describing the benefits of having disciplinary mechanisms integrated in the areas in which lawyers work).

<sup>381</sup> See *id.*

to protect the integrity of proceedings against attorney misconduct.<sup>382</sup>

There are also practical considerations. National bar associations may be a viable recourse for clients of a misbehaving attorney, but in an adjudicatory context, the most probable victim of misconduct is the opposing party and its counsel.<sup>383</sup> Even in domestic settings, it is rare that opposing parties lodge complaints with bar authorities, in part because of the virtually non-existent possibility of recovering compensation for their efforts.<sup>384</sup> When the burden on the opposing party involves the added difficulty and expense of lodging a complaint with a foreign bar association, the potential for viable regulation is dramatically less.<sup>385</sup> On the other hand, the meaningful threat of penalties may have a deterrent effect on the behavior of attorneys.<sup>386</sup>

In addition to the institutional advantages they have over national bar associations, arbitrators are also superior to national courts. If national courts were the first-line regulators against misconduct, there is the risk that ethical regulation could interfere with the international arbitration's neutrality, which derives from its isolation from national courts.<sup>387</sup>

There are essentially two ways national courts could become involved. Either the national courts

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<sup>382</sup> It must be acknowledged that the incentives may also operate in the reverse, with arbitrators avoiding sanctioning counsel they think might be likely to bring future business their way. Because international arbitrations most often match two large international companies, this potential counter-incentive is less likely to be a problem in the international setting than in domestic arbitration, which often pits individual plaintiffs against large companies. Indeed, in domestic arbitration, the need for a sanction power for arbitrators is less compelling and it may only enhance the already perverted incentive structure encountered by plaintiffs arbitrating against repeat players.

<sup>383</sup> See Wilkins, *Who Should Regulate Lawyers*, *supra* note 78, at 835-43.

<sup>384</sup> In the U.S., bar associates “rarely impose fines that compensate complainants.” Deborah L. Rhode, *Institutionalizing Ethics*, CASE W. L. REV. 665, 705 (1994).

<sup>385</sup> For a respectable dissenting opinion, see Abel, *Transnational Law Practice*, *supra* note 63, at 762-63 (1994) (arguing that victims of misconduct are capable of seeking out bar review boards even in foreign countries).

<sup>386</sup> In this way, ethical duties in international commercial arbitration are like other duties in international law. See Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, in INTERNATIONAL LAW ESSAYS 355, 377 (Myres S. McDougal & W. Michael Reisman eds., 1981) (question is whether duty “is viewed as authoritative by those to whom it is addressed and . . . its audience concludes that the prescriber . . . intends to and, indeed, can make it controlling.”).

<sup>387</sup> See *supra* Section I.B.1.

in the situs jurisdiction could be called on to intervene during the proceedings, as they do in some instances for provisional remedies, or the courts of the enforcement jurisdiction could consider misconduct during enforcement proceedings, as possible grounds for setting aside or refusing to enforce the arbitral award. Both of these potential choices are problematic.

With regard to courts in the situs jurisdiction, the most significant problem is the potential for delay. Apart from the problems of potential abuse, the delay and disruption could be significant. Unlike provisional remedies, which can be sought through expedited procedures and while arbitral proceedings continue, national court review of misconduct will not be as easily severed from proceedings and is less likely to benefit from expedited review.<sup>388</sup> Many questions of misconduct in the adversarial context are bound up with proceedings on the merits. Did the attorney improperly withhold information that was required to be produced? Did the attorney make a false statement to the tribunal? If arbitral tribunals must remit these questions to national courts, hold their proceedings in abeyance and then revise their findings based on those judicial determination, arbitral decision-making integrity will be undermined.

Resort to national courts of the enforcement jurisdiction would be an even more problematic choice. Such review would be partial at best and, when available, would reduce ethical enforcement to a zero-sum game. Under the New York Convention, aggrieved parties would only be able to raise challenges to the most egregious types of misconduct. In response to proof of such egregious misconduct, the only remedy national courts could offer would be refusal to enforce the award. Aside from the fact that this procedure could only redress the most extreme and egregious types of misconduct, it could also only redress misconduct by the winning

party.<sup>389</sup> In sum, national courts are neither well-suited to the task of evaluating and regulating behavior that occurred in arbitration, nor well-positioned to be effective in sanctioning misconduct. Meanwhile, arbitrators enjoy a superior institutional competence and have self-interested incentives to exercise it.

#### **4. International Attorneys as Adherents and “Moral Entrepreneurs”<sup>390</sup>**

Incorporating ethical norms into arbitral rules will make them contractually binding on the parties, but it will not make them binding on the attorneys representing the parties. The consensual jurisdiction of arbitration applies only to parties to the arbitration agreement,<sup>391</sup> not to their legally autonomous representatives. As a consequence, attorneys in international arbitration are neither bound by the ethical rules that are incorporated into the arbitral agreement, nor personally subject to any inherent sanction power of the arbitral tribunal.<sup>392</sup> This escape hatch must be closed.

The best way to achieve this goal is to require that attorneys who participate in arbitral proceedings agree to be bound personally by arbitral rules, including the ethical

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<sup>388</sup> It is possible that, consistent with their efforts to attract international arbitration, national legislatures could provide for expedited review of misconduct hearings.

<sup>389</sup> While a losing party could resist enforcement of an award based on allegations of misconduct, at the enforcement stage a winning party has no opportunity to raise allegations of misconduct except in the event that the losing party had costs and fees assessed against it. *See infra* Section III.B.2.

<sup>390</sup> The term “moral entrepreneur” is borrowed from Dezalay and Garth’s groundbreaking research into the social context of the arbitration industry. *See* DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 55, at 11.

<sup>391</sup> *See* REISMAN, *INTERNATIONAL COMMERCIAL ARBITRATION*, *supra* note 190, at 484.

<sup>392</sup> Notably, in the *Biermann* case, *supra* note 224, the court never determined whether the parties had agreed to submit the issue of attorney disqualification to arbitration, but decided instead on the grounds of public policy that such issues could not be submitted to arbitration. *See* Thomas, *Disqualifying Lawyers in Arbitrations*, *supra* note 7, at 565.

requirements.<sup>393</sup> This commitment would be contractual in nature (like the underlying arbitral agreement) and could be secured either as part of the procedures for commencing arbitration (*i.e.*, as an appendix to the Statement of Claim and Response) or during initial meetings provided for under most arbitral rules.<sup>394</sup> As part of the arbitral rules that are incorporated into a party's contract, parties would be obliged to ensure that their attorneys follow this procedure—even if that means they must replace counsel who are unwilling to undertake these obligations.<sup>395</sup>

Making attorneys subject to the proposed ethical regime will not only satisfy the obvious need to subject them ethical regulation, but will also draft attorneys into service as co-sponsors of the process of developing the ethical regime for international arbitration.<sup>396</sup> Practicing attorneys will contribute to the development of ethics when they draft arbitral agreements, when they make arguments for adopting or enforcing particular norms, and through their professional conduct in observing or not observing prevailing ethical norms.<sup>397</sup> Forcing

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<sup>393</sup> The estimable fees to be earned in arbitration will provide sufficient pressure to ensure that attorneys will agree to submit to be governed by arbitral ethical norms and the sanctioning power of arbitrators.

<sup>394</sup> For example, under the ICC Rules, after the arbitral tribunal is chosen, one of the first events prescribed by the rules is a hearing at which the parties and the arbitrators will draw up a document called the “Terms of Reference.” The Terms of Reference spell out the issues in dispute and the procedures for adjudicating those issues. *See* CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 101, at § 15.02, pp.258-59.

<sup>395</sup> Accountability to the arbitral tribunal would not seem to be objectionable since it is comparable to other adjudicatory settings, in which attorneys are subject to the power of judges and bound by the forum jurisdiction's ethical norms. For example, a U.S. attorney licensed in California who appears in a Nevada court must, after obtaining permission to appear *pro hoc vice*, must abide by Nevada ethical rules of court is liable to Nevada (and California) bar authorities for transgressions. *See* Marcia L. Proctor, *Ethics in Adversarial Practice*, 69 AM. JUR. TRIALS 411 (1999) (explaining the process for being admitted *pro hoc vice* and the jurisdiction of adjudicating courts over attorney misconduct in proceedings before them). Likewise, a French attorney appearing in a German court must abide by German ethical rules and is liable to German authorities for transgressions. *See* Terry, *Introduction to the European Community's Legal Ethics*, *supra* note 10, at 17.

<sup>396</sup> “By collectively engaging in the process of enacting and enforcing rules of professional conduct, lawyers develop and reinforce the disposition for moral decisionmaking.” Wilkins, *Who Should Regulate Lawyers*, *supra* note 78, at 862.

