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One, No One and One Hundred Thousand; Which Ethical Rule to Apply; Conflict of Ethical Rules in International Arbitration

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"ONE, NO ONE AND ONE HUNDRED THOUSAND[1]" . . . WHICH ETHICAL RULE TO APPLY? CONFLICT OF ETHICAL RULES IN INTERNATIONAL ARBITRATION

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I. INTRODUCTION

The ABA Ethics 20/20 commission was charged with examining and making recommendations for additions or changes to the ABA Model Rules of Professional Conduct to reflect the impact of technology and globalization on the practice of law.[2] The commission has finished with its work, but it has failed to act on a significant problem that has emerged from the globalization of law practice: determination of the ethical rules that apply in international commercial arbitration ("ICA").[3]

Part II of this paper argues that uncertainty about these rules, coupled with growing instances of unethical conduct in ICA, is a substantial threat to the legitimacy of ICA. We argue that the situation for lawyers engaged in ICA ("ICA Lawyers") is similar to the state of the American legal profession before Watergate, which was characterized by lack of clear guidance to lawyers.

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1. LUIGI PIRANDELLO, UNO, NESSUNO E CENTOMILA (1926).

2. Indeed, when ABA President Caroline Lamm created the Ethics 20/20 Commission in 2009, she said:

> Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as e-mail, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients.

American Bar Association, *ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers* http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730 (August 4, 2009) (last visited Sept. 25, 2013).

3. We use this acronym as a shorthand reference to international arbitration as distinguished from domestic arbitration and state-to-state arbitration. Under this acronym we include international investment arbitration, which—if not technically commercial—is affected by the same uncertainty of the ethics rules applicable to the counsel involved.

Part III discusses two major ethical challenges facing ICA Lawyers: "double deontology" (i.e., when the same lawyer is bound by two conflicting sets of ethics rules) and "inequality-of-arms" (i.e., when in the same proceeding, lawyers are bound by different ethics rules resulting in one side having an advantage in the arbitration.) This section provides specific examples of divergences in ethics rules illustrating these challenges (witness preparation, communications with clients, and relationship among fellow lawyers).

Part IV begins by summarizing five theoretical ways in which the applicable set of ethics rules could be identified in cross-border transactions. We then consider possible application of these approaches to ICA: use of national standards, use of host country standards, and use of a conflict of law approach as in ABA Model Rule 8.5. This section concludes with a discussion of the preparation of a special code of ethics for international lawyers. While we agree that such a code would be desirable, we doubt that one could be agreed upon by the relevant interest groups at all, and certainly not within the foreseeable future. The drafting history of the Code of Conduct for European Lawyers (CCBE) provides support for our skepticism. While the Code has been widely adopted throughout Europe, it fails to provide clear guidance to lawyers about their obligations when dealing with conflicting ethics rules of various countries.

Part V offers a practical proposal to increase certainty and uniformity in ethical obligations of ICA Lawyers. Our approach, which we call "contractarian," is based on the principle that the basis and legitimacy of arbitration flows from the agreement of the parties. Therefore, to us it makes sense for the ethical rules that apply to ICA Lawyers to be based on the intention of the parties, as evidenced by an express clause in their agreement or implied by certain choices that the parties have made. More specifically, below we offer the following rules for determining the set of ethical rules that ICA Lawyers should adhere to.

> 1. The parties may choose the ethics rule applicable to the ICA Lawyers in the proceeding, exactly as they may choose the governing law. Parties are allowed to choose the rules of evidence and procedure applicable in their arbitration; therefore, they should also be allowed to choose the ethics rules.
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> 2. In the absence of selection by the parties of a specific set of ethics rules to govern the arbitration, if the arbitration agreement selects an arbitration provider that has adopted a set of ethical rules, then those rules should apply to the arbitration.
>
> 3. If the provider chosen by the agreement has not adopted a set of ethics rules or if no provider is chosen, but

> the agreement contains a choice of law clause, then the ethics rules that apply should be the ethics rules of the jurisdiction whose law was chosen. If the agreement provides for the law of several jurisdictions, then the ethics rules of the jurisdiction whose law governs the predominant number of issues in the case should apply.
>
> 4. If neither 1, 2, or 3 governs the situation, then the ethics rules that apply should be the rules of the jurisdiction whose law controls the predominant number of issues in the case as determined by the arbitrators using conflict of law principles.
>
> 5. In any case not covered by the first four principles (e.g., when the parties have agreed that the arbitration should be decided by general mercantile law or UNIDROIT principles or similar references) or in cases not covered by the relevant body of ethics rules, the necessary ethics rules should be determined by the arbitrators, either by general order adopting a set of ethics standards or by order dealing with specific issues either on motion of either party or on the arbitrators' own motion. Arbitrators should select a reasonable set of rules, either followed in a jurisdiction, adopted by a reputable international organization, or advocated by a scholar.
>
> 6. Once a set of ethics rules is identified pursuant to this "contractarian" method, the domestic ethics rules different from the identified set of rules should not be applicable to ICA Lawyers. An ICA Lawyer who complied with the rules so identified should not be sanctioned for violation of an ethics rule of the jurisdiction in which he or she is admitted, when there is no violation of the identified set of rules.

