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# Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration

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# FIT AND FUNCTION IN LEGAL ETHICS: DEVELOPING A CODE OF CONDUCT FOR INTERNATIONAL ARBITRATION

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International 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.[1] The extraterritorial effect of national ethical codes is usually murky, as is the application of national ethical rules in a nonjudicial forum such as arbitration.[2] There is no supranational authority to oversee attorney conduct in this setting,[3] and local bar associations rarely if ever extend their reach so far.[4] Arbitral tribunals have no legitimate power to sanction attorneys,[5] and specialized ethical norms[6] for attorneys in

1. *See* William W. Park, Review Article, *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, 334–35 (1998) (reviewing caselaw that affirms ability to represent clients in arbitrations in foreign jurisdictions where counsel is not licensed).

2. *See infra* notes 69–74 and accompanying text.

3. 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 noncompliance. *See infra* notes 261–64 and accompanying text.

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

5. Although the matter remains open to debate, the current consensus is that arbitrators do not have the power to impose sanctions on parties or counsel appearing before them. For an in-depth discussion of the debate, and a proposal to empower arbitrators to sanction parties, see Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. (forthcoming 2002).

6. 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

international arbitration are nowhere recorded.[7] Where ethical regulation should be, there is only an abyss. I propose in this and a companion article how that ethical void can be filled.

In this Article, I develop a methodology for prescribing the normative content of a code of ethics for international arbitration,[8] and in a forthcoming companion article, I propose integrated mechanisms for making those norms both binding and enforceable.[9] In making these proposals, I reject the classical conception of legal ethics as a purely deontological product derived from first principles.[10] I argue, instead,

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Procedure 11), other legal rules (criminal and malpractice), as well as customary norms that define lawyers' ethical behavior. *See* Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 205 (1997). This broad approach is necessary for accurate comparison. 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 C. 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, 1154 & n.184 (1999). 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 the term "ethics" is bound up in the thesis of this Article. *See infra* Section A.1.

7. As discussed elsewhere in this Article, there are some sources for ethical guidance in international cross-border practice, *see infra* notes 62–65, but those sources are limited in scope and utility when applied to 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 a significant amount of attention" from either scholars or regulators).

8. International 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. 79, 95 n.83 (2000) (arguing that, as a highly competitive business, international commercial arbitration is a valuable source for evaluating commercial norms). While this Article develops a methodology for application to the particular context of ethics in international arbitration, the methodology, particularly its reliance on comparative testing, holds more general insights about methods of international law making.

9. *See* Rogers, *supra* note 5.

10. *See, e.g.*, Edward J. Eberle, *Toward Moral Responsibility in Lawyering: Further Thoughts on the Deontological Model of Legal Ethics*, 64 ST. JOHN'S L. REV. 1 (1989) (explaining the deontological roots of legal ethics); Alan Strudler, *Belief and Betrayal: Confidentiality in Criminal Defense Practice*, 69 U. CIN. L. REV. 245 (2000) (describing and rejecting the Dominant View of confidentiality in the criminal context based on deontological moral basis of confidentiality rights). The relationship between legal ethics and deontology is demonstrated by the use in many civil law systems of the Greek root for "deontology" to describe "legal ethics." *See* Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 678 (2000) (citing the French term "*deontologie*").

that ethics derive from the interrelational functional role of advocates in an adjudicatory system, and that ethical regulation must correlate with the structural operations of the system. The fit between ethics and function, I will demonstrate, not only illuminates at a descriptive level the reasons why the different nations of the world have adopted different ethical regimes; it also guides at a prescriptive level for developing new ethics for other systems,[11] such as international arbitration.[12]

This Article begins in Part I by exposing the alarming absence of any ethical regulation in international arbitration. When the international legal profession and the international arbitration community were small, implicit understandings and informal peer pressure effectively substituted for formal regulation. With the recent expansion of the international professional and arbitration communities, however, informal regulation has proven inadequate. The deep divergences between national ethical obligations are manifesting themselves in disruptive collisions. A German attorney could be criminally punished for communicating with a witness before a hearing, while an American attorney would be ethically compelled to engage in the same manner of pre-testimonial communication.[13] A Brazilian attorney may be ethically compelled to disclose to the tribunal information that an American attorney is ethically compelled to maintain as confidential. An American attorney may be ethically impelled to present a creative and unorthodox

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11. My focus is international arbitration, but the methodology of this Article can be used in a range of other international adjudicatory contexts that are similarly in need of guidance in developing international ethical rules. *See* Daly, *supra* note 6, at 1154 & 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) (describing problems in Iran Claims Tribunal caused by lack of ethical consensus among attorneys).

12. 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, 793 (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, its own legal system, or multiple legal systems. To avoid confusion with this debate, I use the term "system," rather than "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* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 6 (1992).

13. For a more detailed description of these contrasting rules, see *infra* notes 84–87 and accompanying text.

construction of the law that an Algerian attorney could be castigated, if not punished, for making.[14]

As a result of these and other conflicts, Michael Reisman recognized long ago that international attorneys must be regulated at an international level.[15] As the number of international lawyers has multiplied, scholars and practitioners have increasingly echoed Professor Reisman's call for an international code of ethics.[16] Despite the significant outcry, however, proposed solutions have been both rare and incomplete,[17] particularly with respect to international arbitration.[18] As a result, international

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14. For a discussion of the different limitations on attorneys' arguments, see *infra* notes 90–92 and accompanying text.

15. *See* W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 116–17 (1971).

16. *See, e.g.*, Vagts, *supra* note 11, at 250; Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, 8 GEO. J. LEGAL ETHICS 439, 451–52 (1995); Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 29 (1986); John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673, 685 (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 ARB. 219, 220 (1987) (concluding that the world of commercial arbitration is no longer a club of gentlemen, but one that needs explicit guidelines for conduct).

17. *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, 1384 (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, 282 (1992) ("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., 1995). 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*, 18 DICKINSON J. INT'L L. 1 (1999). One of the only truly prescriptive pieces in this area is by Professor Richard Abel, whose earlier works on the sociology of lawyers will undoubtedly aid in all future discussion in this area. *See* Richard L. 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).

18. The limited scholarly work that has been done aims primarily at promoting awareness of the problem and the sole legislative effort focused exclusively on the distinct but related problems facing cross-border practice within the limited geographic area of the European Union. *See infra* notes 131–39 and accompanying text (regarding the European code of ethics). There is only one brief article addressing attorney ethics in international arbitration, which aims more at raising questions than resolving them, and a few essays addressing particular problems. *See* Mark P. Zimmett, *Ethics in International Commercial Litigation and*

attorneys remain subject to often conflicting professional obligations.[19] In the context of international arbitration, if attorneys for different parties abide by different ethical obligations, disruption is inevitable. A code[20] is needed to get all participants playing by the same rules, and to guide and measure attorney conduct in arbitral proceedings.

Having established the need for a code of ethics for international arbitration, Part II turns to the methodology for developing the normative 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, demonstrating that professional ethical norms are designed to fit the functional role served by the advocate-lawyer in relation to other actors within a particular legal system.[21] 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.[22] National

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*Arbitration*, *in* LITIGATION AND ADMINISTRATIVE PRACTICE COURSE SERIES HANDBOOK NO. 626, at 361 (Practicing Law Institute 2000); Nicolas C. Ulmer, *Ethics and Effectiveness: Doing Well by Doing Good*, *in* THE COMMERCIAL WAY TO JUSTICE: THE 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE OF ARBITRATORS 167, 171 & n.8 (Geoffrey M. Beresford Hartwell ed., 1997) [hereinafter THE COMMERCIAL WAY TO JUSTICE]; 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 147, 161 (Stefan N. Frommel & Barry A.K. Rider eds., 1999) [hereinafter CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION]. *Cf.* Thomas, *supra* note 7 (addressing related procedural issues of attorney disqualification in arbitration proceedings, but expressly 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 UMKC L. REV. 93 (1998); Tom Arnold, *The Unacceptable Common Partiality of "Neutral" Party Appointed Arbitrators*, *in* THE COMMERCIAL WAY TO JUSTICE, *supra*, at 151–66. My purpose in this Article is primarily to address attorney ethics, not arbitrator ethics. Inevitably, however, some of the issues overlap (such as the issue of *ex parte* contact), and the methodology proposed in this Article will aid in addressing remaining problems of arbitrator ethics. *See infra* notes 234–35 and accompanying text.

19. *See* Vagts, *supra* note 10, at 677–78 (noting the increasing problems because attorneys are subject to "different bar authorities [which] lay down quite different rules within their jurisdictions").

20. Because the thesis of my companion article 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.

21. In reality, even within one system, lawyers act in many different roles, and consequently will face unique ethical problems in relation to these roles. *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).

22. 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

ethical regimes impose on lawyers professional obligations that promote and prescribe conduct consistent with the functions those systems have assigned to advocates.[23]

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 expose the inability of possible approaches—from a *Law-and-Economics* efficiency-based approach, to a choice-of-laws approach—to work successfully in developing 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 interrelational roles assigned to the actors in that system.[24]

Based on these observations, I argue that the content of norms for international arbitration must be developed—not from national norms or abstract ideas about the purpose of ethical norms—but from the defining features of international arbitration and the role of the advocate in that setting. In Part III, I use the *functional approach* to recommend ethical norms for international arbitration based on the most typical procedural arrangements used in modern international arbitration. In practice, however, international arbitration is not a monolithic institution, but instead a type of dispute resolution that is administered by a range of different

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arbitration tribunals. Such a code can be narrower in scope than a code governing all cross-border practice, because it need not address certain areas of ethical regulation that are not directly implicated in advocacy in this setting. Moreover, because international arbitration is detached from national settings, its code of ethics need not address certain other issues that can remain subject to national or cross-border regulation, such as attorney advertising, maintenance of client funds and contingency fees. The code I propose will regulate attorneys' participation in arbitral proceedings, but must be coordinated with national regulation in other areas of professional responsibility. For further discussion on this point, see Rogers, *supra* note 5, at Section III.C.

23. *See* Philip S.C. Lewis, *Comparison and Change in the Study of Legal Professions*, *in* LAWYERS IN SOCIETY, VOLUME THREE: COMPARATIVE THEORIES 27, 32 (Richard L. Abel & Philip S.C. Lewis eds., 1989) [hereinafter LAWYERS IN SOCIETY, VOLUME THREE] ("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, 994 (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).

24. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 840 (1984) ("Procedure is a mechanism for expressing political and social relationships . . . .").

arbitral institutions.[25] In these various institutions, the interrelational roles assigned to attorneys, parties, and arbitrators, can vary dramatically from the standard format I use to explicate arbitral ethical norms. I argue in my companion article that these variations in the nature of international arbitration institutions will require adjustments in the ethical rules that will govern attorney conduct in various proceedings,[26] and I explore in the final Section of Part III some variations in ethical rules that will be necessary to adapt them to the needs of particular institutions.

## I. THE NEED FOR ENFORCEABLE ETHICAL NORMS IN INTERNATIONAL ARBITRATION

The primacy and legitimacy of arbitration as a forum for international disputes is a relatively recent phenomenon. Despite its ancient history,[27] through the mid-nineteenth century in Europe and the United States arbitration was regarded as a "bastard remedy" and arbitrators as

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25. "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* Park, *supra* note 1, at 631 (elaborating on the theory advanced in RENÉ DAVID, L'ARBITRAGE 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 Court likes to describe it, as an alternative adjudicatory forum? *Compare* Allen Rau, *Arbitration as Contract: One More Word About* First Options v. Kaplan, MEALEY'S INT'L ARB. REP. No. 12-3, at 21 (1997) (arguing that arbitration is "above all a matter of private ordering"); *with* Thomas E. Carbonneau, *Le Tournoi of Academic Commentary on Kaplan: A Reply to Professor Rau*, MEALEY'S INT'L ARB. REP. No. 12-4, at 35 (1997) (rejecting the private ordering notion of arbitration in favor of an approach that recognizes the public interest in adjudication). Putting aside the theoretical differences about the nature of arbitration, there are also often dramatic differences in how arbitration is administered. *See infra* Section III.B.

26. *See* Rogers, *supra* note 5.

27. "[P]rivate dispute resolution among commercial men is as old as commerce itself." W. Lawrence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 5 (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.U. L. REV. 954, 954 n.3 (1986) (citing FRANCES 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"); WILL 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 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, *supra*, at 2–11 (tracing the important milestones in the development of modern international arbitration).

"caricatures of their judicial siblings."[28] Prior to the twentieth century arbitration agreements were routinely voided[29] and arbitral awards were subject to intense judicial scrutiny, sometimes even rewriting.[30] Only by virtue of domestic courts' respect for principles of international comity were arbitral awards enforced at all.[31]

Today, the scene has changed. International arbitration holds an exalted status[32] and is commonly revered as vital to world trade.[33] The importance and success of this system can hardly be overstated. Arbitration is considered the "normal" way to resolve international business disputes, and virtually all international agreements contain arbitration clauses.[34] Any nation interested in participating in the global economy

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28. *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).

29. Throughout the nineteenth century, courts in the United States and England frequently invoked the doctrine of "ouster" to void contractual arbitration clauses which they viewed "as unlawful circumventions of judicial jurisdiction and as denials of judicial justice." Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 462 (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?*, 10 N.Y. INT'L L. REV. 29, 32 n.13 (1997).

30. For example, in England, courts were permitted to and routinely did revise legal determinations made by arbitrators. *See* Thomas E. Carbonneau, *supra* note 28, at 1948.

31. *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).

32. *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 (10th 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 (8th 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.").

33. 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* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

34. *See* KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 n.62 (1993) (citing ALBERT JAN VAN DEN BERG ET AL., ARITRAGERECHT 134 (1988) (estimating that 90% of all international agreements contain arbitration clauses)).

must adjust its laws to accommodate the demands of international arbitration.[35] International arbitration has transformed itself from a "bastard remedy" into the crown prince of international dispute resolution. In its new status, international arbitration needs articulated ethical norms to guide and regulate participating attorneys.

The transformation of the international arbitration system and the related expansion in the ranks of international lawyers, both of which are described in greater detail in Section A, provide the backdrop against which the vast divergences among national ethical rules, described in Section B, must be evaluated. In Section C, I examine the problems that ensue in the international arbitration context.

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

The ascendance of international arbitration to its lofty status is perhaps most directly tied, as a factual matter, to dramatic increases in international trade and a related recognition that international arbitration provides the only viable means of resolving trade disputes. Coincident with this flourishing, the international arbitration community has grown in ranks and the newcomers have asserted pressures and demands on the system that have and will cause the system to evolve further.

#### 1. The Judicialization of International Arbitration

Until about twenty years ago, international arbitration was an *ad hoc* compromise-oriented process characterized by its informality and emphasis on fairness.[36] Arbitral decisions were not revered so much for their

35. *See, e.g.*, William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 680 (1989) (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) ("[O]ne 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*, *in* THE COMMERCIAL WAY TO JUSTICE, *supra* note 18, at 17, 20; Donald Francis Donovan, *International Commercial Arbitration and Public Policy*, 27 N.Y.U. J. INT'L L & POL. 645, 650–51 (1995); *see also* 10 WORLD ARB. & MEDIATION REP. 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 (2001) (discussing potential for China in developing more reliable international arbitration enforcement record).

36. *See* Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition*, 21 LAW & SOC. INQUIRY 285, 295 (1996).

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,[37] who exercised a sort of paternalistic (there were no women, and still are few)[38] 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 decisionmaking are sometimes described in terms of formal doctrines, such as *amiable compositeur* and *ex aequo et bono*,[39] which expressly authorize arbitrators to disregard the strictures of so-called auxiliary rules, such as statutes of limitation, in order to "do justice."[40]

Another key attribute of arbitration in this era was the popular use of *lex mercatoria*. This unwritten *law of merchants*[41] was developed by academics, who were also actively involved in arbitrations,[42] as a means to permit arbitrators to tailor decisions to customary trade usages and a

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37. *See* Craig, *supra* note 27, at 6 ("Many arbitration clauses, or rules of trade associations, specifically required that arbitrators be 'commercial men.' ").

38. *See* YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 34–38 (1996); Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration*, *in* THE COMMERCIAL WAY TO JUSTICE, *supra* note 18, at 229, 229–41 (surveying the limited participation of, systematic discrimination against, and recent progress for, women in international arbitration); K.V.S.K. Nathan, *Well, Why Did You Not Get the Right Arbitrator?*, MEALEY'S INT'L ARB. No. 15-7, at 24 (July 2000) (noting that "[t]he majority in a multi-member international arbitral tribunal is always white" and interpreting a British arbitrator's commentary as suggesting that "arbitrators from the developing countries and women simply do not or cannot satisfy the selection criteria" for arbitrators).