<sup>397</sup> Richard L. Abel & Phillip S.C. Lewis, *Putting Law Back into the Sociology of Lawyers*, in LAWYERS IN SOCIETY, VOLUME THREE, *supra* note 23 (“It hardly needs argument today that law and lawyers create [a legal] culture as well as being its creatures.”); *see also* Robert Briner, *The Role of Lawyers in ADR* 243, in GLOBAL LAW IN PRACTICE (ed. J. Ross Harper 1997) (describing how lawyers influence the progress and shape of arbitration).

them to accept a stake in the outcome of these developments will ensure the quality of their participation.

### **5. Published *Sanction Awards* as Explicators**

Arbitrators' new sanction power should be implemented through what I will call "*sanction award*." This enforcement mechanism is consistent with the notion that arbitral ethical rules will also be contractual obligations. With allegations of misconduct, arbitrators should conduct a factual investigation and permit the accused attorney an opportunity to be heard.<sup>398</sup> If the arbitral tribunal determines that a violation has occurred, the tribunal would publish the relevant findings in a reasoned *sanction award*, which imposes a fine and, if appropriate, refer the matter to the attorney's local bar association. In the event that no misconduct is found, the tribunal would publish an advisory opinion articulating the basis for the finding that no misconduct had occurred.<sup>399</sup>

Unlike conventional arbitration awards, which are generally maintained as confidential,<sup>400</sup> *sanction awards* must be published, although publication can be with the names of the parties and the attorneys expunged. Publication will serve a number of functions.<sup>401</sup> The

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<sup>398</sup> In the analogous context of Rule 11, the Advisory Committee notes suggest that the judge has considerable discretion in formulating the process to be followed, including deciding the matter on the basis of the record and the judge's own observation of the conduct of the litigation. See CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, sec. 1337.

<sup>399</sup> See *infra* notes 238-41 regarding enforcement in national courts of *sanction awards*.

<sup>400</sup> Recognizing the benefits of a developed "common law" of arbitral decisions, "UNCITRAL is calling for states to designate national correspondents who will send court and arbitral decisions interpretation relevant conventions as well as abstracts of them to the UNCITRAL Secretariat. The Secretariat will compile the abstracts and enter them into its index or reference system for the particular convention. The compiled abstracts are to be issued in a U.N. document (in the six U.N. languages) several times per year." Peter H. Pfund, *United States Participation in Transnational Lawmaking* 212, in *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau, ed., 1998).

<sup>401</sup> For an expanded discourse on the benefits of published awards in arbitration, see REISMAN, NULLITY AND REVISION, *supra* note 61, and Thomas E. Carbonneau, *Rendering Arbitration Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 *COLUMB. J. TRANSNAT'L L.* 579 (1985).

foremost purpose of publication is to interpret and refine ethical norms. Codes can only address attorney obligations in the broadest and most general terms. As in all systems, the specific content to ethical norms in international arbitration must be developed through application in specific cases.<sup>402</sup> Written arbitrator opinions will form a body of non-binding, persuasive authority, which will guide future arbitrations, provide notice to attorneys about how to conduct themselves and alert parties about the consequences of particular ethical rules.<sup>403</sup>

At a more practical level, publication is necessary for national courts to provide an oversight and review function.<sup>404</sup> There is no requirement for, and in fact there is some resistance to, publication of substantive arbitral awards. The reasons for this reluctance is to avoid tempting national courts to second guess the articulated reasoning of substantive awards.<sup>405</sup> As explained in more detail below,<sup>406</sup> national courts have a vital role to play in reviewing *sanction awards*. Reasoned awards are necessary for national courts to perform the this review function.

Finally, there is the public aspect of publication. Publicity guarantees “some form of continuous public surveillance.”<sup>407</sup> Particularly when the substantive rule making and primary enforcement are taken out of the hands of public bodies that normally administer these aspects of attorney regulation, informal public monitoring becomes more important. Even within the

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<sup>402</sup> In national contexts, rules are supplemented by commentary by bar associations and judicial opinions, which fill out the meaning of often-cryptic code language. See Schneyer, *Legal Process Scholarship*, *supra* note 238, at 39.

<sup>403</sup> See Richard Abel, *Why Does the ABA Promulgate Ethical Rules*, 59 TEX. L. REV. 639, 646 (1981).

<sup>404</sup> For a description of the role of national courts, see *infra* subsection III.A.7.

<sup>405</sup> See Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM.J. TRANSNAT'L L. 579, 602 (1985).

<sup>406</sup> See *infra* Section III.A.7.



international arbitration community, published *sanction awards* will generate dialog about the appropriate conduct for lawyers in international arbitration. “Enforcement proceedings are an important arena for debating conflicting visions of the lawyer’s role.”<sup>408</sup>

While publication is an essential feature of international arbitration’s ethical regime, a number of issues remain to be resolved. Who would undertake the task of publishing? Should all *sanction awards* be published in their entirety?<sup>409</sup> Would or should published *sanction awards* have any influence on future arbitration panels?<sup>410</sup> These and other likely questions, while potentially difficult to resolve, they are not insurmountable obstacles. Sanction awards provide a vital link between the most competent primary regulator (arbitrators), and national legal systems that have a continuing interest in how their attorneys behaving and how they are regulated.

## **6. The New York Convention as Facilitator**

*Sanction awards* will have to be made enforceable under the New York Convention. Currently, signatories to the New York Convention are obliged to recognize and enforce arbitration agreements and awards only when certain jurisdictional requirements are met.

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<sup>407</sup> REISMAN, NULLITY AND REVISION, *supra* note 61, at 124 (1971) (discussing the desirability of publishing substantive arbitral awards).

<sup>408</sup> See Wilkins, *supra* note 78, at 883; Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 420 (1987).

<sup>409</sup> See Carbonneau, *Arbitral Awards with Reasons*, *supra* note 401, at 600 (posing similar questions with respect to publication of substantive arbitral awards).

<sup>410</sup> Arbitration awards do not purport to have any precedential value in the sense that they are binding on future panels, nor could they since arbitrators’ decisions are not subject to substantive review. Moreover, any persuasive authority they may have must be discounted by the degree of party modification of default ethical norms. There have been some indications that at least some parties want the initial decision by arbitrators subject to judicial review. While, for both national legal systems and parties, national court review at the appellate level may not be desirable, it may signal a need for an appellate body to be formed for standard international commercial arbitration similar to that available for ICSID arbitration. For a description of the appellate function in ICSID arbitration, see REISMAN, SYSTEMS OF CONTROL, *supra* note 57, at 122.

Of these jurisdictional requirements, the two that are of concern here are the requirements that the dispute arise out of a “commercial” relationship and that it concern a subject matter that is “capable of settlement by arbitration” in the country where enforcement is sought.<sup>411</sup>

The fit between the “commercial relationship” prerequisite and the proposed *sanction awards* is primarily a question of interpretation. It could be argued that a “commercial” relationship requirement exists since the underlying professional relationship between an attorney and client involves a contract for compensation, even if not traditionally viewed through the lens of commerce. Moreover, the proposal (above in sub-section 3) to make attorneys subject to the new arbitral code of ethics requires that attorneys agree to be bound by the applicable code of arbitral ethics. By so agreeing, attorneys are undertaking what is essentially a contractual obligation to abide by the procedural and ethical provisions of the parties’ arbitration agreement. Notwithstanding possible arguments in favor of capturing *sanction awards* within the definition of “commercial,” some countries might be reluctant to permit arbitrators to impose sanctions are likely to adopt a more narrow interpretation<sup>412</sup> or simply to find, under the second prerequisite, that ethical conduct is not arbitrable.<sup>413</sup>

This narrow approach to arbitrability and particularly the commercial-dispute requirement is a vestige of a past era, when the range of potential claims that could arise between private business entities in a contractual relationship was narrower. Since the time it has acceded

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<sup>411</sup> See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS (1994).

<sup>412</sup> For an older example of such reluctance, even in light of a contract for exchange between two commercial entities, see *India Organic Chemicals, Ltd. v. Chemtex Fibres Inc.* (1978) All India Rep. 106 (High Ct. of Bombay 1977) (concluding that a technology transfer was not “commercial” under law of India) (cited in GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS (1994)).

to the Convention, the United States has entrusted more and more regulatory issues to private litigants to enforce.<sup>414</sup> While the same trend is still only beginning to take hold on the continent,<sup>415</sup> it seems clear that if international arbitration is to offer full adjudication of claims arising out of a particular transaction, its reach must extend to statutory and tort claims that relate to underlying commercial claims. Permitting arbitrators to issue *sanction awards* must be part of that trend. Notwithstanding the potential to interpret the New York Convention to extend to *sanction awards*, this proposal will likely require amendment to the New York Convention, both because spontaneous and consistent national support cannot be presumed and because the heightened standard for review of *sanction awards* cuts against existing standards in the New York Convention.