The ABA Ethics 20/20 commission should have modified Rule 8.5 (or added a comment to it) in order to clarify which set of ethics rules applies to ICA Lawyers and to make clear that once ICA Lawyers comply with the identified set of rules, no sanction for violation of the ethics rules of their jurisdiction of admission is allowed. However, despite this lack of specific guidance from the ABA, Part VI argues that the "contractarian" approach is consistent with the current version of ABA Model Rule 8.5. We also argue that disciplinary authorities should, as a matter of comity to international arbitration, not entertain disciplinary actions against ICA Lawyers when the latter adhere to contractually agreed ethics rules applicable to ICA.

The approach that we suggest provides a substantial degree of uniformity and certainty to the ethical obligations of ICA Lawyers. Moreover, it provides a path for the development of an international code of ethics like that favored by many scholars because it results in the adoption of

rules of ethics to govern ICA proceedings, thus creating a body of experience that can help refine codes. Although the ABA 20/20 Commission has completed its work, the problem of determining the applicable set of ethics rules for ICA Lawyers remains. The issue can still be raised by other bodies of the ABA, such as the Sections of International Law or Litigation. In the concluding section of the article (Part VII), we offer a modest addition to comment 7 to Model Rule 8.5 as a way in which the problem facing ICA Lawyers could be handled.

Lastly, we will provide an explanation for the title of this paper. The title comes from a question that we have asked ourselves: Must we resign ourselves to accept that the ethics rules applicable to ICA Lawyers are like the personal and psychological features of the main character of Pirandello's *One, No one and One Hundred Thousand,* i.e. once we recognize that differences exist, it becomes impossible to establish unity? It is our opinion that we should not. While waiting for an international code for ICA Lawyers, which we hope will arrive, but may not, the answer is: parties' agreement.

II. DO WE NEED ETHICS RULES FOR COUNSEL IN INTERNATIONAL ARBITRATION?

Should the conduct of ICA Lawyers be regulated at all or should we simply rely on unwritten rules of their fraternity? Indeed, when talking of the need to clarify ethics rules for ICA Lawyers, we sometimes encounter a skeptical approach that can be synthesized into: "Why do we need clarification? ICA Lawyers know how to behave." The objection is not meritless because the international arbitration bar has the reputation of being a "quite civilized and ethical bar."[4]

It used to be case that ICA was a niche way to resolve controversies. Before the U.S. accessed the New York Arbitration Convention in 1970, ICA was very European—and civil law-dominated, particularly by France—because of the location of the International Chamber of Commerce.[5] Attention to the significance for international arbitration of differences among ethical regimes is indeed quite recent. In the past, issues such as witness preparation and cross-examination tended to be viewed through the lens of a clash of legal cultures.[6] Lawyers resolved these cultural differences by "gentlemen's agreement" rather than legal resolution.

ICA is not a niche anymore; rather it has become the preferred way to solve international disputes, many of which involve hundreds of millions, if

4. Edna Sussman & Solomon Ebere, *All's Fair in Love and War—Or is it? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 AM. REV. INT'L ARB. 611, 612 (2011).

5. *See* George M. von Mehren & Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 GLOBAL BUS. L. REV. 47, 49-52 (2011).

6. Correspondence and conversation (during 2012 and 2013) with Bette Shifman, Vice President, Director of Publications & Special Counsel, CPR International Institute for Conflict Prevention & Resolution. We thank Bette Shifman for sharing with us these interesting insights.

not billions of dollars. In this context "gentlemen's agreements" are insufficient. In 2011, the International Bar Association's Arbitration Committee issued a survey regarding counsel ethics ("IBA Survey").[7] The answers to the Survey revealed many examples of abuses by ICA Lawyers that have been characterized as "guerrilla warfare."[8] We think that the lack of clarity of the rules (coupled with the increase of the number and significance of ICA) is likely to be responsible for the deterioration of conduct.