39. *See* John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, DISP. RESOL. J., Aug.–Oct. 2000, at 32. The doctrine of *amiable compositeur*, 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.

S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 932 (1998); *see also* W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 8.05, at 137 (2d ed. 1990). 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* Strong, *supra*, at 23.

40. *See* Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577 (1990).

41. For an exploration of "*lex mercatoria*" in its multi-faceted connotations, see LEX MERCATORIA AND ARBITRATION (rev. ed., Thomas E. Carbonneau ed., 1998).

42. Dezalay & Garth, *supra* note 36, at 295.

gentile interpretation of the principles guiding international trade law.[43] The hallmark of *lex mercatoria* is its insistence on the notion that a duty of good faith informs all contract interpretation and performance.[44] In applying the *lex mercatoria*'s requirement of good faith, arbitrators could imply terms to achieve a more equitable result, such as a requirement that "ample notice" of termination be given, even if the contract included no such term.[45]

These noble visions of business relations and dispute resolution were the inspiration of an elite group of continental lawyers who are largely responsible for founding international arbitration in its modern version.[46] Perhaps one of the ultimate testaments to the intimacy of the early international arbitration community, and the altruism that it bore, is that in this period it was not anticipated that there would be any need for judicial enforcement of arbitral awards.[47] Instead, as the 1923 version of the ICC Arbitral Rules provided, it was believed that parties were "honor bound" to comply with the award and that they would indeed do so.[48]

Over the past twenty years, international business has increased in both competitiveness and diversity. As a consequence, the notion of international arbitration as an informal and largely equitable means of resolving disputes now seems quixotic.[49] The modern international business environment has forced international arbitration to become a more formalized and legalized dispute resolution process.[50] In its final incarnation, international arbitration is less recognizable as a form of

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43. These principles are sometimes referred to as the "new *lex mercatoria*," because they are a modern reincarnation of the substantive law of merchants that was developed by medieval English mercantile courts. *See* Craig, *supra* note 27, at 6.

44. *See id.*

45. *See ICC Partial Award in Case No. 5073 of 1986*, 13 Y.B. COM. ARB. 53, 65 (1988), *cited in* Drahozal, *supra* note 8, at 127 n.224.

46. *See generally*, DEZALAY & GARTH, *supra* note 38 (offering a provocative description of the international arbitration "field" and the professionals who constructed it).

47. *See* Craig, *supra* note 27, at 7.

48. "It was expected that moral norms and the force that businessmen of a country can bring to bear upon a recalcitrant neighbor' would be sufficient to ensure respect for arbitral awards." *Id.*

49. *See* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 62 (1999) (documenting in the domestic U.S. context evidence that businesses now seek more formal judicialized arbitration, instead of speedy fact-based awards entered by expert arbitrators after little prehearing process); *but see* Thomas J. Stipanowich, *Future Lies Down a Number of Divergent Paths*, 3 DISP. RESOL. MAG. 16, 16 (2000) (arguing that "many business persons bemoan the increasing 'judicialization' of arbitration").

50. This trend is, as demonstrated by the insightful work of Dezalay and Garth, also likely attributable to competition among the lawyers who participate in arbitration. *See* DEZALAY & GARTH, *supra* note 38.

"alternative dispute resolution"[51] than as a type of "offshore litigation."[52] This transformation has been both celebrated and decried as the "judicialization" of arbitration.[53]

Under current practices, parties hardly ever empower arbitrators to decide the matter as *amiable compositeur* or *ex aequo et bono*,[54] and instead have insisted on measures to make the arbitration process more transparent and more accountable. Arbitral procedure, which traditionally had been open textured and subject to improvisation, has become more definite and precise, both in content and form. While arbitral procedural rules once left vast discretion to the arbitrator, modern rules have generally shifted more control to parties in the presentation of evidence and regulate arbitrator evaluation of evidence through formal rules.[55] Arbitral awards are being published with greater frequency and are even making an appearance as persuasive authority

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51. The term "alternative dispute resolution" is often used to connote a "kinder, gentler" way of resolving disputes as compared to litigation. This connotation may be less true of modern international arbitration in its more legalized form. To the extent that the term is also used to imply the existence of some other, primary means to resolve disputes, it is inaccurate. Given the overwhelming practical problems that complicate the prosecution of international cases in national courts and enforcement of their judgments, international litigation is an unreliable option and international arbitration has become the primary means for resolving international disputes. *See* CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 17–36 (Klower Law International 1996); Nicholas B. Katzenbach, *Business Executives and Lawyers in International Trade*, *in* SIXTY YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 67, 68 (ICC Pub. S.A. 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).

52. Dezalay & Garth, *supra* note 36, at 299. 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—more precisely, through the negotiation that takes place in the context of U.S.-style litigation.

*Id.*

53. *See generally* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY (Richard B. Lillich & Charles N. Brower eds., 1993) (critiquing the need for balance between flexibility and certainty).

54. 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, *supra* note 8, at 129 & n.233.

55. This trend is also reflected in the growing preference for institutional arbitration. *See* Detlev Vagts & W. Michael Reisman, *International Chamber of Commerce Arbitration*, 80 AM. J. INT'L L. 268 (1986) (book review) (suggesting that *ad hoc* arbitration has declined in popularity because parties have traded off the "maximum suppleness" offered by *ad hoc* arbitration for the predictability of institutionalized arbitration). 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.

cited to and by other arbitration panels.[56] Selection of *lex mercatoria* by the parties is now extremely rare.[57] Instead, choice-of-law clauses are used to increase predictability in international transactions and avoid application of law that is not well developed.[58] In sum, international arbitration has become a sophisticated and formal method for resolving international disputes.[59]

Given its preeminent status in resolving international disputes, and its new-found formalism and sophistication, the aspiration of international arbitration cannot be simply to provide *ad hoc* remedial relief in individual cases.[60] It must develop into, as it is already moving toward being, a fully operational transnational adjudicatory process.[61] 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. In both instances, "[t]here [were] only a few persons in the profession and they knew what they [were] supposed to

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56. *Comparative Analysis of International Dispute Resolution Institutions*, 85 AM. SOC. INT'L L. PROC. 64 (1991).

57. Bond's study revealed that only a handful of clauses selected "general principles" and none expressly selected *lex mercatoria*. *See* Drahozal, *supra* note 8, at 129. In addition to the apparent obsolescence of *lex mercatoria*'s underlying tenets, the definition of "custom" among ever-expanding trade usages is harder to identify and it 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. For a description of the increase in mandatory law claims that can arise in arbitration, see Rogers, *supra* note 5.

58. *See* Ryan E. Bull, Note, *Operation of the New Article 9 Choice of Law Regime in an International Context*, 78 TEX. L. REV. 679, 706 (2000); *see also* REISMAN, *supra* note 12, at 111–13 (arguing against application of *lex mercatoria* when it would disrupt expectations of the parties).

59. While the trend is important to recognize, the goal of formality should not be overstated. For many, flexibility remains an important feature of international arbitration.

60. Charles N. Brower, a former judge on the Iran-United States Claims Tribunal, has in the context of evidentiary standards identified 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" 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).

61. *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).

do. In the rare case that somebody [was] tempted to lapse from grace, the prospect of disapproval by one's peers [was] deterrence enough."[62] As the field of international lawyers has expanded in both numbers and cultural vicissitudes,[63] however, informal control mechanisms are no longer sufficient.[64]

Regulation of the legal profession "remains local in both scope and administration, often providing little guidance."[65] The phenomenon can be imagined as contrasting world maps: Ethical regulation is tied to the geographic boundaries drawn on a political map of the world, but the practice of law and movement of lawyers more closely resemble constantly moving radar images of world weather patterns.[66] 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.[67] In the context of attorney solicitation, for example, even though an attorney's home jurisdiction may permit advertisement, another jurisdiction in

62. Vagts, *supra* note 11, at 250. For the seminal exploration of how informal controls are adequate to regulate small social groups, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 130–32 (1991).

63. The ranks of international lawyers now also include small firms and solo practitioners. *See* Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, PROF. LAW., June 1995, at 123.

64. *See* Karl Carstens, *Preface* to CAYTAS, *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 11, at 250 ("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* REISMAN, *supra* note 12, at 6 (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").

65. Brand, *supra* note 1, at 302. The obscurity surrounding ethical regulation of international practice is best demonstrated by U.S. Model Rule 8.5, which regulates 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." *Id.* at 306 (quoting MODEL RULES OF PROF'L CONDUCT R. 8.5, cmt.6 (1996)). The problem is that there do not appear to be any such international law or agreements. *See* Vagts, *supra* note 11, at 251.

66. 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).

67. 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, *supra* note 10, 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 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987)).

which the advertisement occurs has a competing interest in applying its rule prohibiting such advertisement.[68] With regulation of cross-border practice, therefore, the problem is that the home and host jurisdictions compete to regulate the attorney.

In international arbitration, by contrast, there is no regulatory competition. International arbitration occurs in an a-national space internationally disassociated with any sovereign.[69] While arbitration physically takes place within the geographic boundaries of one nation, the so-called host state is constrained by design and agnostic by choice.[70] Consequently, there is no "host state" regulation.[71] Meanwhile, most so-called "home state" ethical rules do not purport to govern attorney conduct in nonjudicial fora such as arbitration.[72] Even if "home state" ethical regulations did reach into arbitration, however, they would not be binding on opposing foreign lawyers or on non-lawyer representatives (who are permitted in most jurisdictions to represent parties in arbitration).[73]

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68. *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, 442–48 (1995).

69. *See* DEZALAY & GARTH, *supra* note 38, 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 neutrality in relation to the dispute and to the parties." *Id.*; *see also* Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, *in* LEX MERCATORIA AND ARBITRATION 11, 27 (Thomas E. Carbonneau ed., 1998).

70. The New York Convention generally permits the nation where arbitration takes place to exercise an expanded role in reviewing arbitral awards and regulatory proceedings. In an effort to attract more international arbitration, however, many nations have declined this opportunity and have instead legislated to constrain court interference with 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* Park, *supra* note 35, at 649.

71. *See* Brand, *supra* note 1, at 334–35 (noting that notwithstanding applicability of 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). Most other countries permit foreign attorneys to act as arbitrators or counsel in international arbitrations. *See, e.g.*, Arbitration Act, No. 53 (1952) (Malay.), *in* INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION Malaysia-1, Annex I (Pieter Sanders & Albert Jan van den Berg eds., 2000 & 2001 Supp.).

72. In the United States, only a few states have attempted to make their ethical rules directly applicable in arbitration. *See, e.g.*, N.Y. Judiciary Law § 90 (McKinney 2002) (containing a single statement in the appendix to the effect that rules apply in ADR settings as well).

73. 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, 15 (1996) ("[T]he ABA Model Rules of Professional Conduct were not drafted with ADR in

The primary problem for ethical regulation in international arbitration, therefore, is not competition among regulators, but an absence of regulation.

In the absence of authoritative ethical guidance at the international level, attorneys show up believing that they are still bound by the ethical obligations imposed by their home jurisdictions, or at least they come with advocacy techniques and professional habits formed by practicing in accordance with those rules. The problem, of course, is that the ethical regulations of various countries are often significantly different, and when attorneys adhering to these different rules are thrust into the same proceedings, attorneys for one party may feel compelled to do what the attorneys for the opposing party feel prohibited from doing.[74] Whereas differences were mute when international arbitration was run by a small group of insiders, newcomers have arrived with a sense that their participation in arbitration is an entrepreneurial venture. They are thus less constrained by established traditions or an inherent sense of obligation to the system held by its founders,[75] who regarded their service in arbitration as a duty not a career.[76] As social norms break down, there is nothing to take their place. The next Section examines the extent of differences among national ethics and the final Section of this Part appraises the potential problems these differences can cause in international arbitration proceedings.

### 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

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mind and efforts to fit ADR practice into the rules of more conventional advocacy will not always work."); *see also* Detlev Vagts, *International Legal Ethics and Professional Responsibility*, 92 AM. SOC. INT'L L. PROC. 378, 378 (1998) (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, *supra* note 7, at 563 ("When an English barrister suggested a couple of years ago that an advocate in a private commercial arbitration was not bound by the same duties owed by counsel to a court, the immediate (near unanimous) response was shock and indignation.").

74. *See* CAYTAS, *supra* note 4, at 3 (noting that "transnational practice is most threatened by conflicting mandatory norms requesting or prohibiting with equal authority and determination disclosure of client-related and therefore presumably confidential information").

75. Informal control mechanisms had been particularly effective among lawyers involved in international arbitration because they were an intimate group of European practitioners who shared a tacit understanding of what constituted proper behavior. *See* DEZALAY & GARTH, *supra* note 38, at 34–36 (describing the "grand old men" who "played a central role in the emergence and recognition of arbitration").

76. 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 id.* at 34–35, 36–38.

universal norms can be distilled down to truthfulness, fairness, independence, loyalty, and confidentiality. While all systems appear committed to these five ideals, I demonstrate in this Section that the apparent consensus is merely "acoustic agreement,"[77] which conceals the radically different obligations imposed on attorneys by different systems.[78]

### 1. Truthfulness

By most accounts, the primary if not sole purpose of adjudication is to discern truth.[79] Truth is universally acknowledged as the intended product of adjudication, but also as an essential element in the process. The importance of truth in the adjudicatory process is manifested in time-honored ethical prohibitions against perjury,[80] against attorney as-

77. 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., 5th ed. 1988) [hereinafter COMPARATIVE LAW: CASES—TEXT–MATERIALS](using the term "acoustic agreement" to describe the readily apparent, but superficial commonalties between systems). Indeed, when less was known about foreign ethics, superficial resemblances were mistaken for fundamental similarities. *See* THOMAS LUND, PROFESSIONAL ETHICS 18 (1970) ("Despite differences in legal systems, legal practices and procedures and legal customs, lawyers in many countries throughout the world have laid down for themselves substantially the same standards of legal ethics . . ."); *see also* David Luban, *The Sources of Legal Ethics*, 48 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 246, 264–67 (1984) (concluding that German and American ethical rules are essentially similar). It is now recognized that national ethical rules diverge dramatically. *See* Vagts, *supra* note 11, at 250.

78. *See* Vagts, *supra* note 73, 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 COLUM. J. EUR. L. 338 (1998).

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

80. Prohibitions against perjury transcend both time and cultures. *See* Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L & COMP. L. 307 (1996) [hereinafter Underwood, *Perjury*] (explaining the ancient Roman laws against perjury and punishments meted out for violations) (citing JAMES STACHEN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 41–42 (1969)); *see also* Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215 (1993) [hereinafter Underwood, *False Witness*](surveying laws against perjury in ancient Egypt, Mesopotamia, ancient India, Greece, the Ashanti society in Africa, medieval Europe and early America).

sistance in perjury[81] and against attorney misrepresentations to the tribunal.[82] Apart from these extreme instances of misconduct, however, legal systems have developed different interpretations of what the demands of truth require from counsel.[83]

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.[84] To take the example of an arbitration involving German and American parties, with counsel from their respective countries, the German attorneys will show up believing that they are prohibited from communicating with witnesses about facts of the case or upcoming testimony, and that such "misconduct" might be punishable by serious criminal penalties for witness

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81. 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* Underwood, *False Witness*, *supra* note 80. Today, all legal systems prohibit, either through criminal laws or professional ethics, lawyers from abetting or encouraging perjurous testimony.

82. *See, e.g.*, CHARLES F. WOLFRAM, MODERN LEGAL ETHICS § 12.3.3, at 641 (1986).

83. This divergence should not be surprising when it is considered that the meaning of "truth" in relation to adjudicatory decisionmaking 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 ONE: THE COMMON LAW WORLD 369 (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, to 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 thirteenth and fourteenth centuries acted as quasi-witnesses, ministering what we would consider "justice" rather than discerning what we would consider "truth." For fascinating expositions on this history, see Mirjan Damaška, *Rational and Irrational Proof Revisited*, 5 CARDOZO J. INT'L & COMP. L. 25, 29 (1997) and Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 181–82 (2000).

84. *See* WOLFRAM, *supra* note 82, § 12.4.3, at 647–48; 3 JOHN HENRY 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 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, Review Essay, *Gulliver's Troubled Travels, or The Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 171 n.110 (1998). 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* Orlandi, *supra* note 18, at 94; David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799, 853–54 (1992).