## **7. National Legal Systems as Legitimaters**

Unlike substantive awards on the merits, *sanction awards* should be subject to more probing oversight and review by national courts. In the context of substantive awards, national court review is limited to severe procedural defects or encroachments on the public policy of national law of the reviewing court.<sup>416</sup> The justification for this limited review is that parties in a business dispute require resolution by a neutral adjudicator and intrusive oversight by

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<sup>413</sup> The issue private arbitrators enforcing public functions will be reviewed in more detail below in section III.B.

<sup>414</sup> In fact, even though the Securities Act was adopted in the 30s, private litigation under the act became fashionable much later. The nature of so-called mandatory law in the international context is inherently different than it is in the domestic setting. In a national context, mandatory law, as its name implies, is inescapable. In the international setting, where there are competing claims to prescriptive and adjudicatory jurisdiction over particular conduct, one nation's assertion that particular law is mandatory does necessarily not make it inescapable. While national perspectives on mandatory law and its effect in arbitration will undoubtedly affect reactions to the proposals to permit arbitrators to sanction, a full discussion of issues implicated is beyond the scope of this Article.

<sup>415</sup> The most immediate example of this transition in the European Union is new reforms to European anti-trust law, which will rely much more on "private attorney general" mechanisms for enforcement.

<sup>416</sup> See *supra* note 81-83, and accompanying text.

national courts “may shift the real decision-making from the arbitral tribunal to the courts.”<sup>417</sup> In the context of *sanction awards*, however, the inquiry is into an arbitrator’s assessment of the conduct of an attorney, not the arbitrator’s assessment of the merits of the case.<sup>418</sup> Consequently, the need to insulate arbitrator decision-making from national court review at the enforcement stage is less strong.<sup>419</sup>

Conversely, in the context of *sanction awards*, the need for procedural safeguards is higher. Regulation of professional conduct through a sanctioning power may affect not only the pocketbook, but also an attorney’s occupation. Meanwhile, ethical rules will be new and, for most arbitrators, the task of evaluating misconduct and meting out of punishment will be new. National courts are therefore needed for quality control. Through monitoring the creation, interpretation and application of ethical norms, national courts will play a vital role in legitimizing arbitral ethical norms<sup>420</sup> and in providing guidance about the ultimate limits of the

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<sup>417</sup> See REISMAN, *SYSTEMS OF CONTROL*, *supra* note 57 at 113.

<sup>418</sup> This is not to deny the inter-relationship between allegations of misconduct and the merits of the case. It is easy to imagine that an allegation that one counsel induced a witness to lie would of course implicate the factual findings on which the arbitral tribunal rested its award. This potential for abuse does not weigh against a more active role for national courts. A finding of attorney misconduct of such magnitude would likely trigger national court inquiry under Article V of the New York Convention. See, e.g., *Waterside Ocean Nav. Co. v. International Nav. Ltd.*, 737 F.2d 150 (2d Cir. 1984) (confirming award notwithstanding evidence of perjured testimony based on reasoning that falsity of testimony was raised during proceedings and evaluated by arbitrators).

<sup>419</sup> The temptation, of course, will be for reviewing courts to color their analysis of misconduct at issue in *sanction awards* with their own culturally determined notions of what is proper conduct for an attorney. For example, a jurisdiction such as the United States might be reluctant to enforce a sanction award against an American attorney who sought to “prepare” a witness for upcoming testimony, even if all participants to the arbitration had agreed that such practice was impermissible. Similarly, a French court may be reluctant to enforce sanctions on a French attorney who intentionally withheld documents that would not be discoverable in a French proceeding. For an explanation of the French repulsion to U.S.-style discovery, see BORN & WESTIN, *INTERNATIONAL CIVIL LITIGATION*, *supra* note 198, at 849-52. Inevitably, international arbitral ethics must displace certain aspects of national ethical regimes. This transposition can only be successful if accepted and endorsed by national courts.

<sup>420</sup> See Carbonneau, *Arbitral Awards with Reasons*, *supra* note 59, at 601.

power to modify ethical rules.<sup>421</sup>

## **B. Anticipating the Detractors**

Having conceived of a potentially efficient and effective enforcement regime, the task now is to anticipate and answer some of the inevitable objections. Concerns over this proposed regime will likely arise because it appears to “privatize” ethical norms and professional discipline in international arbitration.<sup>422</sup> While this characterization is not entirely accurate, it raises concerns that are bound up with more profound questions about the nature of ethics, the function of arbitration and the legal process more generally. Not all objections can be answered here, but this final Section attempts to respond to the most pressing concerns.

### **1. The “Heresy” of Default Ethical Rules**

The concept of ethics is steeped in moral and normative symbolism. It is this feature that many would claim, in sacrosanct tones, distinguishes ethical rules from contract rules. Terms such as price and time of delivery can be altered by the parties, according to this argument, but ethical rules by their nature are immutable and unalterable. They protect interests that are not captured in a contractual agreement and should be treated as inviolable. Under this objection, the need for a match between procedural arrangements and ethical rules<sup>423</sup> is subordinate to the need to maintain the integrity of legal ethics.

Another, equally forceful critique is that a power to modify would give the hen

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<sup>421</sup> For further discussion about the limitations on parties’ power to modify ethical norms, *see infra* Section III.B.1.b.

<sup>422</sup> *See Ware, Privatizing Law through Arbitration, supra* note 187, at 733.

house keys to the proverbial fox.<sup>424</sup> International lawyers are the ones to be regulated, but they will also be the ones entrusted with negotiating changes to default norms and they will have an incentive to negotiate out of existence any constraints on their conduct. In its most extreme form, this objection might characterize modifiable ethical norms as a means, if not a direct attempt, to circumvent and undermine national ethical norms. These objections, while understandable, lose their bite when the context of and limitations on this power to modify are understood.

#### **a) Modifiability in Context**

Despite the apparent anomaly of treating ethical rules as contract terms, it is actually common practice, at least in the United States,<sup>425</sup> where many ethical rules are already contractually modifiable default rules.<sup>426</sup> For example, Model Rule 1.7 prohibits an attorney from representing a client if the representation would be “materially limited” by the lawyer’s other interests and responsibilities, but permits the attorney and parties to contract around the prohibition.<sup>427</sup> The primary difference between the current U.S. practice and the proposal of this Article is that, under current U.S. practice, only a limited number of specified rules can be

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<sup>423</sup> For a description of the relationship between procedural arrangements and ethical norms, *see supra* Section II.A.; for an explanation of why this relationship indicates a need for modifiable norms in arbitration, *see supra* Section III.D.

<sup>424</sup> The fox-henhouse argument has been raised in opposition to self-regulation through professional bar associations and to judicial participation in the process. *See* Schneyer, *The Regulation of Lawyers*, *supra* note 110, at 41.

<sup>425</sup> Although the CCBE Code does not permit client waiver of conflicts of interest, but it has been suggested that such a consent provision is necessary and inevitable. *See* Terry, *Introduction to the European Community’s Legal Ethics*, *supra* note 10, at 1395. Even under the CCBE Code, confidential communications are subject to waiver by a client because communications to which a client consents to disclosure would not constitute a “secret.” *See id.*

<sup>426</sup> *See* WOLFRAM, *supra* note 76, at 339.

<sup>427</sup> *See* Macey & Miller, *supra* note 281, at 969.

contractually modified, such as the duty to maintain client confidences and to avoid conflicts of interest.<sup>428</sup> Under the new regime, all ethical rules would become the product of contractual agreement, though (as explained later) not modifiable in their entirety.<sup>429</sup>

Expanding the realm of ethical norms that are subject to modification is possible in international arbitration because the realm of formal contractual relationships is expanded. Under the Model Rules, only obligations that flow to the client are contractually modifiable because, in standard litigation settings, the only formal contractual relationship exists between the clients and their attorneys. There is no contractual relationship between an advocate and the opposing party, the judge or the system more generally. Consequently, there is no opportunity to contractually modify obligations that an attorney owes to these other entities. All these interests are, however, contractually linked together in an arbitration.

While the arbitration agreement is the central contract, often the only one reduced to writing and typically the only one discussed in the literature, it is not the only contract. Arbitration establishes a web of contracts between the parties, arbitral institutions, arbitrators, and, under the proposed regime, the parties' attorneys.<sup>430</sup> When a party pays money to an arbitral institution in exchange for their services in administering the arbitration, and when a party pays money (usually indirectly through an intermediary arbitral institution) to an arbitrator

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<sup>428</sup> The other major difference is that under the Model Rules, agreements must be particularized and can only be made *ex post*, meaning that a client can agree to waive a specified conflict after the facts of the particular situation are presented. Under the proposed regime, modifications would be *ex ante* and *en masse*. A client would agree to waive all conflicts up to the standard of the proposed modification, even though the precise facts giving rise to such conflicts are as yet unknown. Permitting *ex ante* waiver of some ethical rules, while a delicate subject, is already under consideration in the United States. See Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO J. LEGAL ETHICS 289 (2000).