We see an analogy between the ethical situation governing ICA and the lack of clarity of ethics rules governing attorneys before the Watergate scandal.[9] John W. Dean III, President Nixon's White House counsel, was characterized by the FBI as the "master manipulator of the Watergate cover-up."[10] In the summer of 1971 Egil "Bud" Krogh Jr., a deputy assistant to the President, was given the responsibility to head a special investigations unit, the "Plumbers," whose role was to "plug" news leaks.[11] Among members of the Plumbers were the organizers of the Watergate break-in. Dean and Krogh were disbarred for their roles in Watergate.

Both Dean and Krogh lamented the obscurity of the rules of ethics and the fact that the existing rules were not well known. Krogh stated: "[i]n law school, I took this curious course on ethics. But there was nothing about conflicts or the role of lawyers. We were in completely unknown territory. I was completely unprepared."[12] Similarly, Dean declared:

> In 1972, legal ethics boiled down to don't lie, don't cheat, don't steal and don't advertise .... When I took the elective course in ethics at law school, it was one-quarter of a credit. Legal ethics and professionalism played almost no role in any lawyer's mind, including mine. Watergate changed that—for me and every other lawyer.[13]

Because of the "discredited lawyers who figured so prominently among the Watergate villains," public opinion of the legal profession declined.[14] In response to this situation, the American Bar Association became much more active in proposing ethical standards, including mandatory ethical instruction in law schools and revisions of the governing rules of professional conduct. In 1983 the ABA adopted the Model Rules

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7. Sussman & Ebere, *supra* note 4, at 611.

8. *Id.* at 612.

9. Mark Curriden, *The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics*, ABA JOURNAL (June 1, 2012, 5:20 AM), http://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards/.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Marc Galanter, *The Faces Of Mistrust: The Image of Lawyers In Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 812 (1998).

of Professional Conduct to replace the 1969 Model Code of Professional Responsibility.[15]

As we said the "international arbitration bar" is still perceived to be a "quite civilized and ethical bar,"[16] but instances of ethical abuses are becoming more common among ICA Lawyers. Edna Sussman and Solomon Ebere summarized the IBA Survey. They reported that the 68% of the 81 participants answered that they felt to have been the victim of or witnessed one or more than one situations of "guerrilla tactics."[17]

More than the number of the violations (which are small if we consider the number of ICA proceedings), the types of reported misconduct[18] are of greater concern. The examples are numerous:

- improper behavior in discovery (such as distributing the pages of a requested document in 18 different boxes);
- lying about counsel's or a party's health to delay a hearing;
- changing counsel for the only purpose of creating a conflict with the arbitrator;
- frivolous challenges to the arbitrator to delay proceeding;
- sending inflammatory letters to arbitrators;
- last minute introduction of evidence;
- initiation of criminal or bankruptcy proceedings against opposing counsel;
- threats to arbitrators that they would face contempt actions if they started arbitration proceedings (and other cases of *ex parte* communication);
- threats to witness favorable to the other side ("he would never work again");
- filing of disciplinary complaints against every expert that the other side plans to present;
- hyper-aggressive behavior against the arbitrators who did not rule favorably;
- pretending to present documents to scare witnesses when in fact the "documents" were only blank paper;
- exhibiting boxes of documents that the attorney claimed to be favorable when the boxes were actually empty;
- confusing and insulting witnesses by calling them "liars";
- insisting on having supporting documentation but never presenting it.[19]

Moreover, the use of guerrilla tactics appears to be increasing.[20]

15. Curriden, *supra* note 9.
16. Sussman & Ebere, *supra* note 4, at 612.
17. *Id.* at 613.
18. *Id.* at 613-15.
19. *Id.*
20. *Id.* at 613.

While it might be true that similar abuses occur in litigation,[21] that is an insufficient response to the problem in ICA for two reasons. First, arbitration finds its legitimacy in the agreement of the parties. The parties *choose* to entrust the resolution of their controversies to arbitration instead of taking them to a court of justice. If parties begin to think that ICA proceedings are infected with unethical conduct, they may not feel comfortable in having their cases decided through ICA. ICA proceedings require higher ethical conduct than traditional litigation to maintain their legitimacy. Professor Catherine Rogers, one of the leading scholars on ICA, has this to say about "legitimacy:"

> [A] number of leading arbitrators and practitioners have described the current situation [i.e. the ethical aspects of international arbitration] as a crisis that can threaten the legitimacy of international arbitration and in need of immediate redress.[22]

Second, a vacuum in regulation exists. While the national bar authorities have done very little to regulate or sanction the ethical conduct of lawyers in ICA, at the same time major international arbitrators have failed to give lawyers involved in ICA any guidance.[23] Without regulation and guidance, the potential for a Watergate-like situation is present.