"tampering."[85] 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,[86] but also necessary to avoid committing malpractice, if not an ethical breach.[87]

Similarly, systems impose very different obligations on attorneys with regard to client testimony. Even in the United States, there is relatively little agreement about the scope of attorney confidentiality

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85. *See* Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088–89 (1975) (" 'Coaching' witnesses [in inquisitorial systems] comes dangerously close to various criminal offenses of interfering with the administration of justice" as well as being contrary to professional canons of ethics); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 834 (1985) [hereinafter Langbein, *German Advantage in Civil Procedure*](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 H. Langbein, *Trashing 'The German Advantage'*, 82 Nw. U. L. REV. 763, 767 (1988) [hereinafter Langbein, *Trashing 'The German Advantage'*](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 decisionmaking and are consequently likely to continue a practice until presented with a countervailing and controlling rule.

86. *See* Hamdi & Ibrahim Mango Co. v. Fire Ass'n of Phila., 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 82, § 12.4.3, at 648, 648 n.92 (1986) (citing H. Cecil, Brief to Counsel 102 (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, Jr., Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389, 390–91 (1987) (describing an attorney's goals during witness preparation as to aid the witness telling the truth and organizing the facts, to introduce the witness to the legal process, to instill the witness with self-confidence, to eliminate opinion and conjecture from the testimony, to make the witness understand the importance of his or her testimony, and to 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 82, § 12.4.3, at 648–49.

87. 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. Sec. Litig., 182 F.R.D. 614 (D. Nev. 1998) (characterizing witness preparation as an "ethical" obligation incumbent on attorneys); 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 fulfilling her professional obligations); 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).

obligations in the face of client perjury or the threat of client perjury.[88] Most European ethical codes include no obligation that an attorney disclose client intentions to commit perjury, even though European attorneys are generally required to disclose unlawful conduct or potentially unlawful conduct by a client.[89]

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 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."[90] This room for creativity is bounded only by strategic considerations and the stricture against wholly frivolous arguments.[91] In Continental systems, by contrast, creative arguments that are not, in the attorney's professional opinion, likely to prevail, would be considered professionally irresponsible, if not sanctionable.[92] Thus, while all systems are in theory

88. *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).

89. *See* 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, 36–37 (1993) (suggesting there is a trend toward requiring disclosure). 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 130 & n.60 (1986). 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 244.

90. MODEL CODE OF PROF'L RESPONSIBILITY EC 7–4 (1980).

91. Federal Rule of Civil Procedure 11 provides that the signature of a 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. 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, 793 (1991); Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L REV. 300, 301 (1986).

92. Lawyers in civil law systems are expected to present only a faithful and precise interpretation of the applicable law and not to argue by use of precedent, as is 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. Frank, Note, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 966 (2000). 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*, 7 GEO. J. LEGAL ETHICS 865 app. at 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

committed to truth and imposing 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,[93] a concept that has been embraced by all societies, from modern European nations to traditional African tribes and ancient Indian civilizations.[94] Impartiality is an attribute of adjudicators that in turn demands *audi alteram partem*, or equality of the parties.[95] 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 decisionmaker.[96] These principles require prohibitions against obvious transgressions, such as bribing adjudicators to secure victory[97] or otherwise providing them with a direct stake in the outcome of the case.[98] Outside of these obvious prohibitions, however, the concept of "fairness," and even the more particular requirement of an impartial decisionmaker, is subject to varying interpretations, which again result in divergent ethical requirements.[99]

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undoubtedly deter creative argument by counsel. *See* Werner Pfennigstorf, *The European Experience with Attorney Fee-Shifting*, 47 LAW & CONTEMP. PROBS. 37, 45–59 (1984).

93. "Impartiality is part of the definition of a good judge." ARTHUR T. VANDERBILT, JUDGES AND JURORS 19 (1956). The U.S. symbol of justice, Justicia, 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).

94. *See* V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 16–17 (Martinus Nijhoff Publishers 1980) (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.

95. *See id.* at 16–17.

96. 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 OF PROF'L CONDUCT R. 3.5(a)–(b) (2001).

97. 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* CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, *done* Dec. 18, 1997, Organization for Economic Coordination and Development (OECD), *reprinted in* 37 I.L.M. 1 (1998) (committing signatories to treat bribery of judges as a criminal offense).

98. *See* WOLFRAM, *supra* note 82, § 11.3, at 603–06. 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).

99. *See* DAMAŠKA, *supra* note 89, 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

Some systems tolerate—even celebrate—behavior that other systems find incompatible with notions of fairness.[100] This divergence is manifest in variations regarding the permissibility of *ex parte* communication between judges and parties (or their counsel). 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.[101] The Chinese judge-turned-mediator elicits information from the parties in what—from an American perspective—are *ex parte* conversations.[102] The substance of these *ex parte* conversations may be (but is not necessarily) communicated to other parties.[103] 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. Many national ethical rules expressly permit some contacts.[104] In the United States, by contrast, fairness and impartiality are understood to entail

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the implications of these views and their operational meaning in the administration of justice in various countries.").

100. 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* Matter of Arbitration between Cole Publ'g Co., Inc. v. John Wiley & Sons, Inc., No. 93 Civ. 3641, 1994 WL 532898, at *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 as an advocate than an impartial moderator); *see also* DAMAŠKA, *supra* note 89, 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").

101. Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 127 (1996) (noting that the Chinese Civil Procedure Law requires judges to conduct mediation if the parties do not object). This approach translates into arbitration rules in China and other Asian countries. *See, e.g.*, China International Economic and Trade Arbitration Committee Arbitration Rules, arts. 46, 47 (1994); Japan Commercial Arbitration Association Commercial Arbitration Rules, Rule 39 (1992); Hong Kong Arbitration Ordinance §§ 2(A), 2(B), ch. 341, Laws of Hong Kong (H.K.), *cited in* Philip J. McConnaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427 n.102 (2001).

102. 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, 327–33 (1986); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 107 (1997).

103. *See* Ge, *supra* note 101, at 127.

104. *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, *supra* note 89, at 36 n.159; *see id.* at 37–38 & n.158 (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, "[t]his 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.

almost absolute restrictions against *ex parte* communications, except in certain rare procedural contexts.[105] It is highly unusual for an adjudicating judge to meet separately with the parties to extract confidential information about the case that might be relied on in making a decision, but need not be disclosed to the opposing party.[106] 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.[107] 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.[108] *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.[109]

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105. 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 82, § 11.3.3, at 605–06.

106. 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, 425–27 (1982) (demonstrating and criticizing this trend).

107. *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* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canons III(B)(1) (American Arbitration Ass'n 1977) (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 id.* Canon VII (permitting *ex parte* communications by party-appointed arbitrators as long as general disclosure is made), *with* RULES OF ETHICS R. 5.3 (International Bar Ass'n 2001) (prohibiting "any unilateral communications regarding the case"). For extended discussion of these rules, see W. LAWRENCE CRAIG ET AL., 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).

108. *See, e.g.*, Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429 (11th Cir. 1995); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993) (finding no misconduct despite finding that party arbitrator met with representatives and witnesses of appointing party before arbitration to plan strategy). 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.

109. *See* Vagts, *supra* note 73, at 379 (reporting a panel discussion of a hypothetical case involving European and American lawyers in an arbitration in Geneva that was governed by Swiss law); Ambassador Malcolm Wilkey, *The Practicalities of Cross-Cultural Arbitration, in*

### 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 eighteenth-century Prussia's failure, despite significant efforts, to absorb advocates completely into the civil service machinery.[110] 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.[111] Independence is undoubtedly an essential feature of attorney ethics, but particularly in this area, the wrinkled nuances of language can be misleading.[112]

The texts of both the U.S. and European code of professional responsibility appear to be similarly committed to the principle of attorney "independence."[113] However, the apparently 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.[114] The need for attorneys to be independent from their clients is the

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CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION, *supra* note 18, at 79, 86 (describing differing approaches to *ex parte* communication as a problem in international arbitration that must be overcome).

110. *See* Dietrich Rueschemeyer, *Comparing Legal Professions Cross-Nationally: From a Professions-Centered to a State-Centered Approach*, 1986 AM. B. FOUND. RES. J. 415, 445.

111. *See* Lawrence M. Friedman & Zigurds L. Zile, *Soviet Legal Profession: Recent Developments in Law and Practice*, 1964 WIS. L. REV. 32. There are of course anomalous counter-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. Wilkins, *supra* note 84, at 860 & n.270.

112. 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, 225 (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).

113. *Compare* CCBE CODE OF CONDUCT R. 2.1.1 (1998), *reprinted in* Terry, *supra* note 89, at 66, *with* MODEL RULES OF PROF'L CONDUCT R.R. 5.4, 5.5 (1983) *and* MODEL RULES OF PROF'L CONDUCT, pmbl.

114. *See* Terry, *supra* note 89, at 46–48.

justification for treating attorneys employed as in-house counsel as non-lawyers[115] and against accepting clients on a contingency fee basis.[116] In an extreme example, English barristers are,[117] and (until recently) attorneys in some civil law countries were,[118] 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.[119] Similarly, many civil law countries used to prohibit lawyers from being "employees" of a law firm to prevent obligations in the master-servant relationship from interfering with the attorney's professional judgment.[120] While mandating that attorneys operate independent from their clients and other attorneys, many civil law systems regard attorneys as quasi-governmental agents with intimate ties to government functions.[121]

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115. "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: A Practitioner's Response to Spalding v. Zimmerman*, 2 J. INST. STUDY LEGAL ETHICS 183, 185 (1999); *see also* Terry, *supra* note 89, at 48.

116. From a European perspective, the percentage contingency fee is regarded as promoting excessive litigation and reducing the attorney's independence and judgment. *See generally* Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 320 (1999). While interesting for illustrative purposes, contingency fees need not be addressed in a code for international arbitration. *See supra* note 22. 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, Note, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2163 (1992). For this reason, as a practical matter, contingency fees are not currently used to fund international 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).

117. *See* Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1493 (2000).

118. Such regulations had been adopted in some civil law countries such as France. *See id.* (citing JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 113 (1969)); Daly, *supra* note 6, at 1149.

119. 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, *supra* note 117, at 1494.

120. *See* Terry, *supra* note 89, at 15.

121. For an analysis of national rules that treat lawyers as quasi-governmental agents, see *infra* notes 228–33 and accompanying text.

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.[122] Some individual ethical rules nod toward the notion of attorney independence from client interests,[123] but the larger structure of U.S. codes contemplate that lawyers will have "virtually total loyalty to the client and the client's interests."[124] Some sectors of the U.S. academic and judicial community urge more circumspection by attorneys,[125] but it would be implausible even for reform-minded individuals to call for the same degree of independence envisioned for European attorneys. Indeed, the notion of attorney independence is a point of divergence so profound, that one scholar has concluded that the competing national visions are completely irreconcilable.[126]

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122. *See* MODEL RULES OF PROF'L CONDUCT, pmbl. ¶ 10 (2000) (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 84, at 853–63 (noting that in the United States there are multiple connotations attributed to the concept of lawyer independence and its underlying purposes).

123. 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. *See* George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 287 & n.72 (1998).

124. *See* WOLFRAM, *supra* note 82, § 4.1, at 146 (describing how the "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.* § 4.3, at 154. Although useful for illustrative purposes, these statements ignore interests asserted even in the United States 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, *supra* note 84, at 862.

125. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083–84 (1988) (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). Others argue that the abdication of professional independence in favor of complete loyalty to the client is a more modern event. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 11–17 (1988) (arguing that the ideal of lawyers exercising independence from their clients "has real historical content"); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 910 (1980).

126. *See* Terry, *supra* note 89, at 45–46. Even within the U.S. system, as Professor David Wilkins explains, "No word in the lexicon of professionalism is more commonly invoked—and

### 4. Loyalty

Loyalty is implicit in representation. This principle is self-evident and reaches back into early sources of our social morality[127] and the origins of advocacy.[128] 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.[129] At its most basic level, loyalty precludes an attorney from representing opposing sides in a single case. Although simultaneous representation of opposing clients is universally prohibited, and has been since at least the eleventh century,[130] there is little agreement about what constitutes appropriate attorney conduct in this area.

The United States takes the most stringent view of client loyalty. U.S. codes regulate a range of activities that might give rise to a conflict of interest, such as accepting client gifts,[131] engaging in business dealings

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less commonly defined—than 'independence.' " Wilkins, *supra* note 84, 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* LAWYERS COMM. ON HUMAN RIGHTS, LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS (1998).

127. *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. 227, 232 (1987).

128. Third-party advocacy developed out of a system of patronage in ancient Rome. Patricians were obliged to fulfill their civic duty by providing a host of services as *patronus causarum* for their plebeian *cliens*, including delivering speeches in legal disputes. *See* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 44–46 (1953). In this ancient form, dedication to clients was tied more to a sense of *noblesse oblige* inherent in the patrician's social status than to a sense of ethical obligation to the person of the client. *See* J.A. CROOK, LEGAL ADVOCACY IN THE ROMAN WORLD 32 (1995).

129. *See* POUND, *supra* note 128, at 33; DAMAŠKA, *supra* note 89, 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, 9 (1998).

130. *See* HERMAN COHEN, HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450, 234 (1929) (citing 1280 ordinance prohibiting lawyers' conflicts of interest). In comparing the texts of the two codes, 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 United States, 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 RULES OF PROF'L CONDUCT 1.7(b) (2000). 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. Comparing the language of these two provisions might be futile, but 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, *supra* note 84, at 171–73.

131. While not a model of clarity, Model Rule 1.8 views client gifts with extreme suspicion, reflecting the long-standing skepticism in Anglo-American law of client gifts to attorneys. *See* WOLFRAM, *supra* note 82, § 8.12.2, at 486.

with clients,[132] and receiving payment for services from another party.[133] European codes appear to be silent on such matters, limiting their regulation of conflicts of interest to situations involving dual representation.[134] This omission is likely related to the fact that much attorney regulation in Europe, particularly with regard to conflicts of interest, remains informal.[135] These different standards for evaluating conflicts of interest manifest themselves in international arbitration in differing attitudes between European and American parties about what types of information must be disclosed by an arbitrator.[136] For example, under American standards relationships between an arbitrator and a party's counsel should be disclosed while under European standards, the same relationship can legitimately be withheld.[137]

Another important area in relation to attorneys' duty of loyalty is the degree to which attorneys are ethically required to defer to their clients' decisions.[138] The U.S. Model Rules instruct attorneys to "abide by a client's decisions concerning the objectives of representation . . . and [to]

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132. The Disciplinary Rules prohibit lawyers from entering into business transactions with clients in which they have differing interests, unless the client consents after full disclosure. *See id.* § 8.11.2, 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.* § 8.11.2, at 480 & n.80.

133. Disciplinary Rule 5-107(A) "prohibits a lawyer from accepting compensation or anything else of value from a person other than the client for representing a client unless the client gives informed consent." *Id.* § 8.8.2, at 443.

134. 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 United States, 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 82, § 4.5, at 164. In Europe contingency fees are almost completely prohibited, but not so much, as in the United States, to protect clients against potential conflicts. European systems prohibit contingency fees to avoid an arrangement that might undermine lawyers' professional independence from their clients. *See* Maurer et al., *supra* note 116, at 280.

135. Daly, *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).

136. While arbitrator ethics is beyond the scope of this Article, it is clear that since many arbitrators are attorneys who bring to their decision-making role assumptions formed in their advocacy practice, resolving the conflict between national attorney ethical rules will provide residual benefits for resolving the troubled area of arbitrator ethics. *See* W. Michael Reisman & Catherine A. Rogers, *Evaluating the Conduct of International Arbitrators* (forthcoming).

137. *See* Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, MEALEY'S INT'L ARB. REP., No. 16-4, at 37 & n.44 (Apr. 2001).

138. Another aspect of the duty of loyalty is the duty of professional competence. For reasons explained elsewhere, see *supra* note 22, 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, although internationally developed standards of conduct will inevitably inform national evaluation of attorney competence.

consult with the client as to the means by which they are to be pursued."[139] Under this formula, U.S. attorneys are obliged, subject only to their right to withdraw, to defer to client decisions regarding matters that substantially affect the client's rights, and they are also required to consult with clients on other important matters of strategy.[140] 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,[141] on the other hand, appears to emphasize more that attorneys protect clients' interests than that they abide by client instructions.[142] This difference is manifested in CCBE Rule 4.3, which requires that an attorney "defend the interests of his client honorably and in a way which [*the lawyer*] considers will be to the client's best advantage within the limits of the law."[143] This provision reflects an attorney prerogative over the client's case, instead of an obligation to honor client decisions.[144] In some countries, this attorney prerogative appears to extend so far that it permits substitution of counsel without either the knowledge or consent of the client.[145] Thus, while the duty of loyalty is universally acknowledged, the general principle has not been consistently translated in national contexts.