<sup>429</sup> Limitations on the parties' ability to contractually modify the proposed ethical codes will be taken up *infra* III.B.1.

<sup>430</sup> See *supra* section III.A.4.

in exchange for decision-making services, implied-in-fact contracts arise.<sup>431</sup> With all these players implicated in contractual arrangements, it is possible to expand the range of ethical rules that can be modified through contract.

The American rules pertaining *ex parte* communication with party-appointed arbitrators, while not normally thought of in such terms, can be understood as an example of ethical norms modified (or created) by agreement.<sup>432</sup> U.S. ethical rules, even if they do not apply directly to international arbitration, prohibit communication with judges and juries in order to preserve the impartiality of the decision-maker.<sup>433</sup> The contrary rule that followed in U.S. domestic arbitration is a creature of contract—it is permissible, even if contrary to the assumptions underlying the U.S. rule, because the parties agreed to it.<sup>434</sup>

While party agreement will be a necessary requirement for modification of default rules, it will not always be a sufficient one. Ethical rules protect some interests of the international arbitration system generally and national interests that are not implicated in the web of contractual arrangements that constitute a particular arbitration. For example, even if contractually agreed to, a particular rule may do such violence to the principle of impartial decision-making that an award rendered in accordance with it is inherently unfair. Enforcing such an award would degrade the international arbitration system, even if the parties in the

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<sup>431</sup> Many systems, particularly civil law systems, explicitly acknowledge the contractual nature of the relationship between arbitrators and parties by imposing liability on arbitrators for professional and ethical breaches under a contract theory. See Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L.SCH. J. INT'L & COMP. L 1 (2000).

<sup>432</sup> See *supra* Section 2.B.2.

<sup>433</sup> See *id.*

<sup>434</sup> *Ex parte* communication with party arbitrators makes for an interesting example of an existing practice of contractually modifying ethical rules, but I am not advocating here that it be adopted for international arbitration.



arbitration were willing to accept the result.<sup>435</sup>

National legal systems continue to have an interest in attorney conduct, even though they are not directly administering international arbitration cases. In domestic litigation, national legal systems regulate attorneys in order to protect clients and third parties, and to ensure the proper functioning of the state adjudicatory apparatus. In arbitration, these regulatory interests still exist, but their dimensions are decidedly narrower. For example, there is less of a need for regulatory protection of clients in international commercial arbitration because they are, by definition, sophisticated corporate entities. They have considerable resources to invest in evaluating lawyer conduct and can demand loyalty in exchange for future business.<sup>436</sup> Third-party interests in international arbitration also require less protection. International arbitration cases involve private commercial disputes and arbitral decisions are not binding on other third parties. As a consequence, the risk is lower that attorney misconduct during an arbitration could adversely affect parties who are not directly involved in the proceedings.<sup>437</sup> Finally, national legal systems are less vulnerable to institutional damage from attorney misconduct in international commercial arbitration because under the New York Convention, the role of domestic courts in enforcing awards is minimal in comparison to their role in adjudicating cases.

Even if diminished, however, some interest in protecting clients, third parties and

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<sup>435</sup> Some argue that permitting *ex parte* communication with party arbitrators is just such a rule. See Desiree A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 765 (1995) (criticizing arbitration that permits party communication with arbitrators as incompatible with the principle that adjudicators should be impartial).

<sup>436</sup> See Wilkins, *supra* note 78, at 817-18 (describing how corporate clients have experience, access to information and resources “to devote to the task of understanding and evaluating lawyer conduct”).

<sup>437</sup> It is also worth noting that witnesses, a class of third parties often referred to as a target of ethical protections, are a less vulnerable as a group in international arbitration. Proceedings are private, which means that potential embarrassment from abusive cross-examination is less extensive, and witnesses cannot normally be compelled to testify in international commercial arbitration .

the legal order remains. The threat that corporate clients will replace irresponsible attorneys may deter prospectively, but it is neither a complete deterrent nor an adequate remedy once misconduct has occurred. Third parties may be less exposed to harm in international commercial arbitration, but—particularly with respect to opposing parties—they are not completely insulated. Finally, even if domestic courts are not responsible for direct administration of the proceedings, they can be debased if they ratify an award produced by a corrupt and unfair process.<sup>438</sup> Together, these concerns are not enough to preclude the possibility of modifiable ethical norms, but they are sufficient to raise concerns about what limitations exist on the power to modify.

#### **b) Constraints on the Power to Modify**

Attorneys' power to modify the arbitral codes will be limited by a range of interdependent constraints. Before considering those that are integrated in the international arbitration system, it should be noted that several external constraining forces.<sup>439</sup> For example, many national statutes criminalize,<sup>440</sup> or impose civil liability for,<sup>441</sup> conduct that also constitutes

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<sup>438</sup> “The authority of the arbitrator derives not only from the consent of the parties, but also from the several legal systems that support the process.” William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 649 (1989) (noting that national courts may be required to intervene at several points to assist the arbitral process). WRONG PLACE

<sup>439</sup> Notably, conduct that is not addressed in a code of arbitral ethics, such as attorney handling of client funds or attorney advertising, will remain subject to national ethical rules.

<sup>440</sup> For example, some types of conflicts of interest may constitute a criminal offence. *See* United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), (affirming conviction of lawyer for fraudulent use of mails for lawyer's conflicting and undisclosed purpose) (cited in WOLFRAM, *supra* note 76, at § 7.1.1, p. 314 & n. 6). Moreover, the federal Racketeer Influenced and Corrupt Organizations Act (RICO) can be applied if a lawyer assists clients in committing crimes. *See id.* at 698.

<sup>441</sup> *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(e) (West 1990) (prohibiting an attorney from disclosing client confidences after representation has ended). These constraints are not sufficient to obviate the need for articulated and binding norms proposed in this Article, but they do provide substantial safeguards against attorney efforts to abolish ethical constraints altogether. Malpractice claims are the other obvious area of civil liability, though standards used to evaluate whether since client ratification is an affirmative defense to legal malpractice

an ethical violation. Such conduct will continue to be prohibited under these national statutes, even if the correspondent ethical rule is modified.<sup>442</sup> In addition to formal prohibitions, less formal constraints, such as professional reputation and peer pressure, will deter over-zealous truncating of ethical obligations.<sup>443</sup> Even attorneys who might be willing to act unscrupulously are likely to hesitate displaying their indifference toward ethical rules, particularly in the delicate moments of negotiation.<sup>444</sup>

Turning to the international arbitration system and the proposed regime, there are a range of constraints on the power to modify, which together will provide adequate protection for clients, third parties and larger systemic interests. Clients are protected against injurious modifications because the power to modify ultimately rests in their hands. No alterations can be made without consent, and in the context of international commercial arbitration, that consent comes from a sophisticated international company. Opposing parties are similarly protected by a requirement of their consent. Any incentive a party may have to minimize the ethical constraints on its own attorney will be counterbalanced by the party's disincentive to bargain away constraints on opposing counsel. Consequently, the most likely victim of attorney misconduct in an advocacy setting, the opposing party, also enjoys protections inherent in the modification

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claims and ethical codes are often looked to as a source of guidance in evaluating civil liability. See WOLFRAM, *supra* note 76, at 206-26, 52.

<sup>442</sup> Under the U.S. Model Rules, attorneys are prohibited from making any material misrepresentations of fact or law to third parties, which would arguably include the arbitral tribunal. Since attorneys do not enjoy the same immunity in arbitration that they do in litigation settings, at least in the United States, it is possible that a misrepresentation to an arbitral tribunal could also give rise to a claim for fraud. While interesting to contemplate, particularly sine the *res judicata* effect of arbitral awards is dubious, such collateral claims could do serious damage to the arbitration system if they became a popular replacement for appeal.

<sup>443</sup> Cf. W. Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and the Public Order*, 12 DENV. J. INT'L L. & POL'Y 165 (1983) (describing the role of social pressure and informal regimes in regulating behavior).

process.

Even if in light of these constraining forces, it is still possible that attorneys can exceed the limits of good sense and seek to eliminate essential ethical precepts from the rules that bind them. That is where systemic controls come into play. Parties and counsel who tamper with fundamental essentials of legal ethics will risk that an award produced under their modifications will not be enforceable. Under the New York Convention, national courts can refuse to enforce arbitral awards if basic notions of fairness and justice were not observed during the arbitral proceedings,<sup>445</sup> as would be the case if fundamental ethical precepts were abrogated. Parties could not, for example, expect that an award would be enforceable if they had erased all prohibitions against misrepresenting facts to the tribunal or against bribing arbitrators. In addition to providing an actual control, the threat of unenforceability will likely deter abusive modifications.