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139. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2000).

140. This obligation to consult requires that attorneys explain matters well enough that clients can participate intelligently in decisions about both the means and the objective of representation. *See* WOLFRAM, *supra* note 82, § 4.5, at 165 (citing comment to Model Rule 1.4(a)).

141. 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, *supra* note 89, 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 267–72 and accompanying text.

142. 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 decisionmaking 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. *See* CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION, Council of the Bars and Law Societies of the European Union, R. 3.1, *available at* http://www.ccbe.org/documents/EN/codeuk/pdf.

143. *See* Terry, *supra* note 89, at 36 (emphasis added).

144. *See id.* at 30 & n.114 (citing Austrian legal sources and anecdotal evidence from an Austrian attorney).

145. *See id.* at 47.

### 5. Confidentiality

Concomitant with the obligation of loyalty is the duty of confidentiality. It is universally acknowledged that lawyers are obliged to preserve client confidences.[146] The purpose of confidentiality obligations is to ensure privacy for communications between lawyers and clients, thus generating mutual trust and maximum disclosure, which will, in turn, enhance representation.[147] 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[148] and attorneys are not obliged to maintain as secret information they communicate to clients,[149] or communications they had with other attorneys.[150] 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.[151] Under Islamic law, the principles of *shari'a* arguably impose an even higher duty of confidentiality, requiring protection not only of communications between attorneys and clients but also protection of all information relating to representation.[152] 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.[153] At

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146. *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

147. 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. RES. J. INT'L L. 145, 172 (1995).

148. 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, *supra* note 89, at 37; *see also* LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES 131 (1987).

149. SPEDDING, *supra* note 148, at 127–28. The civil law "professional secret" derives from a penal law that prohibits disclosing the "secrets" of another. *See id.* at 127.

150. *See id.* at 128.

151. *See* WOLFRAM, *supra* note 82, 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. *Id.* at 258.

152. Mark McCary, Note, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 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.

153. 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*

an international level, the level of disagreement in this area has been described as the most significant threat to orderly transnational legal practice.[154] In making the CCBE Code, European regulators have identified the problem, but not made any real progress toward resolving the profound and difficult differences among systems in the area of confidentiality.[155] The CCBE Code fails to even acknowledge that there is a tension between obligations to disclose wrongdoing and obligations to maintain client secrets, let alone to acknowledge that systems resolve the tension differently.[156]

National ethical regimes also vary significantly in the extent to which they provide post-representation protection for client confidences. In the United States, 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."[157] 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.[158] 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 accept-

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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. Model Rule 8.5 attempts to resolve the problem with a conflict-of-laws rule. Ultimately, however, Model Rule 8.5's 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).

154. *See* CAYTAS, *supra* note 4, at 3 (characterizing conflicting rules regarding confidentiality as the greatest threat to international practice).

155. 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, 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 and duties of a lawyer vis-à-vis his client, the courts in criminal cases and administrative authorities in fiscal cases.

*See* THE DECLARATION ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY 1 (1977).

156. *See* Terry, *supra* note 89, 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).

157. WOLFRAM, *supra* note 82, § 7.4.3, at 366.

158. *See id.*

ing 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.[159] This formulation appears to leave substantial discretion to the attorney to determine whether confidences can be maintained and or whether an advantage to a new client would be "unfair."[160] 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.

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.[161] 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.[162] In the United States, 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 obligations to keep clients informed, particularly if the communication involved refers to a potential settlement.[163] In sum, the area of attorneys' duty of confidentiality once again demonstrates that the differences between and among national ethical regimes are vast.

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

Knowing the divergences between national ethical obligations, sketched in Section B, it is easy to understand that they cannot peacefully co-exist in a single arbitral proceeding. They will be forced

159. *See* Terry, *supra* note 89, at 43. The strictures of U.S. rules may also be more demanding with respect to vicarious conflicts. Under the Model Rules, a lawyer in a firm is barred from representing a new client who has interests that conflict with a former client of another attorney in the firm, even if the former representation by another attorney occurred at a different firm. *See* Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33, 45 (1996).

160. *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, *supra* note 89, at 85.

161. *See* Terry, *supra* note 89, at 85. In Ireland and the United Kingdom, ethical codes refer only to an attorney's obligation to keep a client informed. *See id.*

162. *See id.*

163. For a discussion of U.S. attorneys' obligation to keep clients informed, see *supra* notes 139–43 and accompanying text.

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, even if they conflict with those of their opponents. The ensuing problems are easy to predict. 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? As yet, no empirical research has been done to measure the full extent to which ethics conflict in international arbitration, but there are anecdotal reports that national ethics are colliding in arbitral proceedings with greater frequency and that these clashes are producing greater concern among participants.[164]

The visibility of these clashes is being obscured, however, by a range of factors. The most significant factor is that arbitration is a private process. Most arbitral awards are complied with voluntarily[165] and public reports on these cases are not generally available.[166] Of those cases that

164. For example, 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, *supra* note 109, at 86; *see also* Reed & Sutcliffe, *supra* note 137, at 37 (suggesting that while some consensus has emerged about the possibility of preliminary communication with witnesses, there remains conflict as to the extent it is permitted); Cremades, *supra* note 18, at 161 (suggesting that arbitrators must distinguish the cultural background of parties in order to effectively preside over proceedings to which parties come with differing approaches to pre-testimonial communication with witnesses); Ulmer, *supra* note 18, at 171 n.8 (noting that it is "not [an] uncommon practice" for an arbitrator to be communicating with the appointing party). In one celebrated case in the public law arena different ethical standards led to failure of an arbitration over a boundary dispute between the United Kingdom and Saudi Arabia, in part because the Saudi arbitrator engaged in intense collaboration with the party that nominated him, including rehearsing testimony with witnesses. The Saudi arbitrator acknowledged his collaboration without embarrassment, suggesting his belief that such behavior was not unethical, while the arbitrator for the United Kingdom ended up resigning. *Id.* Given these anecdotes, it is possible that assessments by arbitration insiders underestimate the scope of the problem since their livelihood depends on continued public confidence in arbitration and criticisms of the system might erode that confidence.

165. For example, as of 1984, the ICC boasted a ninety percent voluntary compliance rate. *See* Carbonneau, *supra* note 61, at 606. This statistic may have already fallen victim to the new culture of international arbitration, in which informal agreement is less likely to effectively bind the parties. *See supra* Section I.A.1.

166. Legal research regarding individual arbitration cases is limited because arbitration awards are rarely rendered with reasoned opinions, let alone published. *See* Carbonneau, *supra* note 61, at 606. 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 of those cases that reach the award stage, however, but also of the significant percentage of arbitral cases that settle before award. Indeed, discovering midway through proceedings that one party has been communicating throughout with its

do end up being contested at the enforcement stage, ethical misconduct can only be raised if it was so disruptive of the proceedings that it could be characterized under one of the narrow exceptions permitted by the New York Convention.[167] The lack of formal reporting is highlighted by the fact that, notwithstanding anecdotal reports, a review of all U.S. cases reveals none in which challenges based on conflicting ethics were raised.[168]

It is also probable that ethics collide under the surface of proceedings, hidden even from the plain view of the participants. New practices and procedures might obscure the breakdown of implicit understandings about ethical conduct. For example, under discovery procedures that have been newly introduced into arbitration, an attorney can legitimately withhold from discovery information that is otherwise relevant if that information is "confidential." When the parties have different understandings of what "confidential" means, one party may be producing materials that the other party is maintaining as confidential.[169] 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. Meanwhile, 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 discovery.[170] Similarly, it might be difficult for participants to detect that opposing parties and counsel are talking to witnesses or communicating with a party-appointed arbitrator. It is also

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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.

167. For a description of the grounds under the New York Convention for setting aside or refusing to enforce an arbitral award, see *infra* Section III.A.1.a.

168. A review of U.S. cases found only one international case in which a court was presented with misconduct at the enforcement stage. Totem Marine Tug & Barge, Inc. v. N. Am. Towing, 607 F.2d 649, 652 (5th Cir. 1979) (vacating arbitral award because arbitral tribunal based award on evidence received *ex parte* after the close of evidentiary hearings). Even if limitations in 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.

169. 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 and enforcement of ethical norms for international arbitration must coincide with the means by which procedural and evidentiary rules are made applicable in arbitral proceedings. *See* Rogers, *supra*, note 5.

170. Because of similar differences in the parties' expectations and assumptions, one party's pre-testimonial communication with witnesses or ongoing *ex parte* communication with a party arbitrator may go undetected. *See supra* note 169.

likely that counsel and arbitrators might have strong incentives to conceal from the parties certain types of conflicts of interest that might impede their participation in future arbitrations.[171]

Another major factor masking the full impact of conflicting ethical norms in arbitration is the clandestine techniques by which arbitrators undoubtedly 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.[172] 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.[173] An American arbitrator may have the opposite reaction if a witness flounders during routine cross-examination on questions for which an American 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, and assessments of costs and fees.[174] Under older notions of international arbitration as a sort of "rough jus-

171. For example, it is plausible and, in my professional experience, not uncommon that, in one case, an attorney may appear as counsel before an arbitrator who, in a second case, is counsel where the attorney from the first case is the arbitrator. While the potential for harm to clients is obvious, a kind of guilty complicity may deter attorneys and arbitrators from disclosing the existence of such relationships. The risk of these incestuous cross-representations, of course, is that an attorney or arbitrator might orchestrate professional decisions, not in the client's best interests, but in an effort to curry favor with someone who can influence their future arbitral employment.

172. This example has been identified as a recurring problem in international tribunals. *See* Vagts, *supra* note 11, at 260.

173. For example, "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." Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1201 (1958).

174. 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 (1999). For further discussion of arbitrator power to award costs and fees and its relationship to a sanction power, see Rogers, *supra* note 5.

tice,"[175] these informal constraints may have been sufficient to instill a sense of justice in the proceedings. They are, however, 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.[176] Such reactions to perceived attorney misconduct might also be sanctioning an innocent party. Clients pay substantive awards, costs, and fees, but the misconduct may belong wholly to the attorney.

Particularly given the extent of differences, collisions between ethical norms cannot effectively be resolved on an *ad hoc* basis during proceedings. An arbitral tribunal attempting to do so will likely 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 obligation on attorneys to maintain client confidences, but also an expectation in clients that their confidences will be maintained.[177] Because confidentiality obligations differ from jurisdiction to jurisdiction,[178] however, arbitrators may be called on to choose a single rule to govern

175. *See* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 744–45 (1999) ("There is a long tradition of arbitrators deciding on the basis of their own sense of justice, rather than any set of rules."); *see also* Carbonneau, *supra* note 29, at 39.

176. One scholar, in proposing solutions to the clash of legal cultures in international arbitration, has suggested that the problem could be alleviated by heightened sensitivity on the part of arbitrators and increased communication during the process. *See* Cremades, *supra* note 18, at 161 (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, however, it cannot obviate the inequity of having parties abide by differing rules during the presentation of evidence.

177. One example of the newly recognized need to protect party expectations of confidentiality in arbitration is a rule introduced by the Venice Court of National and International Arbitration that requires that parties treat evidence in arbitrations as confidential. *See* VENICE COURT OF NATIONAL AND INTERNATIONAL ARBITRATION: RULES OF ARBITRATION art. 37.1, *available at* http://www.venca.it/rules.htm#37 ("[E]vidence [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. Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, AM. U. INT'L L. REV. 969, 992–98 (2001) (noting that arbitral institutions' rules are usually silent or inadequate in protecting confidentiality).

178. *See supra* Section I.A.4.

proceedings.[179] One obvious example is communications with an in-house attorney in preparation for litigation, which the in-house attorney would clearly have a duty to maintain as confidential under U.S. rules, but not under most European regimes.[180] A decision by an arbitrator that an American in-house counsel's communications must be disclosed could be devastating to the U.S. party, while a decision that such communications are to be maintained as confidential would leave the European side (which had likely already made unnecessary disclosures) vulnerable, even if such a ruling rendered that information inadmissible. An established code of ethics will resolve these and other conflicts up front,[181] 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 lawyers is in part what confers legitimacy, real and perceived, on the international arbitration system. The rituals and formalities that signal the existence of State power behind national adjudicatory processes[182] are generally eschewed in arbitration. Instead, the legitimacy of international arbitration derives primarily from party consent, which is orchestrated by international law-

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179. *See* Geoffrey C. Hazard, *Ethics*, NAT'L L.J., Mar. 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.

180. *See supra* notes 146–51 and accompanying text.

181. 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 United States, but would be considered under many European regimes as a purely private issue between an attorney and client. For a discussion of the substantive differences in the European and American regulation of conflicts of interest, see *supra* notes 92–98 and accompanying text. In choosing between these standards (again, assuming for the moment that arbitrators have the power), arbitrators will likely disrupt the expectations of one of the parties. If the tribunal 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. *See* Bidermann Indus. Licensing, Inc. v. Avmar N.V., 570 N.Y.S.2d 33 (N.Y. App. Div. 1991). For commentary, see Thomas, *supra* note 7, at 564; *see also* Image Technical Servs., Inc. v. 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).

182. *See* Resnik, *supra* note 24, at 850 (describing the importance of ritual and formality that pervade the adjudicatory process and legitimate decisions rendered).

yers.[183] It is the international lawyer who selects the rules, laws, sites, and arbitrators on behalf of the client.[184] Considering that international lawyers wield dramatically more power in the international arbitration system than their counterparts do in domestic litigation, it is particularly alarming that there is no express regulation of their conduct.[185]

Instead, ethical conduct in international 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."[186] 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. However, the size of the gulf between inconsistent ethical obligations is foreboding and the consequent threat to arbitral neutrality is unmistakable, even if as yet 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 attorney conduct can be assessed and by which members of the arbitration community can understand the consequences of their decision to arbitrate.[187]

## II. Deriving the Content of International Ethical Norms

With the need for a code of 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 freestanding precepts, which are independently modifiable and interchangeable.

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183. *See supra* Section I.C.

184. *See id.*

185. *See id.*

186. W. Michael Reisman, Folded Lies: Bribery, Crusades, and Reforms 12 (1979).

187. *Cf.* Edward Brunet, *Questioning the Quality of ADR*, 62 Tul. L. Rev. 1, 5 (1987) (commenting generally on the function of articulated norms that allow disputants to assess the neutrality of arbitral decisions).

Instead of these approaches, I propose a theory I call the *functional approach* to legal ethics.[188] Section A of this Part constructs a model of the *functional approach*, which is premised on the link between morality and role. This *functional approach* illuminates, in Section B, why different national systems have adopted conflicting ethical norms identified in Part I—those systems have assigned to attorneys different functional roles. Based on the reasons why national systems differ, I describe in Section C why none of the alternative solutions for developing international norms would yield satisfactory norms for use in international arbitration.

### 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."[189] 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 prosecutors).[190] Proponents of this view argue that in following ethical rules, lawyers are not making "ethical" decisions.[191] 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 mere compliance with the code deems their conduct "ethical." In the most strident articulations of this approach, lawyers' work is described as intentionally "amoral."[192]

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188. The *functional approach* is not intended to be a historical account of how ethical norms are actually derived, but rather a conceptual analysis of the nature of legal ethics.

189. 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).

190. *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 decisionmaking. For this insight, I am thankful to Ted Schneyer for his thoughtful comments on an earlier draft.

191. *See* Salbu, *supra* note 190, at 105 ("Confronted with a code, the individual has only one ethical choice: to abide or not to abide.").

192. 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*,

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.[193] 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.[194] They should not be permitted to avoid moral condemnation on the 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."[195]

Both of these approaches err in their understanding of the relationship between role and ethical decisionmaking. The ethics-as-law approach suggests that the role of lawyer obviates completely the need for legal professionals to engage in ethical decisionmaking, while the ethics-as-ethics approach denies that the role of the lawyer as professional advocate should affect ethical decisionmaking at all. Both of these approaches overlook the basic premise that no one is ever an abstract moral agent.[196] "[M]oral agency is embodied in roles" assigned

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1986 AM. B. FOUND. RES. J. 600, 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.*

193. *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.

194. This view is primarily attributable to moral philosophers who have taken up the subject of attorney ethics. *See, e.g.*, ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90 (1980); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) [hereinafter LUBAN, LAWYERS AND JUSTICE]; WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 1 (1998); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); Michael Bayles, *Professionals, Clients and Others*, *in* PROFITS AND PROFESSIONS: ESSAYS IN BUSINESS AND PROFESSIONAL ETHICS 65 (1983); David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983) [hereinafter THE GOOD LAWYER]; David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1999); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS Q. 1, 12 (1975) [hereinafter Wasserstrom, *Lawyers as Professionals*]; Richard Wasserstrom, *Roles and Morality*, *in* THE GOOD LAWYER 25, *supra*. For a more recent exploration of these issues, see ARTHUR ISAK APPLEBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE (1999).

195. *See, e.g.*, Bayles, *supra* note 194, at 66; *see also* Wasserstrom, *Lawyers as Professionals*, *supra* note 194. Ted Schneyer has already effectively demonstrated how many aspects of this criticism rest on empirical misconceptions and intentional ignorance about the degree of discretion conferred on lawyers by ethics rules. *See* Schneyer, *supra* note 193, at 1534–43; Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11 (1991).

196. *See* Alasdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, 2 PHIL. EXCHANGE 37, 46 (1978), *cited in* Schneyer, *supra* note 116, at 35–36.

to actors, who are "mutually inter-defined in terms of relationship."[197] 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).[198] 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 decisionmaking.

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.[199] 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. Ethics-as-law proponents are therefore misguided when they suggest that existence of a code wholly obviates the need for individual ethical decisionmaking.[200] Codes simply make certain choices impermissible and frame the inquiry for other choices.

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197. *See id.*

198. This example is borrowed from Ted Schneyer's provocative and insightful work in the field. *See* Schneyer, *supra* note 193, at 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 points such as John Rawls' "original position"); Ted Schneyer, *My Kind of Philosopher: A Lawyer's Appreciation of Joel Feinberg*, 37 ARIZ. L. REV. 10 (1995).

199. 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 82, at 69–70 (tracing history of state codes from original codes). It is also possible that a system could adopt a dysfunctional rule, particularly if rulemaking becomes hostage to special interests.

200. *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).

These observations lead to an important distinction: Ethical codes do not *establish* the role of a professional.[201] 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.[202] 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.[203] 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.[204]

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201. 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 as an objection that the rule chosen is a dysfunctional rule. If critics are in fact complaining about the role assigned to a professional through social and political institutions, such as rules of evidence and procedure, 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.

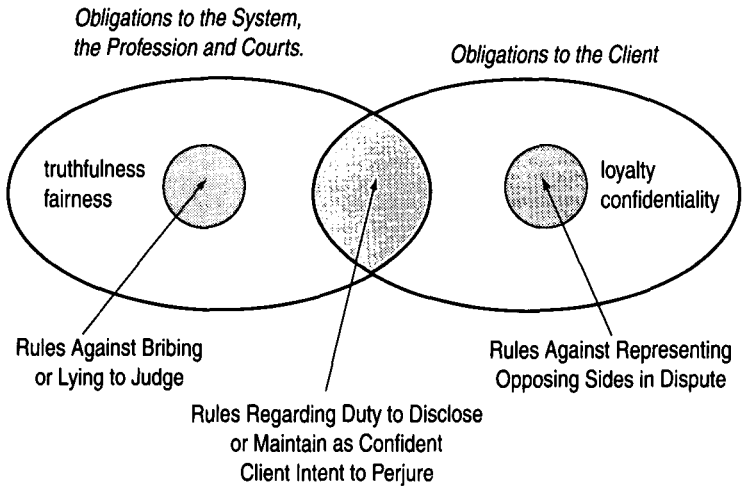
202. *See* Eric E. Jorstad, Note, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 YALE L.J. 1089, 1090 (1990) (characterizing the fundamental question underlying the ethics of advocacy as "How does a litigator mediate between the state's interest in the litigation and the private 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 CAL. L. REV. 379, 386 (1987). "We use lawyers both to express our 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* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40–41 (1989) (acknowledging the conflicting duality of an attorney's role); Patterson, *supra* note 125, at 969 (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* LUBAN, LAWYERS AND JUSTICE, *supra* note 194; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PENN. L. REV. 1031 (1975); H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PENN. L. REV. 1067 (1975) (questioning both the plausibility and desirability of Judge Frankel's proposed expansion of lawyers' obligations to tribunal).

203. *See* Wilkins, *supra* note 84, at 815–18.

204. 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" or they "file too many unnecessary lawsuits." *What America Really Thinks About Lawyers*, NAT'L L.J., Aug. 18, 1986, at S-3, *cited in* Post, *supra* note 202, at 380. 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 Post observes, these statistics demonstrate that "lawyers are applauded for following their clients' wishes and bending the rules

The interrelationship between these competing obligations can be conceptualized as a Venn diagram, composed of two overlapping circular zones. Each sphere is composed of the various particular ethical obligations that were taken up in Part I—obligations relating to fairness and truthfulness are in the one sphere, and those relating to loyalty and confidentiality are in the other.[205] In the center of each sphere are the universally accepted ethical rules, such as those against bribing judges[206] or representing opposing sides in a single dispute.[207] The overlap between the two spheres represents those areas in which the obligations are in tension or directly conflict with each other. Thus, for example, the collision between the obligation to maintain client confidences, on the one hand, and the obligation to avoid participation in clients' perjury, on the other hand, is located in the shaded area in the middle of Figure 1.

FIGURE 1




The systems of the world agree on the general structure of the Venn diagram, and the core principles of legal ethics in the center spheres, because these features derive from the universal features of the advocate's

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 id.*; *see also* Marvin Mindes, *The Lawyer as Trickster or Hero*, 1982 AM. B. FOUND. RES. J. 177.

205. *See supra* Section I.A. For the moment, I will leave the obligation of independence to one side.

206. For a discussion of universal prohibitions against bribing judges, see *supra* notes 92–97 and accompanying text.

207. For a discussion of the universal understanding that attorneys cannot represent opposing sides in a single case, see *supra* notes 129–30 and accompanying text.

role.[208] 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.[209] This definition necessarily implies basic commitments to truthfulness, fairness, confidentiality, and loyalty, but it also recognizes, at least implicitly, that as these competing obligations expand, they will collide, as represented in the shaded area in the middle.

Figure 1 is helpful to illustrate the basic structure underlying legal ethics as it applies to a generic advocate, but national systems assign unique functional roles to advocates. Outside of the fundamental features inherent in the definition of an advocate, 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 witnesses) in their respective adjudicatory systems.[210] As a consequence of these different roles assigned to advocates, outside of the nucleic centers of the ethical obligations represented in the Venn 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

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208. 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* POUND, *supra* note 128, at 32–33 (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, *supra* note 89, at 141; *see also* Rose, *supra* note 129, at 7–8 (noting that most scholars point to the reign of Edward I (1272–1307) as the time in which the legal profession was born).

209. The term "advocate," and its counterparts in other Western European languages (i.e., the French *avocat* and *avoué*, the Italian *avvocata*, the Spanish *abogado*, the Swedish *advokat*, or the Polish *adwocacka*) have common historical origins. *See* SPEDDING, *supra* note 148, at 88.

210. Notwithstanding the supposed universality, and the linguistic similarities among translations of the term "advocate," " '[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*, *in* LAWYERS IN SOCIETY, VOLUME THREE, *supra*, note 23, at 27, 32; *see also* Kelly Crabb, Note, *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) (describing the various national designations for persons who perform legal functions).

the court and society. Other systems may conceive of the attorney as principally an instrument of the state, and thus construct almost the reverse relationship between the spheres,[211] 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.[212]

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.[213] While all 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. It is through these procedural rules that specific roles, in relation to other actors in a legal system, are determined.

Procedures, in turn, are chosen to reflect and promote the values that underlie the larger legal culture of a society. They emerge out of the "culture" of a society, meaning "those beliefs about how to properly relate to each other that are deeply held, widely shared, and persistent over time."[214] 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."[215] 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 jus-

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211. 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* note 182 and accompanying text; *see also* WOLFRAM, *supra* note 82, § 1.2, at 5 (describing the diminished obligations lawyers in Soviet countries owed to their clients); ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 141 (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).

212. 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.

213. *See* Resnik, *supra* note 24, at 839 (arguing that procedure has normative content reflected in the features of procedural models and the structure of decisionmaking). Other factors that affect the role of the attorney are rules of evidence and cultural traditions. For an insightful 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).

214. *See* Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, 8 (1997) (citing GEERT HOFSTEDE, CULTURE'S CONSEQUENCES 25 (1980)).

215. *See id.* at 9.

> tice fit specific purposes, only certain forms can be justified in terms of the prevailing ideology.[216]

Procedures, then, are integrally linked to the values or goals of the system for which they were designed.

If cultural values motivate procedural choices, which in turn determine the advocate's role in adjudication, and an 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 legal systems.

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

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 (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 the interrelational roles performed by actors (judges, advocates, witnesses and parties) in different systems. Consequently, a comparative proof must begin with an inquiry into the roles established by various national adjudicatory systems.[217]

In any adjudicatory apparatus, the judge[218] is the primary determinant from which counsel, witnesses, and parties are cast in their respective

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216. DAMAŠKA, *supra* note 89, at 11.

217. 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's and Mirjian 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, *supra* note 89, at 9. The limited focus of my comparative analysis reflects primarily limitations of my own knowledge, not a judgment that norms for international 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* John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, DISP. RESOL. J., Aug.–Oct. 2000, at 32 (explaining that there "remains a huge task" to convince developing nations that they can expect a fair hearing before international arbitration tribunals); 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 arbitration in light of complaints by developing countries that it favors the economic interests of the North).

218. 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 decisionmaker. The most obvious exception is the jury. *See* DAMAŠKA, *supra* note 89, at 54.

roles.[219] 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.[220] During the episodic hearings that characterize civilian proceedings, it is the judge, acting on recommendations from the parties, who decides which witnesses and documents will be presented, and the order of such proof.[221] 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.[222] The judge is expected to take an active role in both clarifying the issues and encouraging settlement. To this end, the civil law judge expresses views as to the merits of the case as it proceeds and moves from an initial position of impartiality to one that favors one party over the other.[223]

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.[224] "At least according to the internal folklore, judicial interpretation of [civil] codes does not involve the

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219. The contrasting role of the judge in civil and common law systems has been called the "grand discriminant" between the two systems. *See* Langbein, *German Advantage in Civil Procedure*, *supra* note 85, at 830.

220. *See id.* at 831.

221. 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* Langbein, *German Advantage in Civil Procedure*, *supra* note 85, at 830. 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 Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988) (criticizing Langbein for overstating the role of the judge in German civil proceedings).

222. Conventional wisdom among German advocates is that a lawyer should be wary of putting more than three questions to a witness because asking more risks implying that the judge did not do a satisfactory job in initial questioning. *See* Chase, *supra* note 214, at 4–5. While the conventional wisdom is not always followed, it demonstrates the gravitational force of the judge's power over fact-gathering process.

223. *See* DAMAŠKA, *supra* note 89, at 138 (noting that Continental decisionmakers are expected to conduct prehearing review of the files and are not presumed to come to the case with a "virgin mind"); Langbein, *German Advantage in Civil Procedure*, *supra* note 85, at 832 (noting that "[a]s the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the likely outcome . . . and sometimes encouraging a litigant to abandon a case that is turning out to be weak or hopeless, or to recommend settlement").

224. *See* JOHN HENRY MERRYMAN, THE LONELINESS OF THE COMPARATIVE LAWYER—AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW 184 (1999).

judges in a process of law creation."[225] 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."[226] A judicial opinion, with its rhythmic recitals and studied detachment, is the voice of a 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.[227] The role of guide is, in many respects, collaborative. Some nations make this collaborative role explicit. 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)[228] and in Greece the "Lawyers' Code" characterizes lawyers as "unsalaried Public Servants."[229]

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.[230] 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. Microregulation of attorney fees by the government implies that attorneys are performing state-coordinated functions, not personal services in a predominantly private arrangement.[231] 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),[232] seemed aimed

225. *See* Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347, 379 (1994); *see also* MERRYMAN, *supra* note 224, 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 . . . .").

226. *See* RENÉ DAVID & JOHN E.C. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 142 (3d ed. 1985).

227. *See id.*

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

229. *See* Costas K. Kyriakides & Anthony B. Hadjioannou, *Greece*, *in* TRANSNATIONAL LEGAL PRACTICE, *supra* note 228, at 155.

230. *See id.*

231. *See id.*

232. Daly, *supra* note 6, at 1150–51. These geographic restrictions have recently been lifted under compulsion from the European Union. *Id.*

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 understood as a symbolic reflection of their quasi-official role.[233]

In contrast to these continental arrangements, the American system is built on a model of party contest before a "judicial *tabula rasa*."[234] The American judge (or jury) is supposed to obtain only through the party dialectic all evidence that must be evaluated and legal arguments that must be analyzed,[235] and they are expected to remain completely neutral until it is time to render the final judgment.[236] As a consequence of the relatively passive role of decisionmakers, 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, 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.[237] Parties go to court, therefore, not only seeking resolution of an individual dispute, but potentially changes in the law.[238] 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.

Through 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 sphere comprised of obligations relating to fairness and truth must expand, pro-

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233. *See* Olga Pina, Note, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797, 809 (1988).

234. *See* DAMAŠKA, *supra* note 89, at 138.

235. Professor Reitz characterizes the difference as that U.S. judges "view themselves as umpires between the contending parties, rather than [as German judges] government officials responsible for determining the truth of the allegations." Reitz, *supra* note 23, at 992.

236. *See id.*

237. *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).

238. *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).

truding 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.[239] 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,[240] and independence shifts to become a mechanism primarily aimed at maintaining distance from the State.

These models are the frameworks in which the specific content of national ethical rules is located. Beginning with the rule about pretestimonial communication, if witnesses are presented by one party as part of its case,[241] 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.[242] 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.[243] In that context, an attorney would be intruding on the province of the court if the attorney tried to discuss with the witness the facts of the case.[244] Finally, civil law jurisdictions'

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239. Indeed, Professor Damaška argues that in the adversarial system, counsel's role as "officer of the court" is given an exalted ethical dignity because it acts as an "ethical stabilizer" to prevent abuse of the role of zealous advocate. DAMAŠKA, *supra* note 89, at 143. By contrast, in systems in which the court system is used as a forum for advancing governmental policies, "the professional ethic now counteracts pressures reflecting the idea that aggregate state interests must always prevail over narrow individual interests of the client . . . and the dignity of acting on behalf of a private individual enmeshed in the machinery of justice is likely to be glorified." *Id.* at 143–44.

240. Daly, *supra* note 160, at 1262–63 (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.").

241. 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* Damaška, *supra* note 83, at 28. While U.S. witnesses do not technically "belong" to one party, U.S. attorneys approach litigation with a "proprietary concept of evidence." *See* Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 845 (1997). 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 82, § 12.4.3, at 647.

242. 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 87.

243. *See* Langbein, *German Advantage in Civil Procedure*, *supra* note 85, at 864; *see also* Reitz, *supra* note 23, at 994 ("American courts could only adopt the German rule discouraging pretrial contact with witnesses by changing our cultural definition of the lawyer's role.").

244. The reason why there is no apparent obligation for an attorney to report client perjury or intent to commit perjury is that Continental systems distinguish sharply between the

willingness to vest attorneys with discretion on delicate issues involving their own conflicts may reflect confidence in the professional independence that attorneys are expected to maintain from their clients, which, prior to the adoption of the CCBE Code, was considered sufficient to leave conflicts of interest solely as a matter of an attorney's personal relationship with the client.[245]

The U.S. system's prohibition against *ex parte* communications is framed in more absolute terms because the decisionmaker 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 extrajudicial information will endanger the validity of the result, and hence more relaxed ethical standards regarding *ex parte* communication in civil law systems.[246] 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.[247] 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 not terribly objection-

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role of party and that of witness. Parties to an action are rarely permitted to testify because that would force the dubious choice between testifying against their own interest and perjuring themselves. *See* Damaška, *supra* note 241, at 842. The rarity of party testimony is probably responsible for the lack of attention to attorney obligations regarding client perjury.

245. *See 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.