While the specified grounds in the New York Convention for non-enforcement will permit review to ensure that attorney conduct in the arbitration comported with the most universal, basic precepts of justice and fairness, national courts will also be able to protect those aspects of ethics that are of particular importance to their national regulatory scheme. Article V contains a public policy exception, which permits national courts to refuse enforcement of awards that offend their domestic public policy.<sup>446</sup> There is a ready-made example of the line

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<sup>444</sup> Negotiation over ethical rules is most likely to occur, not in the initial drafting of the arbitration agreement, but at the commencement of arbitration when other procedural negotiations are ordinarily done.

<sup>445</sup> See Park, *Safeguarding Procedural Integrity in International Arbitration*, *supra* note 68 at 701.

<sup>446</sup> Although the public policy exception has been defined very narrowly by courts and is rarely enforced, it seems clear that arbitrations conducted in violation the enforcing nation's ethical fundamentals would call into serious question the fairness of the proceedings, as fairness is understood in that country. See THOMAS E. CARBONNEAU, *THE REMAKING OF ARBITRATION: DESIGN AND DESTINY*, IN *LEX MERCATORIA AND ARBITRATION* 10

between permissible and impermissible modifications in Model Rule 1.7. Under this rule, a party cannot consent to conflicting representation unless the lawyer reasonably believes that the party's representation will not be adversely affected.<sup>447</sup> This limitation has been interpreted to require an objective evaluation of whether there is a threat to the client's representation.<sup>448</sup> While this objective standard may not be universally considered necessary to ensure the fundamental fairness of proceedings and is likely more stringent than European standards,<sup>449</sup> it would be enforceable as U.S. public policy if U.S. courts reviewing substantive arbitral awards choose to apply it as such. In this way, the public policy exception will act as an escape hatch that will permit national courts to police modification to ensure that they do not violate the essential assumptions about attorney conduct.

While national courts will be the ultimate bastion of protection, arbitrators will also exercise a control function. Because arbitrators are always (or should always be) concerned with the effectiveness of the award,<sup>450</sup> they will use their powers to ensure that ethical

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(Thomas E. Carbonneau ed., 1990) (noting that the French Cour de Cassation “has devised a special notion of *ordre public* for international [arbitral awards]: . . . public policy is confined to due process considerations and requirements of basic procedural fairness (*le contradictoire*)”); *see also* Arnold M. Zack, *Arbitration as a Tool to Unclog Government and the Judiciary: The Due Process Protocol as an International Model*, 7 *WORLD ARB. & MEDIATION REP.* 10 (1996).

<sup>447</sup> *See* WOLFRAM, *supra* note 76, at 339. Model Rule 1.7 also requires that the consent be in writing after consultation. These requirements will ordinarily be met in the course of negotiating modifications to default rules and memorializing the agreed to modifications.

<sup>448</sup> *See* WOLFRAM, *supra* note 76, at § 7.2, p. 341.

<sup>449</sup> It has yet to be determined how the standard under the CCBE Code will be interpreted. It is plausible, however, that given the different role of civilian lawyers and more personal approach to conflicts, European standards might be satisfied with a less restrictive standard, for example as long as the attorney subjectively believes that representation will not be impaired. *See* Section I.B.4.

<sup>450</sup> *See* Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC OF POLICY IN ARBITRATION* (Pieter Sanders, ed., 1987) (suggesting that arbitrators must keep an eye toward the mandatory law of the like enforcement jurisdiction or jurisdictions to ensure that their award is enforceable); Park, *Safeguarding Procedural Integrity in International Arbitration*, *supra* note 68 (same). Article 26 of the ICC Rules expressly states that arbitrators “shall make every effort to ensure that the award is enforceable at law.” Moreover, in ICC arbitration, the International Court of

modifications do not imperil enforcement. Arbitrators generally have a great deal of discretion in managing proceedings, but this power usually yields when both parties have agreed to a particular procedural rule and would, by extension, to ethical rules. It is unclear to what extent arbitrators have the power or obligation to disregard the will of the parties in order to ensure the fairness of the arbitral proceedings.<sup>451</sup>

Even when the parties have agreed to a rule, however, arbitrators still have the power of interpretation. Faced with a general rule that appears to unacceptably undermine critical ethical precepts, arbitrators can interpret and apply the rule in a way that ensures the fundamental fairness of the proceedings.<sup>452</sup> Even in the absence of formal power, to the extent that modifications take place after proceedings have begun, arbitrators can use their powers of persuasion to urge reason to ethically reckless parties.

In sum, the lesson of the functional approach is that ethical rules can only effectively regulate attorneys if they coincide with the functional roles they have been assigned in particular arbitrations through the chosen procedures. Because procedural rules are subject to modification, the attendant ethical rules must also, with some limitations, be modifiable. The

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Arbitration (the administrative body of the ICC), is empowered under Article 21 to scrutinize awards and “draw attention” to points of substance that might interfere with enforcement of the award.

<sup>451</sup> The English 1996 Act provides a helpful example of the problem. The Act imposes on arbitrators a duty to “act fairly and impartially” and permit each party “a reasonable opportunity” both to put on its case and to respond to its opponent’s case. See Martin Hunter, *The Procedural Powers of Arbitrators Under the English 1996 Act*, 13 *Arb. Int’l* 345, 346 (1997) (citing section 33(1) of the Act). In addition, the Act imposes a duty on arbitrators to adopt procedures and exercise their powers generally in a way that “provide[s] a fair means for the resolution of the matters[.]” See *id.* These obligations appear to be in conflict with the requirement in section 34, which states that the power of the tribunal to decide procedural and evidentiary matters is “subject to the right of the parties to agree [sic] any matter.” See *id.* Some scholars suggest that this apparent tension does not create an opportunity for arbitrators to disregard the will of the parties, and is instead resolved by the ability of arbitrators to resign if an agreement of the parties conflicts with its obligations under section 33. See *id.* at 347.

potential for abuse of this power to modify will be deterred and controlled by multiple and interrelated constraints.

## **2. The “Anarchy” of Private Adjudicators Imposing Public Sanctions**

Currently, none of the major arbitral rules expressly confer on arbitrators the power to sanction for misconduct.<sup>453</sup> Analogs in the public international law arena do not offer much guidance because international tribunals have themselves only rarely addressed the issue of their own power to sanction attorney misconduct.<sup>454</sup> Perhaps as a consequence of this silence, scholars have paid little attention to the issue of whether arbitrators have such power.<sup>455</sup> A review of scholarship in this area reveals only a few stray conclusory remarks, with no little or no explanation or analysis for the origin of such power.<sup>456</sup> No authoritative scholarly work has

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<sup>452</sup> In doing so, arbitrators would not be disregarding the parties’ intentions, so much as interpreting those intentions at a higher level of abstraction. Premier among the parties’ intentions in selecting arbitration is to choose an effective means for resolving their dispute.

<sup>453</sup> The only partial exception appears to be the recently promulgated arbitral rules developed by the Center for Public Resources (“CPR”). Designed to provide an alternative to the popular UNCITRAL rules for *ad hoc* arbitration, arbitrators are authorized under the CPR rules to “impose any remedy it deems just, including an award on default, wherever a party materially fails to comply with the rules”. See Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 8 AM. REV. INT’L ARB. 275 (1997). Notably, the power contemplated by the CPR rules seems to extend only over the parties, not their attorneys.

<sup>454</sup> The sanctioning power of international tribunals has only recently been raised in the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations in the Territory of the Former Yugoslavia. See *Prosecutor v. Dusko Tadic*, <http://www.un.org/icty/tadic/appeal/judgement/vuj-aj000131e.htm> (January 31, 2000) (finding a counsel in contempt for inducing perjury by witnesses). Interestingly, the ITCFY is one of the only international bodies to draft and implement a code of ethics. See Code of Professional Conduct for Defence Counsel, published at <http://www.un.org/icty/basic/counsel/IT125.htm>. The International Court of Justice has only criticized counsel on two occasions, and has apparently never attempted to impose any sort of sanction on counsel. See Vagts, *The International Legal Profession*, *supra* note 8, at 260.

<sup>455</sup> The lack of attention to the power of arbitrators to sanction is inevitably related to the larger reasons why little attention has been paid to the lack of ethical regulation in international arbitration. As noted above, this neglect is likely attributable both to the fact that until recently the arbitration was informally regulated by social controls. See *supra* Section I.A.1.