246. *Compare* WOLFRAM, *supra* note 82, § 11.3.3, at 604–06 (purpose of prohibition against *ex parte* communications with judge is to prevent communicating party from gaining unfair advantage), *with* Langbein, *German Advantage in Civil Procedure*, *supra* note 85, at 830 (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).

247. 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." Lorzano v. Md. Casualty Co., 850 F.2d 1470, 1472 (11th Cir. 1988). The requirement of an impartial tribunal is assured by a 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).

able.[248] Such communication may even be regarded as necessary to ensure that the party arbitrator fulfills her assigned role.[249]

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.[250] 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 protection, while the need to protect information or advice disseminated from the quasi-official attorney to the client is less obvious.[251] Moreover, if questions of confidentiality come up only infrequently in civil law

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248. Some U.S. cases attempt to apply the notion of the decisionmaker 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 decisionmakers are often chosen because of their experience with or knowledge of a particular industry. *See* Carteret County v. United Contractors, 462 S.E.2d 816 (N.C. App. 1995) (holding that arbitrators are not considered biased simply because they are members of the same profession as one of the parties).

249. 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, but also strictures that apply during the selection process. *See* Kennedy, *supra* note 247, at 789.

250. 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, *supra* note 89, 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.'" Schneyer, *supra* note 117, at 1499–1502 (contrasting emphasis in Europe on independence from clients and U.S. emphasis on preserving independence from third parties who would interfere with lawyer's judgment on behalf of client).

251. Notably, in the Anglo-American tradition, the attorney-client privilege was originally thought to belong to the barrister rather than the client. *See* Hazard, *supra* note 146, at 1071. 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.*

proceedings, and primarily in response to questions from a judge,[252] there is less concern in leaving attorneys with discretion about when information can be disclosed.[253]

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. Communication with the client is essential and withholding important communications from an opposing party would interfere with representation. 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.

Ultimately, these differing roles assigned to attorneys reflect the larger cultural values of the societies that produced them. Using very broad brushstrokes to render the opposing scenes, it has been argued that the greater authority of civil law judges reflects in German society a greater acceptance of authority and less tolerance for uncertainty.[254] 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.[255] 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.[256]

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252. "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." Daly, *supra* note 6, at 1154 n.184.

253. *See supra* Section II.A.2.

254. *See* Chase, *supra* note 214, at 19. This observation about German society and its relation to the civil law tradition may not be generalizable. Anyone who has driven on the roads of Italy, another civil law system, inevitably noticed that Italians appear to have an extraordinarily high tolerance for uncertainty—or even chaos!

255. By maximizing the role of partisans who have obvious incentives to distort the truth in favor of their personal interests and by 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, *supra* note 89, at 11; Chase, *supra* note 214, at 19 (arguing that legal culture in Germany is more comfortable with authority, while in the American system the 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).

256. 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, intentions, and actions, and in so doing generally presup-

### 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.

#### 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 it is not possible to "reason" which system's values are "better." On questions of values, "reason is silent; conflict between rival values cannot be rationally settled."[257] 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.[258] 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."[259] 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.[260]

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poses some claim that these concepts are embodied or at least can be in the real social world." ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 23 (2d ed. 1984).

257. *See id.* at 26.

258. FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 12 (1989).

259. *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 Greenwood Onuf, *Global Law-Making and Legal Thought*, *in* LAW-MAKING IN THE GLOBAL COMMUNITY 1 (Nicholas Greenwood Onuf ed., 1982) (discussing the impact of the shift in the development of international law from scholars to bureaucrats).

260. *See* KRATOCHWIL, *supra* note 258, at 12.

We do not need to speculate whether this problem could manifest itself in the 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").[261] While called a "Code" and referring to "Rules," the IBA Code is more accurately characterized as an aspirational statement of "professional culture."[262] For example, on the subject of conflicts of interest, lawyers are admonished only to "preserve independence in the discharge of their professional duty."[263] 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 that they have different definitions of the term "independence."[264] 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.[265] 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."[266] 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 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,[267]

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261. IBA INTERNATIONAL CODE OF LEGAL ETHICS, *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) [hereinafter IBA CODE].

262. Daly, *supra* note 6, at 1158–59.

263. *See id.*

264. *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 of representatives from legal traditions outside of those of Europe and North America, such as Syria, Iraq, Iran, Egypt, Jordan, Israel, Lebanon, Pakistan, and Turkey, although admittedly these endorsements may have been influenced by the post-colonialist forces. *See* McCary, *supra* note 152, at 294.

265. *See* THE DECLARATION ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY (1977) [hereinafter DECLARATION OF PERUGIA].

266. *See* Daly, *supra* note 6, at 1159.

267. The following countries are Member States of the CCBE: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. *See* Terry, *supra* note 89, at 1 app. C. In addition to the Member States, there are several observer countries: Austria, Cyprus, Finland, Norway, Sweden, Switzerland,

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.[268]

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 definitively resolved by any code of ethics for international arbitration.[269] Because the CCBE Code regulates cross-border practice,[270] as opposed to practice before international tribunals, in many instances when its drafters found harmonization of ethical norms impossible, they relied, although not always successfully, on choice-of-law provisions.[271] In one telling example, the CCBE 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 an obligation to communicate the information to her client.[272] Instead of adopting a definitive rule resolving the conflicting approaches, Rule 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.[273]

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and the Czech Republic. *See* John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673, 674 (1991–1992). 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, *supra* note 214, 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").

268. *See* Terry, *supra* note 89, 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*, MEALEY'S INT'L ARB. REP. No. 9-12, at 12 (Dec. 1994).

269. *See* Terry, *supra* note 89, at 19, 25.

270. Although these rules have not been entirely satisfactory, it is not certain if the reason is the inherent nature of conflict-of-laws rules in ethics, or because these particular rules are unclear. *See id.* at 78; *see also* Frank, *supra* note 92, at 963.

271. *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 S.P.G. INT'L L. PRACTICUM 23 (1994); Terry, *supra* note 89, at 25–27. 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. *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, 400 (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).

272. For a discussion of the contrasting national rules applying to attorney communications marked confidential, see *supra* notes 114–15.

273. *See* Terry, *supra* note 89, at 40.

Other examples of unresolved conflicts, such as in the area of confidentiality in the face of client wrongdoing, are less obvious. Rule 2.3 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.[274] The CCBE Code simply ignores the vast disagreement that exists regarding the limits on the duty of confidentiality, presumably because agreement was improbable.[275]

In contrast to some of the shortcuts that the CCBE Code took, either successfully or not,[276] any ethical code drafted for international arbitration must directly confront and resolve areas of conflict.[277] These areas will undoubtedly be magnified when radically contrasting systems, such as Zimbabwe,[278] the United States,[279] China,[280] and Saudi Arabia[281] get

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274. *See id.* at 27–28.

275. *See id.*

276. 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-laws 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, in favor of the jurisdiction that has an interest in protecting the prospective client and regulating activities occurring within its borders. Even this rule becomes more complicated when Internet solicitation is considered, since it is difficult to categorize the place where solicitation occurs. *See* Brian G. Gilpin, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. MARSHALL J. COMP. & INFO. L. 697 (1995).

277. 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 Section II.C.4.

278. *See* Shalakany, *supra* note 217, at 422–24 (describing special needs of developing countries in international arbitration).

279. 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 23, at 520–22 (quoting HENRY P. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 7 (1976)); WOLFRAM, *supra* note 82, § 1.2, at 4 ("[T]he practices and philosophies of lawyers practicing in other legal cultures very often bear little resemblance to those of lawyers in the United States.").

280. *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 Comm. for Human Rights 1998).

281. *See generally* McCary, *supra* note 152 (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

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. To devise these international rules, negotiation and compromise will of course be necessary. The *functional approach* will focus such negotiations on the relationship between role and legal ethics, instead of letting the negotiations remain an unacknowledged contest between competing adjudicatory values.

### 2. The "Most Restrictive" Approach

An alternative approach, proposed by a very accomplished 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.[282] 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 would be 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.

Despite its apparent appeal, 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. The *functional approach* demonstrates that this conception is inaccurate. The apparently "more lackadaisical" U.S. approach to pre-testimonial communication with witnesses 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,

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and current popularity of arbitration in Arab nations, the Arab legal community remains hostile toward transnational arbitration because of biased treatment by "Western" arbitrators).

282. 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 23, 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.

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 decisionmaker. 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 decisionmaking. While the "most restrictive" approach has an implicit allure,[283] 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.[284] Moreover, economic concerns have motivated drafting of the CCBE Code and current focus on international ethical norms as it has become apparent that professional licensing can be a barrier to international trade and the free movement of persons and services.[285] 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.[286]

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283. The inherent appeal of the "most restrictive" approach even captured the drafters of the Declaration of Perugia, who 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* DECLARATION OF PERUGIA, *supra* note 265, § IV, at 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.

284. *See, e.g.*, George M. Cohen, *Legal Malpractice Insurance, Loss Prevention, and Professional Ethics*, 4 CONN. 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. REV. 579 (1992) (presenting economic analysis of conflict of interest rules); Jonathan R. Macey & Geoffrey P. 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 A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997) (presenting economic analysis of professional responsibility rules regarding aggregate settlements).

285. Some are concerned that the World Trade Organization may attack certain ethical rules as barriers to trade. *See* Daly, *supra* note 6, at 1119–20.

286. 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. Enforcement is another area, which I examine in a companion article, that is likely to attract interest from Law-and-Economics scholars. *See* Rogers, *supra*, note 5. Although I use legal process analysis, the enforcement regime I propose has some tenets in common with Law-and-Economics work in the field because it is based on assessments of comparative institutional competence and be-

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.[287] Outside of regulation of the commercial aspects of the legal services market, however, the object of "efficiency" is not self-evident.[288] Before determining whether a 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 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 accurate fact-finding" or "more accommodating to party participation in proceedings."[289] 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 arbitration have already been identified through the *functional approach.*

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cause it proposes default rules that are adopted into parties' contracts and are subject to party modification. *Compare* Rogers, *supra* note 5, *with* Jeffrey 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*").

287. *See* Richard A. 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* Cohen, *supra* note 123, at 274. Even when Law and Economics turned to "core" legal rules of professional responsibility, its focus was relatively limited to particular rules. *See id.* at 274–75.

288. 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 (1996); Mark G. Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics,"* 33 J. LEGAL EDUC. 274 (1983).

289. *See supra* notes 254–55 and accompanying text.

### 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 arbitration, is to treat ethics as a matter to be resolved either by conflict-of-laws 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 the substantive national law that will govern their dispute.[290] In the absence of such a choice by the parties, arbitrators employ a conflict-of-laws analysis or the doctrine of *lex loci arbitri*[291] to select one nation's laws to govern. Moreover, conflict-of-laws techniques are used in the U.S. Model Rule 8.5[292] and the CCBE Code[293] to resolve multijurisdictional conflicts in cross-border practice. These methods are appealing because they facilitate identification of a single controlling rule through selection of 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.[294] To avoid such problems, the rules chosen must, according to the *functional approach*,

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290. *See* W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 1215 (1997). 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 chosen legal system may affect the outcome of possible controversies. *See* Park, *supra* note 35, at 659.

291. The *lex loci arbitri* is the law of the place where the arbitration occurs. *See* William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 23 (1983).

292. *See* Daly, *supra* note 153, at 752–55. Model Rule 8.5 attempts to resolve the often prickly conflicts that a U.S. attorney with a multijurisdictional practice may confront.

293. *See* Terry, *supra* note 89, at 35–36.

294. In a distinct but related area, arbitrators differ from judges in that they are not expected to be a "blank slate," but are in fact chosen for their substantive knowledge and in that 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.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern Multicultural World*, 38 WM. & MARY L. REV. 5, 31 & n.126 (1996) (discussing Poly Software Int'l Inc. v. Su, 880 F. Supp. 1487, 1492–95 (D. Utah 1995) and the 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).

reflect and facilitate performance of the interrelational roles assigned to actors in an adjudicatory setting.

The importance of the fit between ethical norms and functions assigned to advocates is implicitly acknowledged 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.[295] Even though it is unlikely that these rules were intended to apply to international arbitration,[296] 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.[297]

Particularly staunch advocates of party choice may insist that the participants in arbitration are able to undertake the analysis necessary to 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.[298] The sophisticated character of these parties has led some scholars to speculate that elaborate negotiations produce sophisticated arbitration agreements that are designed to circumnavigate onerous national laws and map out customized adjudicatory procedures.[299] 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 yet, become the practice in drafting arbitration agreements. Often, arbitration agreements

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295. *See* Terry, *supra* note 89, at 19; Roger Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307 (2000).

296. It is not clear whether or how Model Rule 8.5 applies in arbitration and, as noted above, *supra* notes 71–73, Rule 8.5 expressly disavows application in the international context. Vagts, *supra* note 73, at 378. The CCBE Code purports to apply certain rules, such as the obligation of candor to the court, to arbitration. *See* CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION §§ 4.4–4.5 (1998) *at* http://www.ccbe.or/uk/publications.htm. The CCBE Code does not, however, instruct that other obligations, such as confidentiality and conflicts of interest, apply with equal force in arbitration.

297. 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 Model Rule 3.4(c), which prohibits knowing disobedience of rules of a tribunal, except for an open refusal based on an assertion that no such obligation exists. *See* Terry, *supra* note 89, 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.

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

299. *See* Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279 (2000) (arguing that parties often 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).

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.[300]

National ethical rules are also unable to be an adequate substitute for specialized rules for arbitration because national rules do not address all areas of conduct raised in international arbitration.[301] For example, because parties do not choose judges, national ethical codes do not contain any provisions governing what types of questions are permissible in interviewing candidates to act as party-appointed arbitrators. Moreover, because arbitrators are most often drawn from the ranks of large law firms or corporations, arbitral arrangements present unique opportunities for potential conflicts of interests between decisionmakers and lawyers that are not present in traditional litigation settings, in which judges are isolated government employees.[302]

Even if it were assumed that the inadequacy of national ethical rules was simply their failure to address a few discreet areas where regulation is unique to arbitration,[303] it is not plausible that these gaps could be filled by rules specially negotiated at the time when the parties choose national rules. The time-cost of negotiating individual rules to circumnavigate the limitations of national ethical rules is prohibitive. By way of analogy, arbitration agreements almost never include provisions regard-

300. *See* Park, *supra* note 35, at 659 ("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."). Another factor that inevitably keeps rampant opportunism in check may be that, unlike consumer or employment arbitration in the United States, the parties are equally matched. Notwithstanding the sophistication of the parties, though, their agreements have proven not only to fall short of being cunningly expert, they are often downright incompetent. For numerous, often humorous, examples of poorly drafted arbitration clauses, see CRAIG ET AL., *supra* note 107, at 422. While undoubtedly selected from a large sample pool, in my professional experience, even arbitration clauses drafted by Fortune 100 companies often suffer from significant defects and could not accurately be described as anything approaching a masterful orchestration of the elements of dispute resolution.

301. This omission is demonstrated by Professor Menkel-Meadow's persistent efforts to address special ethical considerations that face attorneys involved in domestic U.S. arbitration settings. *See, e.g.*, Carrie Menkel-Meadow, *The Silences of the Restatement on the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631 (1997); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Ideas, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997)[hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*].

302. *See* Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 301, at 432–41; *see also* Carrie Menkel-Meadow, *Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution*, 28 FORDAM URB. L.J. 979 (2001) (describing the complex and unique conflict of interest issues that arise in ADR settings).

303. My thesis, under the *functional approach*, is that there are not simply a few discreet rules that are omitted from national ethical codes, but that their entire orientation is based on nationally conceived interrelational roles, which differ at an organic level from the role of the attorney in international arbitration.

ing procedure, because it is simply too difficult to negotiate procedural rules during negotiation of the underlying contract.[304] Parties are even less likely to negotiate more particularized provisions regarding ethics.[305]

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.[306] The IBA Supplemental Rules are a prefabricated set of default rules that parties can easily incorporate into their contract.[307] For the same reasons that party autonomy is served better by the IBA Supplemental Rules than it is by the opportunity to adopt a national system's or negotiate individual rules of procedure and evidence,[308] a prefabricated code specially tailored to international arbitration will serve parties' interests better than permission to choose one nation's law.[309] The *functional approach* is a coherent methodology that can identify and shape norms for such a code.

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304. *See* Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures, in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY, *supra* note 53, at 3, 13 (citing study by Stephen Bond (former Secretary General of the ICC) of nearly 500 arbitration clauses submitted to the ICC, in which only one referred to specific procedures).

305. Leaving selection of ethical rules to conflict-of-laws 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 the 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 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.

Smit, *supra* note 16, at 22–23.

306. *See* INTERNATIONAL BAR ASSOCIATION'S SUPPLEMENTARY RULES GOVERNING THE PRESENTATION AND RECEPTION OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (1983), *available at* http://www.asser.nl/ica/iba.htm.

307. *Id.* For discussion of the substance of these rules, see *infra* notes 343–44 and accompanying text.

308. Indeed, the IBA Supplemental Rules indirectly address some ethical issues. For example, with regard to witnesses, the IBA Supplemental Rules expressly permit pre-testimonial communication. *See id.* art. 5(8).

309. 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 as the IBA Supplementary Rules are modifiable by the parties, I propose in a companion article that the rules be set as "default" ethical rules, which fit with the fundamental aims of international commercial arbitration but can be modified by the parties. *See* Rogers, *supra* note 5.

### D. *Conclusion*

In addition to the substantive insights it holds into the nature of legal ethics, the *functional approach* also demonstrates the overwhelming importance of comparative analysis to the development of international legal rules.[310] 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.[311] 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 and other international adjudicatory systems.

## III. THE *FUNCTIONAL APPROACH* AS A PRESCRIPTIVE TOOL

Until this point, this Article has used the *functional approach* to examine 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. The actual drafting of ethical codes and even of precise rules is beyond the scope of this Article and, in a companion article, I argue that this task is better undertaken by the various arbitral institutions.[312] This Part illustrates the methodology to be used by arbitral institutions in undertaking the task of drafting those codes, and provides a brief sketch of what its application will portend.

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310. 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.

311. *See* Daly, *supra* note 6, at 1148–53; Terry, *supra* note 89, at 47.

312. *See* Rogers, *supra* note 5.

### A. *The* Functional Approach *in Prototypical 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 arbitration system. To that end, the *functional approach* requires identification of the interrelational functional roles of actors in the international arbitration system,[313] meaning those roles that are assigned by the procedural arrangements of international arbitration and that reflect the underlying cultural values of the international arbitration system.

#### 1. The Predicates for Applying the *Functional Approach* to International Arbitration

The dictates of the *functional approach*, which are premised on procedural arrangements and cultural values, seem difficult to apply in the international arbitration system. Instead of established procedural arrangements, institutional arbitral rules only provide skeletal procedures for commencing arbitration and selecting arbitrators.[314] Beyond these basics, arbitral rules are generally silent with regard to the actual proceedings, including such fundamentals as whether hearings will be held.[315] 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"[316] of the international arbitration community. International arbitration exists between cultural boundaries and is intended to fuse multiple, diverse legal traditions. It is a system of dispute resolution without geographic borders or a discernible citizenry. Indeed, the dynamic increase in the ranks of participants is one of the major sources of pressure for development of an established ethical regime.[317] How can the cultural values of this amorphous system inform development of ethical norms?

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313. In using the *functional approach* as a descriptive tool, I began by analyzing the interrelational functional roles of various actors in national judicial systems. *See supra* Section II.B.

314. *See* John M. Townsend, *Overview and Comparison of International Arbitration Rules*, *in* LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 817 (Practicing Law Institute 2000).

315. *See, e.g.*, UNCITRAL Arbitration Rules, art. 15(2) (1977) (permitting arbitrators to determine whether to hold hearings in the absence of party request).

316. For a definition of "cultural values," see *supra* note 214 and accompanying text.

317. *See supra* Section I.A.

Notwithstanding the open texture of the international arbitration system, there is in fact substantial guidance for formulating ethical norms. The questions posed above can be answered by identifying in the international arbitration system analogues to the national cultural values and rules of civil procedure that inform development of national ethical rules.

### 2. The Normative Goals of International Arbitration

While the international arbitration system does not have "cultural values," as that term is defined in reference to national contexts, it does have distinctive normative goals. For our purposes, these goals can be distilled down to: neutrality, effectiveness, and party autonomy. Just as with national cultural values,[318] it will be shown that the normative goals of the international arbitration system, described in this subsection, undergird and reflect the structure of procedural arrangements in international arbitration, described in the following subsection.

The primary accomplishment of international arbitration, and the primary reason why parties choose international arbitration, is that it ensures neutrality.[319] Parties presume, rightly or wrongly, that the national courts of the opposing party would be biased against them. Significant threats of bias come not only, as is often mistakenly supposed, from the courts of developing nations because of their presumed lack of judicial independence or their vulnerability to corruption. Bias against foreign defendants is alive and well in all countries, including the United States. This unfortunate reality was recognized during the drafting of the U.S. Constitution and led to the diversity clause, which extends the jurisdiction of presumably less-biased federal courts to matters between

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318. *See* Tom R. Tyler et al., *Cultural Values and Authority Relations: The Psychology of Conflict Resolution Across Cultures*, 6 PSYCHOL. PUB. POL'Y & L. 1138 (2000) (describing the effect of values of a population on their relation to authority, particularly individual reactions to conflict resolution either based on its substantive outcomes or on its treatment of them in the process); Resnik, *supra* note 24, at 839 (elaborating the normative content of procedural rules in relation to the "valued features" of U.S. culture).

319. *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). A recent survey of participants in international arbitration bears this hypothesis out. Of those surveyed, seventy-two percent identified "neutrality" and sixty-four percent identified enforceability as "highly relevant to their decision to arbitrate." *See* BÜHRING-UHLE, *supra* note 51, at 45, *cited in* Drahozal, *Commercial Norms*, *supra* note 8, at 95 n.83 (2000). Other popular reasons were expertise available through arbitration (37%) and the unavailability of appeal (37%). *See id.*

American citizens and foreign nationals.[320] 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."[321]

To avoid the potentially biased national courts of their opponents, international businesspersons enter into agreements that prevent national courts from deciding the case and instead place decision-making power in the hands of an arbitral tribunal of their choice.[322] By transferring substantive decisionmaking from national courts to a private arbitral tribunal, parties obtain a uniquely neutral forum for resolving their disputes.[323]

Another important goal of international arbitration is to ensure that disputes will be resolved effectively. Because the exercise of judicial jurisdiction over foreign nationals is an exercise of coercive power, and it reaches into the boundaries of a foreign sovereign,[324] national court litigation of international private disputes often implicates issues of foreign national sovereignty and international comity.[325] As a consequence, many otherwise routine procedural matters, such as

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320. *See* THE FEDERALIST No. 80 (Alexander Hamilton); 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Philadelphia, Lippincott 2d ed. 1876).

321. 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 (1996); *but see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1143 (1996) (concluding, based on analysis of data of federal court civil litigation involving foreign parties, that foreign parties fare better than their domestic counterparts).

322. Until recently, the standard conception was that arbitration clauses "divested" courts of jurisdiction. *See, e.g.*, McConnaughay, *supra* note 29, at 473. More recently, this view has been called into question, particularly by the First Circuit: "The . . . modern view [is] that arbitration agreements do not divest courts of jurisdiction, though they prevent courts from resolving the merits of arbitrable disputes." DiMercurio v. Sphere Drake Ins., PCL, 202 F.3d 71, 77 (1st Cir. 2000); *see also* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 29 F.3d 727, 733 (lst Cir. 1994) ("[A]n agreement to arbitrate does not deprive a federal court of its jurisdiction over the underlying dispute."), *aff'd*, 515 U.S. 528 (1995); Morales Rivera v. Sea Land of Puerto Rico, Inc., 418 F.2d 725, 726 (lst Cir. 1969) (holding that arbitration clauses are "not destructive of jurisdiction").

323. *See* William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, *in* LEX MERCATORIA AND ARBITRATION 143 (Thomas E. Carbonneau ed., 1998).

324. In the words of Alexander Hamilton, "An unjust sentence against a foreigner . . . would . . . be an aggression upon his sovereign as well as one which violated stipulations in a treaty or the general laws of nations." THE FEDERALIST No. 80, at 476–77 (Clinton Rossiter ed., 1961).

325. *See* Joseph F. Weis, Jr., *The Federal Rules and The Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 903 (1989) (analyzing the sovereignty issues that are implicated and "pos[e] substantial problems in transnational litigation").

service of process and production of discovery, must be conducted pursuant to international conventions.[326] In addition to sidestepping the procedural complications inherent in international litigation, arbitration permits parties to determine where their dispute will be resolved, which is no small accomplishment when the all-too-likely alternative of litigating simultaneously on multiple fronts is considered.[327] Finally, international arbitration ensures effectiveness by offering a final award that is enforceable. Given the radically different standards for adjudication in national courts, judicial judgments are often viewed with suspicion or rejected outright as unenforceable by foreign courts.[328]

To achieve the first two goals, neutrality and effectiveness, the modern international arbitration system strikes "an exceedingly fine balance between arbitral autonomy and minimum competence for national judicial review."[329] When the role of national courts is reduced to ensuring that minimal procedural requirements are observed, the necessary by-product is that under the New York Convention there is no appeal from the substantive errors arbitrators may make. Instead, awards must be enforced by national courts unless they offend what might be considered the "most basic notions of morality and justice."[330]

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326. For an extended description of the complicated procedures and uncertainties that are involved in national court litigation of international cases, see GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 439–97, 546–50 (1989); and BÜHRING-UHLE, *supra* note 51, at 31–40.

327. The power to decide where the dispute will be resolved also entails the power to ensure that claims will be brought in a single forum, instead of the multiple fora that inevitably have concurrent jurisdiction in international cases. Indeed, it is often the case that multiple national courts have concurrent jurisdiction over international transactions or events. *See* William S. Dodge, *Extraterritoriality and a Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 133 (1998). As a consequence, it is not only possible but probable that an international dispute will be raised in more than one jurisdiction.

328. *See* REISMAN ET AL., *supra* note 290, at 1215 ("[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, 325 n.11 (1992).

329. REISMAN, *supra* note 12, at 111–13. This balance is established by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *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"].

330. Park, *supra* note 35, at 701. For a detailed discussion of the meaning and effect of these provisions, see REISMAN, *supra* note 12, at 111–13. Specifically, article V of the New York Convention provides:

> 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 extraordinary effect of the first two goals mandates the third normative goal of international arbitration—party autonomy.[331]

To compensate for their lack of a right to appeal the substance of arbitral awards, parties are given *ex ante* control over the arbitral process.[332] The parties create arbitral jurisdiction,[333] select the arbitral tribunal,[334] and determine the powers of the tribunal.[335] Parties also have the opportunity to require that the tribunal follow certain procedures, which is the other touchstone for applying the *functional approach.* The interplay between these three goals, like the "legal culture" of

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> 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
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> 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, *supra* note 12, at 111–13.

331. Toby Landau, *Composition and Establishment of the Tribunal*, 9 AM. REV. INT'L ARB. 45, 45 (1998) ("It is often said that one of the central advantages of arbitration over litigation is the ability to choose one's judge.")

332. BORN, *supra* note 25, at 44 (describing party autonomy as "[o]ne of the most fundamental characteristics of international commercial arbitration").

333. *See* Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, *in* LITIGATION AND ADMINISTRATIVE PRACTICE COURSE SERIES HANDBOOK NO. 579, at 147, 152 (Practicing Law Institute 1998).

334. 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 ET AL., *supra* note 290, at 541–72; *see also* MANI, *supra* note 94, at 16–17 (describing control over the composition of the tribunal as the "royal road" that has lured sovereign nations into international adjudication).

335. 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 ET AL., *supra* note 290, at 1174–54.

national systems, is the background against which procedural arrangements should be modulated and a new ethical regime should be developed.

### 3. Procedural Arrangements in International Arbitration

The rules of arbitral institutions are left intentionally sparse to allow parties the opportunity to set the procedures to be followed by the tribunal.[336] In practice, however, parties rarely exercise this power during the drafting of arbitration agreements,[337] and agreement after a dispute has arisen is difficult, although some notable exceptions exist.[338] Since there are few mandatory procedures, the gap in procedures has until recently been filled by shared assumptions premised on a civil law style of adjudication, with the arbitrator assuming an active role and enjoying broad discretion and powers similar to those of a civil law judge.[339]

As part of the judicialization of international arbitration, however, hybridized procedures have emerged, which are routinely adopted by parties.[340] These procedures have become popular to the point of being commonplace,[341] both because they make proceedings more formal and predictable, and because they effectively neutralize the sharp edges of national procedural practices.[342] Under these hybridized procedures,

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336. 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 ET AL., *supra* note 107, § 8.08, at 146 & § 16.01, at 269 (citing article 11 of the ICC Rules). Some institutions' rules grant arbitrators authority to formulate appropriate procedural rules. *See, e.g.*, ICC RULES OF ARBITRATION art. 11 (1998), *reprinted in* CRAIG ET AL., *supra* note 107, app. 2, at 7; *see also*, Smit, *supra* note 16, at 23–24. "Arbitrators may be empowered to fill gaps [in arbitration agreements] either by the parties themselves, or by the properly applicable law." Park, *supra* note 35, at 653 (citing Fritz Nicklisch, *Agreement to Arbitrate to Fill Contractual Gaps*, J. INT'L ARB., Sept. 1988, at 35).

337. *See* Holtzmann, *supra* note 304, at 10.

338. *See* Richard J. Medalie, *The Libyan Producers' Agreement Arbitration: Developing Innovative Procedures in a Complex Multiparty Arbitration*, J. INT'L ARB., June 1990, at 18–20.

339. *See* CRAIG ET AL., *supra* note 107, § 24.01, at 387–88.

340. For a discussion of the judicialization of arbitration, see *supra* Section I.A.1.

341. *See* Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION, *supra* note 18, at 31 (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, 90–91 & 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*, 7 MICH. Y.B. INT'L LEGAL STUD. 163, 163 (1985).

342. 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

oral hearings are routinely held.[343] In these hearings, most often direct examination is submitted by the parties in the form of witness statements or declarations,[344] which 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.[345] During cross-examinations, arbitrators routinely interject with questions of witnesses, but more for the purpose of clarifying and filling in gaps in

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development information, and of being subjected to the seeming barbarism of cross-examination. *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."). 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. *See* Kurt Riechenberg, *The Recognition of Foreign Privileges in United States Discovery Proceedings*, 9 N.W.J. INT'L L. & BUS. 80, 88 (1988); *see also* Damaška, *supra* note 241, at 842. ("In most continental jurisdictions, a litigant's statement is not a recognized means of proof of his allegations.").

343. For example, the 1977 version of the UNCITRAL Arbitration Rules treated the possibility of an oral hearing as relatively remote, whereas the modern version assumes that there will be an oral hearing. *See* Andreas Lowenfeld, *International Arbitration as Omelette: What Goes into the Mix*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION, *supra* note 18, at 19–38. Although the UNCITRAL Rules, like most arbitral rules, permit parties to contractually agree not to have any oral hearings, as a matter of practice, parties virtually never do. *Id.* at 24.

344. *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 also* Rau & Sherman, *supra* note 341, at 92 ("[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*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION, *supra* note 18, at 1, 13–14.

345. Lowenfeld, *supra* note 8, at 654 ("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. RESOL. J., Aug. 1999, at 33, 34–35 (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. *Id.* at 34. By contrast, Continental practitioners focus more on questions that might elicit new information, rather than on raising questions about the witness's credibility. *Id.*

testimony, than developing the initial content of testimony.[346] Limited discovery is usually allowed, including depositions,[347] and evidentiary objections are making an appearance in many arbitrations.[348]

As noted above,[349] these hybridized procedural practices have recently been synthesized into specific rules by the International Bar Association, which can be incorporated into the parties' contract.[350] These procedures are not mandatory, but I will demonstrate below that they reflect a balance of power between parties and arbitrators that serves the tri-partite goals of arbitration. The balance in power relations established by the hybrid procedures can be the essential touchstone for application of the *functional approach* to derive ethical norms for the international arbitration system.

### 4. Applying the *Functional Approach* to International Arbitration

Just as the role of the judge was the starting point in analyzing 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.[351]

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346. *See* Rau & Sherman, *supra* note 341, at 96–97 (citing DAVID RENÉ, ARBITRATION IN INTERNATIONAL TRADE 296 (1985)); Cremades, *supra* note 18, at 161; Wilkey, *supra* note 109, at 81.

347. 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, BB1 1988 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* § 1036 ZPO (F.R.G.). Foreign law in this note derives from citations and translations in Charles S. Baldwin, IV, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451 (1996).