<sup>456</sup> See, e.g., Thomas E. Carbonneau, *National Law and the “Judicialization” of Arbitration: Manifest Destiny, Manifest Disregard or Manifest Error* 129, in INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY” (Richard B. Lillich & Charles N. Brower, eds. 1993) (suggesting that arbitrators possess the inherent “authority to sanction a party for refusing to cooperate in good faith with the

been done to explore whether arbitrators have the power to sanction parties and their counsel for misconduct.<sup>457</sup>

Similarly, there is no clear guidance from national precedents. The few national courts that have addressed the subject have reached discordant conclusions. In the United States, only three jurisdictions have considered whether arbitrators have the power to sanction. Of those, courts in the District of Columbia and Rhode Island decided that arbitrators do have an inherent power to sanction,<sup>458</sup> while New York courts have adamantly refused to ratify any such power.<sup>459</sup> Meanwhile a French court has held that, in their role as private judges, arbitrators have

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arbitral proceeding); See CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 101, at § 8.07 p.145 (stating bluntly that arbitrators do not have the power to hold parties in contempt). Some commentators have engaged in more reasoned consideration of the issue, but even their conclusions are tentative and incomplete. See Vagts, *The International Legal Profession*, *supra* note 8, at 253 (noting that although arbitral “[j]urisdiction over cases charging attorney misconduct in arbitration is in doubt, . . . [i]t appears that while arbitrators have no authority to suspend or disbar attorneys, they could disqualify attorneys from appearing before them and could impose sanctions for attorney misbehavior when it came to assessing the costs of the arbitration.”); Thomas, *Disqualifying Lawyers in Arbitrations*, *supra* note 7, at 577 (concluding, based on the New York Code of Professional Responsibility, that in the context of attorney disqualification, “it is clear that arbitrators *are* empowered, directly and indirectly, to regulate the conduct of lawyers”) (emphasis in original); C. Thomas Mason III, *Lawyers’ Duties of Candor Toward the Arbitral Tribunal*, 998 PLI/CORP 59, 64 (1997) (“There are sanctions and remedies available to arbitrators who conclude that counsel has misrepresented the law or, through lack of due candor, has jeopardized the fairness of the proceedings.”).

<sup>457</sup> Apparently the only article addresses a potential sanction power for arbitrators in the context of U.S. securities arbitration. See Darren C. Blum, *Punitive Power: Securities Arbitrators Need It*, 19 NOVA L. REV. 1063 (1995).

<sup>458</sup> A court of appeal in the District of Columbia held that arbitrators have authority to impose sanctions, including costs and fees, for misconduct such as discovery abuses. See *Pisciotta v. Shearson Lehman Bros, Inc.*, 629 A.2d 520 (D.C. 1993). Following the District of Columbia’s lead and arguing by analogy to statutory judicial powers, a Rhode Island court found that arbitrators possess the power to award attorneys’ fees for discovery misconduct. See *Terrace Froup v. Vermont Castings, Inc.*, 753 A.2d 350 (R.I. 2000). This decision may have more limited application because it was based on a Vermont statute that expressly permits an award of attorneys’ fees for bad-faith conduct.

<sup>459</sup> Only two New York courts have squarely addressed the issue of arbitrator power to rule on issues of ethical misconduct. See *Bidermann Indus. Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401, 570 N.Y.S.2d 33 (1991) (finding that issue of attorney disqualification involves both interpretation and application of attorney ethical codes as well as client’s right to counsel and therefore can not be left to determination of arbitrators); In the Matter of the Arbitration Between Erdheim and Selkove, 51 A.2d 705 (1976) (“[W]e find nothing in the record before us authorizing or empowering privately chosen arbitration board to censure members of the academy; and the power to censure attorneys as members of Bar is reserved to the Appellate Division of the Supreme Court in each department.”). Other cases have considered related matters, such as in which court motions for disqualification from



the responsibility of assuring party compliance with arbitral rules and the power to impose sanctions for the parties' failure to abide by the rules of international public policy.<sup>460</sup> This power arguably would include at least the fundamentals of legal ethics, which ensure basic fairness in the process. These scant precedents do little to resolve the issue, especially in light of the significant national opposition to permitting arbitrators to perform what are considered public judicial functions.

Many systems, particularly systems with a civil law tradition, prohibit arbitrators from performing functions that other systems would consider basic adjudicatory functions, such as swearing witnesses,<sup>461</sup> awarding punitive damages,<sup>462</sup> or ordering provisional remedies.<sup>463</sup>

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an arbitration should be brought and whether attorney disqualification is a matter that a generally worded arbitration agreement can be interpreted as submitting to the arbitral tribunal. *See* In the Matter of Erlanger and Erlanger, 20 N.Y.2d 778 (N.Y. Ct. App. 1967) (holding that “jurisdiction to discipline an attorney for misconduct is vested exclusively in the Appellate Division” and that motions for disqualification are matter to be resolved by court in which matter is pending, as opposed to other court); In the Matter of the Arbitration Between R3 Aerospace and Marshall of Cambridge Aerospace Ltd., 927 F.Supp. 121 (S.D.N.Y. 1996) (finding that issue of attorney disqualification from representation in arbitral proceedings is not arbitrable and does not “relate” to arbitration agreement such that there was no federal jurisdiction under the New York Convention for dispute concerning disqualification of counsel in arbitration). A claim for disqualification of counsel, while bound up in ethical issues, is procedurally distinct from sanctions and many argue should be based on a different substantive standard. *See* Thomas, *Disqualifying Lawyers in Arbitrations*, *supra* note 7, at 563 (arguing that disqualification is not a remedy aimed at punishing misconduct, but rather a pragmatic effort to protect the integrity of ongoing proceedings).

<sup>460</sup> Judgment of Mar. 29, 1991, *Societe Ganz v. Societe Nationale des Chemin de Fers Tunisiens*, Cour d'appel de Paris, *Revue de L'arbitral* 478 (1991) (Fr.). (cited in Thomas E. Carbonneau & Francois Janson, *Cartesian Logic And Frontier Politics: French And American Concepts Of Arbitrability*, 2 TUL. J. INT'L & COMP. L. 193, 217 (1994) (Essay).

<sup>461</sup> In continental Europe, arbitrators are not permitted to administer oaths to testifying witnesses because it is considered a usurpation of judicial prerogatives, potentially exposing arbitrators to sanctions. *See* CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 101, at § 25.02 p.398.

<sup>462</sup> In a famous opinion on the subject, the New York Court of Appeals held that arbitrators have no power to award punitive damages, even if the parties contractually agreed to confer such power on the arbitrator. *See* *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 40 N.Y.2d 354 (1976). In strident terms, the *Garrity* court reasoned that allowing arbitrators to award punitive damages would displace the court and jury, and therefore the state, as the engine for imposing social sanction. *See id.* The court also expressed concern that in arbitration, punitive damage awards would be unreviewable and impervious to the protections provided by trial and appellate powers of remittature. *See id.* Most other states in the United States permit arbitrators to award punitive damages in commercial cases. *See, e.g.,* *Gateway Technologies v. MCI Telecommunications Corp.*, 64 F.3d 993 (5<sup>th</sup> Cir. 1995). *See* *Stipanowich supra* note 24 at 1002 n.266 (“Medieval merchant tribunals provide an ancient precedent for awards of punitive damages outside the courts of law.”) (quoting I. GROSS, SELECT CASES ON THE LAW MERCHANT

Some countries have expressly prohibited arbitrators from imposing sanctions. For example, under the Swedish Arbitration Act, arbitrators are not prohibited from making orders on penalty of a fine.<sup>464</sup> The justification for prohibitions against these activities is that they are so-called “public functions” and are therefore only properly administered by government agents. A “public function” is said to differ from a purely private matter because society has an interest in monitoring and safeguarding the performance of a public function.<sup>465</sup> In the modern international arbitration system, the distinction between public and private functions is breaking down.

The various objections raised against arbitrators exercising public functions, such as a sanction power, boil down to essentially three types of concerns. The first area of concern is about substantive results—that arbitrators often do not apply the law or are not as adept as judges at applying the law and, as a consequence, will get it wrong.<sup>466</sup> The second area of concern is procedural—that the public interests involved require the procedural protections and judicial

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102- 03 (1908)). The *Garrity* rule has since been limited by the U.S. Supreme Court decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). In that case, the Court held that for international arbitrations New York’s prohibitions against punitive damages in arbitration was preempted by the Federal Arbitration Act, which permits arbitrators to make such awards. In international arbitrations, the *Garrity* rule applies to preclude punitive awards only if the parties’ agreement invoked New York arbitration law as well as substantive law.

<sup>463</sup> See, e.g., CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 101, at § 8.07 p.145 (noting that “some countries’ laws expressly reserve the judge’s prerogatives of granting provisional relief even when the dispute is subject to arbitration”) (citing C. Reymond, “*Problèmes actuels d’arbitral commercial international*,” 1982 REVUE ÉCONOMIQUE ET SOCIALE 5)).

<sup>464</sup> See Arbitration Act of 1929 (Swed.), Art 15, ¶ 1 (reprinted in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Pieter Sanders & Albert Jan van den Berg, eds. 2000 & 2001 Supp.)).

<sup>465</sup> See Ware, *Privatizing Law through Arbitration*, *supra* note 187 (citing IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 2.6.1, at 2:37 n.1 (1994); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-64 (1978)).