348. *See* Baldwin, *supra* note 347, 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).

349. *See supra* note 301 and accompanying text.

350. 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* Holtzmann, *supra* note 304. 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 an ALI project to develop transnational rules of civil procedure, which national courts could use when adjudicating international disputes. *See* ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (Discussion Draft No. 2, April 12, 2001).

351. 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, *supra* note 35, at 667. In-

This power is striking in contrast to their judicial counterparts.[352] Even clear mistakes of law in arbitral awards are virtually immune from appellate review.[353] Arbitrator decisions cannot draw legislative responses that, in national systems, are used to counterbalance judicial activism.[354] Other types of indirect controls that constrain national judges—such as pre-established rules of evidence and procedure—were often, under traditional procedure, 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.[355] Arbitrators are vested with this extensive, uncontrolled power to ensure that their decisions are neutral and effective.

Moreover, under traditional procedures, the ability of parties to control proceedings has significant practical and temporal limits. Since party control must be exercised through unanimous decision with other parties, as a practical matter the opportunity for such control almost ends once a dispute arises because, in the midst of a dispute, coordinated efforts among parties is difficult to attain.[356] Inevitably, one party regards extensive discovery as a means to develop evidence bolstering its case,

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deed, 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 "merchant law," or an equitable doctrine such as *amiable compositeur*, which permits arbitrators to resolve the matter based on notions of fundamental fairness. Another form of discretion is a byproduct of the fact that arbitral decisions are not subject to substantive review.

352. In Continental proceedings, judges enjoy significant fact-finding power, but they are significantly limited in their decision-making powers. *See* COMPARATIVE LAW: CASES–TEXT-MATERIALS, *supra* note 77, at 456–70 (describing the appellate processes in civil law countries). 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.

353. Comparison of the relative power of judges vis-à-vis arbitrators in this context can only be made within 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.

354. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)

355. Public scrutiny of judicial opinions acts as a constraining force on judges. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 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: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). Some arbitral institutions, such as the AAA, even recommend that arbitrators not provide the parties with a reasoned award to avoid the possibility that it might provide a basis for future challenge.

356. *See* Lucy F. Reed, *Drafting Arbitration Clauses*, *in* LITIGATION AND ADMINISTRATIVE PRACTICE COURSE SERIES HANDBOOK NO. 648, at 607 (Practicing Law Institute 2001) Moreover in the absence of reasoned awards, it is more difficult for parties to adjust their *ex ante* planning for future arbitrations since they cannot effectively attribute outcomes to particular causes.

while another regards such discovery as potentially exposing its vulnerabilities. One party sees witness testimony as an important source of evidence, while the other can mount a better case if the decision is made only on documentary evidence.

Because of the improbability of agreement, after parties have a clear sense of the advantages of particular litigation strategies, party control over arbitration procedure virtually ends. Under traditional procedures that were applied in the absence of party agreement, after a dispute arose, arbitrators were entrusted with virtually complete control over all fact-finding, including decisions about whether and which witnesses to call, how they should be questioned, and which documents would be requested from the parties.[357] Ironically, party control may effectively end when the dispute commences, but that is precisely when parties' interest in exercising control is most intense. Parties may draft arbitration agreements in the hope that no dispute will arise and without any notion about what a potential dispute would be about,[358] but by the time a genuine dispute arises, they are keenly interested in exerting as much influence as they can to win a favorable result.[359]

The changes brought by the "judicialization" of the international arbitration system are effecting some curtailment of this expansive arbitrator power. For example, the new-found interest in reasoned and published arbitral awards will subject arbitrator decisions to public scrutiny,[360] while the existence of prefabricated procedural rules limits arbitrator discretion in determining how proceedings will progress and how evidence will be received. Even more importantly, the hybridized procedures that have evolved[361] shift primary control over fact-finding during the proceedings from the arbitrator to the parties.[362] The hybrid-

357. Rau & Sherman, *supra* note 341, at 94.

358. Park, *supra* note 35, at 659; *see also supra* notes 295–98 and accompanying text.

359. This shift also likely reflects the fact that arbitration agreements are most often drafted by corporate attorneys unfamiliar with adjudicatory strategies, while arbitration specialists take over after the dispute arises. *See* John D. Berchild, Jr., *Institution Disputes Involving Financial Institutions: Developing U.S. Experiences—A Prototype for NAFTA Cross-Border Transactions?*, 5 NAFTA L. & BUS. REV. AM. 361, 367 (1999) ("Simply incorporating boilerplate or standard arbitration language can give an attorney and his or her client an unpleasant surprise . . . .").

360. *See* Carbonneau, *supra* note 61, at 581.

361. *See supra* notes 340–48 and accompanying text.

362. *See supra* Section 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, *supra* note 38, 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

ized procedures vest the parties and their counsel (not arbitrators) with substantial control over the fact-finding process during the arbitration,[363] including deciding which witnesses to present and controlling their direct testimony (or statements), as well as their cross-examination. Parties also have more opportunity than traditionally allowed to investigate the case, through discovery and interviews with potential witnesses, which permits them to develop their own theory of the case and present it to the arbitrator.

The net result of these hybrid procedures is that the power of parties and their counsel is expanded in the proceedings to counterbalance the vast power arbitrators have in the final decision. By expanding party control in the proceedings, the hybridized procedures create interrelational roles for parties, their attorneys, and arbitrators that reflect and reinforce the tri-partite normative values of the international arbitration system. Neutrality and effectiveness are preserved, but the immense discretion that used to exist for arbitrators is curtailed. These interrelational roles, established by the hybrid procedures and reinforced by the structural goals of the international arbitration system, in turn suggest the contours of the Venn diagram that represents the competing obligations on attorneys in international arbitration.[364]

The considerably expanded discretion an arbitrator has in applying the law suggests that parties through their counsel must appeal to that discretion. On the other hand, international arbitrators are at once presumed to have more specialized industry knowledge than judges (though less than industry arbitrators)[365] 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).[366] 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.

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have the effect of creating a balance, which probably contributed to their universal acceptability. This need to counterbalance arbitrator power is also evidenced in the general formalization of the international arbitral process, particularly the reduction of the hybrid procedures to a formal, structured body of rules and the calls for publication of arbitral awards.

363. *See supra* Section I.B.3.

364. For an illustration of this Venn diagram as it exists in national legal systems, and the theories underlying the model, see *supra* notes 208–10, accompanying text, and Figure 1.

365. *See* Drahozal, *supra* note 8, at 97.

366. *See* C. Thomas Mason III, *Lawyers' Duties of Candor Toward the Arbitral Tribunal*, *in* SECURITIES ARBITRATION 1997, at 59, 100–05 (PLI Corp. & Practice Course, Handbook Series No. 998, 1997).

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.[367] 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 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.[368] 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.[369] Any ethical norm regarding attorney contact with witnesses must therefore accommodate some communication.

This overview provides the general contours of a code of ethics for international arbitration. The fashioning of particular rules will require nuanced calibration to the particular needs and features of arbitral institutions and players. In addition, ultimately, the code will also need to take account of national ethical norms that will be displaced. In a companion article,[370] I propose that this study be undertaken by arbitral

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367. 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.

368. *See* Mason, *supra* note 366, at 100–05; *see also* Deborah L. Rhode, *Institutionalizing Ethics*, CASE W. RES. L. REV. 665, 707–09 (1994) (arguing for higher disclosure obligations in U.S. litigation).

369. Damaška, *supra* note 241, at 847 (arguing that if civilian systems introduced cross-examination, fairness would require at least some "minimumal degree" of witness preparation). Pre-testimonial communication is also necessary in international arbitration because witnesses are often physically located far from the place of arbitration. Bringing them to arbitration, if they could indeed be compelled, would be uneconomical and unrealistic unless there is some knowledge beforehand about what they might be able to contribute to an understanding of the issues in dispute. *See* Ulmer, *supra* note 18, at 179.

370. *See* Rogers, *supra* note 5.

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 roles and normative goals present in those forms.

### B. *Differentiating Among Arbitral Regimes*

While it is possible to discuss generally the elemental goals of arbitration, they are not always adopted, or adopted in the same combination as the prototypical arbitration discussed so far. While highly unpopular, it is possible and occasionally it still happens, that parties agree to have the arbitrator act as *amiable compositeur* or *ex aequo bono.*[371] To address the needs of modern international arbitration, a code of ethics cannot be a single, static set of rules. This Section discusses some institutional examples that demonstrate the need for multiple codes of ethics and that foreshadow the implementation and enforcement regime I propose in a companion article.[372]

Some 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).[373] 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.[374] 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. In addition, LCA arbitrators deal with largely standardized transactions, which permits them to develop a level of further expertise,[375] and given the relatively small dollar amounts involved, efficiency becomes a more important goal.

As a consequence of these features, the role of the parties in LCA arbitration is usually marginal—often limited to submitting samples of

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371. *See supra* notes 39–40.

372. *See* Rogers, *supra* note 5.

373. 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* JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 19–20 (1918). Lisa Bernstein's work surveys a host of other interesting examples, such as arbitration administered by the National Grain and Feed Association. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PENN. L. REV. 1765 (1996).

374. *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).

375. *See id.*

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.[376] This appellate body avoids resort to national courts relied on in standard international arbitration. This system of intentionally diminished party control, augmented arbitrator fact-finding power, and increased need for efficiency, requires that the Venn diagram be redrawn. The relative spheres of obligation in these types of arbitration might 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 client's case. Some resulting rules might include, for example, a code of ethics for attorneys participating in LCA arbitration that would likely restrict attorneys from communicating with potential witnesses. The duty of candor would be augmented and the tolerance for creative argumentation diminished.

In a contrasting example, in international arbitration under the auspices of the International Convention for the Settlement of Investment Disputes (ICSID), party autonomy and control arguably receive a higher priority than in standard commercial arbitration. ICSID arbitration developed under the aegis of the World Bank, to provide recourse for the settlement of investment disputes between investors and host states. The ICSID Convention, in turn, established the International Center for the Settlement of Investment Dispute, which implements the provisions of the ICSID Convention.[377] The unique feature of the ICSID system is that it is designed to accommodate nation-states as parties.[378] This emphasis, in turn, creates a unique need for deference to parties that are sovereign

376. The Liverpool Cotton Association, *Bylaws and Rules*, (2002), *at* http://www.lca.org.uk/publications.html (last visited Mar. 18, 2002).

377. Under sponsorship of the World Bank, over eighty nations, including the United States, have adopted the 1965 International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 159. ICSID was submitted for ratification in March 1965 and entered into force on October 14, 1966, after ratification by 20 countries. *See id.* art. 68(2). It is the only arbitration convention that provides for both adjudication and enforcement of its judgments. ICSID signatories waive sovereign immunity and, in federal systems, ICSID judgments are enforceable in sub-federal courts at the discretion of the national government. *See id.* art. 54(1).

378. *See* REISMAN, *supra* note 12, at 48–49. ICSID arbitration is becoming more important and prevalent, as demonstrated by its growing caseload: "From 1965 to 1996, ICSID had sponsored only thirty-eight arbitrations. During 1997, ICSID registered ten new cases. At the end of 1997, the ICSID center had fourteen pending cases." *ICSID Arbitration on the Rise*, 9 WORLD ARB. & MEDIATION REP. 150, 150 (1998) (citing Professor Emmanuel Gaillard, managing partner of Shearman & Sterling's Paris office).

nations, and corresponding limitations in the role of the arbitrator.[379] ICSID arbitration rules emphasize the independence of arbitrators, while clearly regulating their exercise of power, and party control is enhanced. The augmented control for parties is in part what makes ICSID arbitration palatable for developing nations,[380] although its reputation is not untarnished.[381]

For example, under ICSID rules, arbitrators' power to choose the applicable law is guided and limited.[382] Under recent and somewhat questionable precedents, ICSID rules require automatic reversal by the ICSID appellate panel any time there has been any minor technical defect in the award.[383] Rule 1(4) of the ICSID procedural rules disqualifies anyone who has previously served as a mediator in the same dispute from acting as an arbitrator. 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 Venn diagram illustrating ethical obligations in this system should be closer to the American model than that of traditional, civil law style international arbitration.

As a consequence of redrawing an expanded sphere of client obligation, conflicts of interest would become less tolerable and the need to protect client confidences would become acute. The need for parties to prepare and present their case implies the related need for attorneys to be able to communicate with witnesses and potential witnesses. Given that the parties are nation-states, and the heightened loyalty they are likely to demand from their attorneys, the duty of candor and restrictions on creative argumentation should be relaxed.[384] In addition to being compatible

379. The other unique feature of ICSID arbitration is that it is an almost entirely self-contained system. Neither the procedure nor the awards rendered are subject to challenge in the national courts of contracting states. Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV.: FOREIGN INVESTMENT L.J. 321, 322 (1991).

380. *See* MANI, *supra* note 94, at 16–17.

381. *See* Shalakany, *supra* note 217, at 422.

382. Unlike other arbitral rules, which permit arbitrators to choose the governing law in the absence of party agreement, article 42(1) of 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 ET AL., *supra* note 290, at 258.

383. The adoption of this "hair-trigger" rule appears to have been motivated, at least in part, by an effort to limit the discretion involved in appellate review, but it arguably also aims at constraining the original arbitral tribunal. For a discussion of the problems caused by this "hair-trigger" rule, and efforts to reform it, see REISMAN, *supra* note 12, at 57–83.

384. This ethical relaxation would be consistent with the structure of the ICSID system, which forecloses appeal to national courts even for fraud. *See* William W. Park, *Arbitration and the FISC: NAFTA's 'Tax Veto'*, MEALEY'S INT'L ARB. REP., May 2001, at 33. "ICSID itself is expected to supply the arbitration's quality control under its ad hoc challenge procedure." *Id.* at 34.

with the procedural structure and power relations in ICSID arbitration, an ethical regime that emphasizes client loyalty might also have the effect of providing developing nations that participate in ICSID arbitration with a greater sense that their interests are well protected in arbitration, which will in turn strengthen their confidence in the process.[385]

These and other specialized applications in international arbitration highlight the need for flexibility in any regime for ethical regulation in the international arbitration context. 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 my companion article is to describe a regime that can accommodate these shifting needs, while still providing clear guidance. Before any enforcement regime can be established, however, there must be a clearly defined code of ethics that is tailored to the special needs of the various forms of international arbitration.

## CONCLUSION

International arbitration has emerged as the only viable means for resolving international business disputes. It functions to promote the "rule of law" at an international level when national systems are inadequate to the task.[386] As a consequence of its new role and the increased competitiveness of the international business climate, international arbitration has transformed itself into a more "judicialized" system. The transformation, however, is incomplete. The principle challenge for arbitration is to increase predictability and accountability in the conduct and administration of arbitral proceedings.[387] Without articulated, enforceable ethical norms, this goal cannot be attained.[388]

The task of developing an ethical code for international settings is daunting. The CCBE Code represents a dramatic improvement over past attempts, but it was still unable to address, let alone resolve, several of the most critical issues. The one arbitral institution that has grappled

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385. *See id.* at 42.

386. *See* Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 331 (1997) (explaining how arbitration can implement a "rule of law" in the absence of state mechanisms).

387. *See* MARTIN DOMKE, COMMERCIAL ARBITRATION 14 (1965), *cited in* McConnaughay, *supra* note 29, at 458 & n.22. Admittedly, this predilection for predictability and codification may be more appealing to Western interests. *See id.* at 458 & n.22 (arguing that the goal of legal predictability is not shared in Asia and much of the developing world).

388. For an analysis of why methodologies for developing ethical norms cannot produce a code that will accommodate the special needs of international commercial arbitration. *See infra* Section II.C.

with the issue abandoned its efforts, at least temporarily, because of the difficulties.[389] It is universally recognized, however, that international ethical norms must be developed to guide and regulate attorneys operating in various international contexts. The missing link in accomplishing this goal has been the lack of a theoretical framework or a feasible methodology.

The *functional approach* provides the missing link. By exposing the critical fit between the functional role of the advocate and the normative content of a governing ethical regime, the *functional approach* illuminates the reasons why different national legal systems have developed different ethical rules to govern their attorneys. It also provides theoretical guidance and a clear methodology for developing new ethical codes for international arbitration, in all its incarnations, as well as for other international adjudicatory settings.[390]

389. *See Stockholm Institute's Ethics Project on Hold*, *supra* note 268, at 12.

390. For a description of the need for ethical regulation in other international adjudicatory contexts, see *supra* note 11.