<sup>466</sup> See Ware, *Privatizing Law through Arbitration*, *supra* note 401, at 733.

oversight that are lacking in arbitration.<sup>467</sup> The final area of objection is more symbolic—that punishment and enforcement of so-called mandatory law involve traditional notions of the government’s function and should therefore be reserved solely to government officials.

Of these three areas of concern, the first two are ameliorated if not completely redressed by the proposed regime. Arbitrators will be applying the ethical norms developed especially for international commercial arbitration and the conduct at issue will, by definition, have occurred during the arbitral proceedings. Consequently, arbitrators will be uniquely qualified to interpret arbitral ethical rules and uniquely positioned to evaluate whether attorney conduct comports with those rules. The second area of concern, lack of procedural safeguards, is also redressed in this proposed regime, which contemplates publication and enhanced judicial review of *sanction awards*. It is not clear whether, as a matter of U.S. constitutional law, heightened judicial review of sanction awards is necessary because of the punitive nature of sanction awards. There exists extensive scholarly debate about whether arbitration involves “state action” and thus implicates constitutional protections such as due process.<sup>468</sup> Even if

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<sup>467</sup> See Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages*, 32 AM. BUS. L.J. 583 (1995) (arguing that the Supreme Court’s decision in *Honda Motor Co. v. Oberg*, which held that due process requires appellate review of jury awards of punitive damages, also extends to arbitration); Ira P. Rothken, *Punitive Damages in Commercial Arbitration: A Due Process Analysis*, 21 GOLDEN GATE U. L. REV. 387, 404 (1991) (opposing punitive awards in arbitration because arbitrators are not restrained by the rigor of due process); *but see* Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, (1994) (arguing that under the present state actor doctrine, constitutional protections are not implicated by commercial arbitration). Although much of the debate has focused on questions of constitutional requirements, there are more fundamental jurisprudential questions about the basic desirability of enhanced procedural protections.

<sup>468</sup> See Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*, 32 AM. BUS. L.J. 583 (1995); Ira P. Rothken, *Punitive Damages in Commercial Arbitration: A Due Process Analysis*, 21 GOLDEN GATE U. L. REV. 387, 404 (1991); Jean R. Sternlight, *Rethinking The Constitutionality Of The Supreme Court’s Preference For Binding Arbitration: A Fresh Assessment Of Jury Trial, Separation Of Powers, And Due Process Concerns*, 72 TUL. L. REV. 1 (1997); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 559 (1994) (arguing that due process obligations do not apply in arbitration because it does not involve state action); Richard Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 U.C.L.A. L. Rev. 949, 997-99 (2000) (arguing that arbitration does involve state action and should therefore be

constitutional due process concerns do not require increased procedural protections when arbitration is punitive, prudential concerns do.

As proposed above, heightened review of reasoned *sanction awards* would have to be formulated as something more penetrating than the current factors in Article V of the New York Convention, but something less exacting than *de novo* review. This deferential but substantive review will allow courts to ensure that arbitral interpretations of ethical rules were reasonable and that there is some support for the factual findings. In other areas of mandatory law, such as securities regulation and antitrust, the U.S. Supreme Court has suggested (although not particularly clearly), that reluctance about submitting such claims to arbitrators is alleviated if national courts take a so-called “second look” at arbitral awards involving mandatory law claims.<sup>469</sup> Although meaning and application of the second-look doctrine remain unclear, at a minimum it suggests that arbitration of mandatory law claims are more palatable to the Supreme Court if there is heightened review by national courts over the minimal review permitted by the New York Convention. Under the proposed regime, national courts will be invited to undertake

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subject to due process requirements under a proper understanding of the state action test, and in light of the binding nature of arbitration and state court involvement in the process); Courts are similarly conflicted about whether arbitration involves state action and is therefore subject to due process requirements. Compare *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989), with *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (assuming without analysis that the due process clause applies in arbitration); rejecting the argument that either arbitration or judicial enforcement of awards implicate state action, reasoning that dispute resolution is not an “exclusive” governmental function).

<sup>469</sup> This doctrine derives from the Court’s now-famous dicta in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985), where the Court stated that in arbitrations implicating U.S. antitrust claims:

the tribunal . . . should be bound to decide that dispute in accord with the national law giving rise to the claim. . . . [I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

*Id.* at 636-37 & n.19. This language has been interpreted to suggest that in arbitration of mandatory law claims, such as antitrust, U.S. courts will take a “second look” to ensure that U.S. mandatory law has been honored. The exact meaning and application of this doctrine remains unclear.

such heightened review, which will be facilitated by the requirement that arbitrators articulate the bases for *sanction awards*.<sup>470</sup> Whereas courts can protect the system against under-enforcement when reviewing substantive arbitral awards,<sup>471</sup> courts will protect individual attorneys against over-enforcement or procedurally improper enforcement of arbitral ethical when reviewing *sanction awards*.

As for the third area of concern, symbolic concerns about contracting out the government's role in performing public functions, such concerns must be both weighed against practical needs and evaluated in light of existing powers. Any discussion about an arbitrator sanction power must acknowledge that arbitrators *will* confront misconduct and, in the normal course of controlling the proceedings before them, they *will* be impelled to redress the misconduct. Misconduct by counsel can affect the balance between the parties and ultimately the fairness of the proceedings. Ignoring misconduct or failing to rectify the advantage gained by an advocate through improper conduct taints the proceedings before the tribunal. If left unchecked, perceived unfairness will erode confidence in the international commercial arbitration system. Ethical regulation must become more formal and explicit in order to serve the needs of the modern international arbitration community.

It also has to be acknowledged that arbitrators already have substantial powers that, as a practical matter, can be (and probably already are) used to as the functional equivalent

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<sup>470</sup> The fact that arbitration “may occur in complete secrecy” has been cited as one of the reasons why matters of public policy, such as mandatory statutory claims, should not be subject to arbitration. *See generally*, Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453 (1999); *see also* William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 629, 630 (1986) (calling for greater transparency in the arbitral process and more uniform rules of procedure and publication of awards as means of increase the legitimacy and lawfulness of international commercial arbitration).

<sup>471</sup> *See supra* Section III.B.1.

to a sanction power. Under virtually all international arbitral rules, arbitrators can award costs and fees, either under a “loser pays” theory or under a more equitable analysis that includes an assessment of whether one party inappropriately increased the cost of arbitration.<sup>472</sup> Arbitrators generally have the power to formulate procedural rules,<sup>473</sup> which might be presumed to include the power to enforce those rules.<sup>474</sup> Not coincidentally, awards of costs and fees are the primary means by which U.S. judges regulate misconduct, punishing transgressors and compensating victims in the United States court proceedings.

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<sup>472</sup> See, e.g., *International Arbitration Rules of the Zurich Chamber of Commerce*, Art. 56, reprinted in 1 ARB. MAT’L 215, 225 (1989) (providing that the “costs of the proceedings are, as a rule, borne by the losing party” but allowing the tribunal “for special reasons” to “depart from this rule, especially if the proceeding became without object or if a party caused unnecessary costs”) General Arbitration Law (Peru), embodied in Law No. 26572, Arts. 52 & 89 (providing that, unless otherwise provided in the agreement, arbitrators may determine costs and fees in accordance with the terms of their award); see also John Yukio Gotanda, *Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations*, 21 MICH. J. INT’L L. 1 (1999) (noting that an overwhelming number of countries permit arbitrators to award costs and fees, which often run into the millions of dollars). As several scholars have explained, fee-shifting operates as a means of regulating attorneys. See Schneyer, *The Regulation of Lawyers*, *supra* note 110, at 35; WOLFRAM, *supra* note 76, at 929-30.

<sup>473</sup> See Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT’L L. 9, 23-24 (1986); William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647 (1989) (citing Nicklisch, *Agreement to Arbitrate to Fill Contractual Gaps*, 5 J. INT’L ARB. (1988)).

<sup>474</sup> The Paris Court of Appeal in *Societe Ganz v. Societe Nationale des Chemin de Fers Tunisiens*, ruled that arbitrators have not only the authority but also the jurisdictional right to apply the rules of international public policy. Judgment of Mar. 29, 1991, *Societe Ganz v. Societe Nationale des Chemin de Fers Tunisiens*, Cour d’appel de Paris, *Revue de L’arbitral* 478 (1991) (Fr.). (cited in Thomas E. Carbonneau & Francois Janson, *Cartesian Logic And Frontier Politics: French And American Concepts Of Arbitrability*, 2 TUL. J. INT’L & COMP. L. 193, 217 (1994) (Essay)). A few U.S. courts have reached similar results, again with little explanation. See Forsythe Int’l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1023 n. 8 (5th Cir.1990) (“Arbitrators may ... devise appropriate sanctions for abuse of the arbitration process.”); Bigge Crane & Rigging Co. v. Docutel Corp., 371 F.Supp. 240, 246 (E.D.N.Y.1973) (“[A]rbitrators ... may be able to devise sanctions if they find that [a party] has impeded or complicated their task by refusing to cooperate in pretrial disclosure of relevant matters”). Similarly, the ICTFY has assumed, since its inception, the power to sanction attorneys for misconduct:

A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction. That is not to say that the Tribunal’s powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community.

See Prosecutor v. Dusko Tadic, 31 Jan. 2000, <http://www.un.org/icty/tadic/appeal/judgement/vuj-aj000131e.htm>.

Another analogy that is useful to understanding what is really stake in granting a sanction power is that arbitrators already undoubtedly have the power to issue a default award when a party or their counsel refuse to submit to arbitral jurisdiction or participate in an arbitration. A default award is a means for proceeding in the absence of a party, but can also be viewed as a sanction for refusing to participate in an adjudication.<sup>475</sup> When arbitral rules become incorporated by reference into the parties' agreement, parties are contractually obligated to abide by the arbitral rules.<sup>476</sup> Failure to abide by arbitral rules, like failure to abide by any other contractual obligation, could give rise to a claim for damages for breach, even if parties rarely assert such claims.<sup>477</sup> Because a claim alleging misconduct by an attorney would arise out of the arbitration agreement, under most arbitration clauses arbitrators would have jurisdiction to adjudicate the claim.

The debate over an arbitrator sanction power is, therefore, not so much about whether to endow them with a new power as it is about whether to acknowledge and validate their use of existing powers. In the context of domestic arbitration there might be less to recommend acquiescing to private regulation of attorney conduct, since local bar associations provide a ready alternative for regulating attorneys. In the international context, however, the unique need for a politically neutral forum and the unique absence of any alternative means of regulation may warrant that states reconsider their historic reluctance based on these symbolic

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<sup>475</sup> See *Bitzko v. Gamache*, 168 A.D. 888 (1990).

<sup>476</sup> See *supra* note 377.

<sup>477</sup> From my practical experience, the only such claims I saw were allegations that a party had failed to engage in good faith negotiations, as required by the agreement as a predicate to commencing arbitration. Since it is nearly impossible to assess whether a party engaged in settlement negotiations in "good faith" such allegations were used more as an attempt to disparage the opponent than as an assertion of a substantive claim. The most likely reason why there are no reported cases alleging breach of an arbitration agreement is that default awards and awards of costs and fees usually satisfy harm done by recalcitrant parties.

concerns. Given the recent strides in national arbitration legislation, particularly in the area of resolving cultural differences,<sup>478</sup> it seems plausible that national reluctance toward arbitrator exercise of public functions can be similarly overcome.

### **3. The “Tumult” Caused by Overlapping Ethical Norms**

One final area of concern that will need to be worked through is determining the perimeters of arbitration ethics and arbitrators’ sanction power in relation to national ethical rules. The lifespan of an individual case typically involves pre-dispute representation and appearances in national courts,<sup>479</sup> as well as participation in arbitral proceedings. When precisely will the proposed “arbitral ethics” apply and how will their conflicts with national ethical regimes be resolved?<sup>480</sup> Contributing to this problem, it is likely that misconduct in a case could be discovered after the close of arbitral proceedings. Is it better to reconvene the arbitral tribunal, or leave national courts (or bar associations) with the task of investigating party conduct during past arbitral proceedings? Although these may be difficult questions to resolve, they are not unlike the problems that are present in any cross-jurisdictional practice.

Whenever attorneys appear in a jurisdiction other than the one they are licensed in, they are ethically obliged to investigate and abide by the ethical regulations of the new jurisdiction. At a more general level, professionals are often required to adopt different

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<sup>478</sup> See Pieter Sanders, *Quo Vadis Arbitration?: Sixty Years of Practice—A Comparative Study* 24 (1999).

<sup>479</sup> Even before the enforcement stage, parties to an arbitration often end up in court for a number of reasons, including challenges to the validity of an arbitration clause, challenges to the arbitrability of a dispute, requests for interim relief, requests for assistance in procuring discovery, and appeals of interim awards. See Henry P. DeVries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, at 47 n.21. (1982).

<sup>480</sup> This problem is complicated by the possibility that parties can modify the ethical rules at some point after they are binding on the attorneys.



standards of behavior in different contexts or when performing different functions.<sup>481</sup> Attorneys may be initially reluctant to act in ways that are permissible in international arbitration but are prohibited in their home jurisdictions. For example, it has been observed that arbitrators who hail from jurisdictions in which it is impermissible for arbitrators to administer an oath are reluctant to put witnesses under oath, even if the arbitration is being conducted in a place where local law authorizes arbitrators to administer oaths.<sup>482</sup> Similarly, attorneys hailing from civil law jurisdictions may be reluctant to talk to witnesses before they take the stand, even if they know the opposing counsel is. The difficulty in shifting roles may be understandable, particularly for those lawyers who only occasionally dabble with international matters. For those whose role as international advocate or arbitrator is a primary occupation, however, an understanding of the shifting of their roles in different contexts and an ability to comply with international ethical norms must be part of what defines their professional competence.<sup>483</sup>

#### **IV. Conclusion**

Arbitration is a highly effective and popular form of international dispute resolution, but it is also a rather fragile one. The functioning of the entire system depends on party confidence (to select arbitration) and national court accreditation (to enforce arbitration agreements and awards). With expanding global markets, law is an ever more important tool for

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<sup>481</sup> See Carrie Menkel-Meadow, *Ethics in Mediation Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3 (discussing whether a different set of ethical rules for lawyers involved in the mediation context is necessary and desirable).

<sup>482</sup> See CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, *supra* note 101, at § 25.2, p.398.

<sup>483</sup> See Goebel, *supra* note 17, at 448 (“The lawyer in international transactions is . . . an interpreter of systems and habits of thought with a responsibility for bridging the gulf of disparate national experiences, traditions, institutions, and customs.”) (quoting Ball, *The Lawyer’s Role in International Transactions*, 11 Record of A. of Bar of City of N.Y. 61 (Feb. 1956); Michael J. Malony & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: “Where Angels Fear to Tread”*, 36 S. TEX. L. REV. 933 (1995) (describing how in international litigation a lawyer’s duties to the client are more demanding because of added complexities in

mediating trade when parties lack common culture.<sup>484</sup> Even when they belong to different national professions, lawyers share a common professional culture and can make vital contributions to the development of international dispute resolution through, among other things, the development of an international ethical regime.<sup>485</sup>

Invariably, adherence to an international, “private” code of ethics will meet with some resistance, much like arbitration itself confronted as it sought to establish itself as a form of “private justice.”<sup>486</sup> National courts eventually agreed to let parties privately settle their contract disputes through arbitration. They may be more reluctant, however, to relegate to the private realm a subject that is so encrusted with moral connotation, it is believed to enshrine the very dignity of the law.<sup>487</sup> But with international trade increasing, and no viable alternatives for attorney regulation available, that reluctance must be overcome. Arguably, the “principle challenge” facing international commercial arbitration is promoting predictability in the conduct and administration of arbitral proceedings.<sup>488</sup> Without articulated, enforceable ethical norms,

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everything from accepting referrals, to setting a fee, to competent understanding of foreign law, to communicating with foreign clients to issues regarding consent and payment logistics for settlement.).

<sup>484</sup> See Richard L. Abel & Phillip S.C. Lewis, *Putting Law Back into the Sociology of Lawyers*, in *LAWYERS IN SOCIETY, VOLUME THREE*, *supra* note 23.

<sup>485</sup> See *id.* The value of contributions to the methodologies of international adjudication is increasing because the number of international courts and tribunals has increased dramatically over the past several years. The New York University Journal of International Law and Politics dedicated an entire symposium issue to the subject. See, e.g., Benedict Kingsbury, *Foreward: Is the Proliferation of International Courts and Tribunals a Systematic Problem?*, 31 N.Y.U.J. INT’L L. & POL. 679 (1999).

<sup>486</sup> For a description of the historical hostility toward arbitration, see *supra* notes 32-37, and accompanying text.

<sup>487</sup> See H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel’s Idea*, 123 U. PA. L. REV. 1067, 1067 (1975).

<sup>488</sup> See MARTIN DOMKE, *COMMERCIAL ARBITRATION* 14 (1965) (cited in Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 458 & n.22 (1999)). Admittedly, this predilection for predictability and codification may be more appealing to Western interests. See Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 458 & n.22 (1999) (arguing that the goal of legal predictability is not shared in Asia and much of the developing world).

this goal cannot be attained.<sup>489</sup>

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<sup>489</sup> See *infra* Part II.C. for an analysis of why methodologies for developing ethical norms cannot produce a code that will accommodate the special needs of international commercial arbitration.