III. SOME EXAMPLES OF CLASHES BETWEEN ETHICS RULES

National ethics rules differ greatly and so do their "conflict of ethics rules,"[24] especially between civil law and common law countries. If there are professionals who have not focused on how different the ethics and conflicts rules are, then these professionals may one day have an experience similar to that of Mr. Moscarda—the main character of Pirandello's novel, *One, No One and One Hundred Thousand*—who until the age of twenty-eight had never noticed that his nose was tilted to one side, instead of being straight as he always thought it was.[25] After this sudden discovery

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21. *Id.* at 612.

22. Catherine A. Rogers, *Ethics in International Arbitration: Introduction and Chapter One* (Oxford University Press Accepted Paper Series), *available at* http://ssrn.com/abstract=2016290, at 5.

23. Sussman & Ebere, *supra* note 4, at 616 ("[M]ajor international arbitration providers are silent as to the question of ethics for counsel").

24. By "conflict of ethics rules" we mean the rules that identify which set of ethical rules apply to lawyers in different situations. In the U.S., the principal conflict of ethics rule is Model Rule 8.5.

25. PIRANDELLO, *supra* note 1, at 13.

> "What are you doing?" my wife asked, seeing me linger, unusually, in front of the mirror.
>
> "Nothing," I replied. "Just looking at myself, at my nose, here, inside this nostril. When I press it, I feel a little pain."
>
> My wife smiled and said: "I thought you were looking to see which way it tilts."
>
> I wheeled around like a dog whose tail has been stepped on.
>
> "Tilts? My nose?"
>
> And my wife said, serenely: "Of course, dear. Take a good look. It tilts to the right."

Moscarda loses completely the perception of his own identity and ends his days in an asylum:

> I believed everyone saw me as a Moscarda with a straight nose, whereas everyone saw a Moscarda with a bent nose . . . I was obsessed by the thought that for others I was not what till now, privately, I had imagined myself to be. . . . [W]ith the discovery of the hundreds thousand Moscardas that I was, not only for the others but also for myself, all with this one name of Moscarda . . . all inside this poor body of mine that was also one and, alas, no one, if I set myself before the mirror and looked . . . into my eyes . . . .[26]

Before considering some examples of differences among ethics rules, we will examine the consequences that derive from the differences.

A. Why Differences Matter: "Double Deontology" and "Inequality of Arms" Issues

Generally lawyers are bound by the ethics rules of the jurisdictions in which they are admitted to practice or where they practice. When a lawyer engages in an international arbitration, the arbitration may be related to a number of countries other than the lawyer's home country.[27] For example, the arbitration provider may be located in France, the arbitration panel may hear the matter in Argentina, and the parties may come from Brazil and Mexico. In this situation, the lawyers may become subject to the ethics rules of more than one jurisdiction. In addition, different lawyers in the same proceedings might be bound by different sets of rules.

Two types of problems arise from differences in ethical standards of lawyers involved in ICA: "double deontology"[28] and "inequality-of-arms."[29]

The "double deontology" problem occurs when a lawyer is admitted to practice in two different jurisdictions or when he is licensed in one jurisdiction but appears in another. If the relevant jurisdictions have conflicting

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I was twenty-eight years old, and until then I has always considered my nose—if not actually handsome—at least quite decent, like all the other parts of my person generally.

Id.

26. *Id.* at 6-7.

27. Multijurisdictional practice has been a reality in the United States for many years. The fact of such practice generated two types of ethical problems. First, lawyers who practiced across state lines without being admitted to practice in all of the jurisdictions in which they provided services ran the risk that they were engaged in the unauthorized practice of law. The ABA and most states have attempted to deal with this problem by Model Rule 5.5. Second, even if the lawyers were admitted in all of the relevant jurisdictions, either by regular admission or pro hac vice, the lawyers faced possible uncertainty or conflicts between the rules of the relevant jurisdictions. Model Rule 8.5 attempts to deal with this problem.

28. Catherine A. Rogers, *The Ethics Of Advocacy In International Arbitration* 5 (Penn State Legal Studies Research Paper No. 18-2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559012 (last visited Sept. 26, 2013).

29. *Id.*

rules, then "the attorney is faced with the prospect of professional discipline regardless of what actions he takes."[30] Notice that the "double deontology" problem is not peculiar to international arbitration; it may also occur in domestic practice when lawyers—because admitted in two different jurisdictions or anyway subject to the ethical rules of two jurisdictions—are bound by ethics requirements that are inconsistent with one another.

The "double deontology" problem has been widely analyzed by scholars, among others by Matthew T. Nagel, who defined the problem as "[p]erhaps the most confusing issue confronting lawyers in transnational practice."[31] It is a problem of potential disciplinary sanctions and most of all of lack of guidance:

> Double deontology describes the situation where someone is obligated to simultaneously follow two different sets of ethical standards, and often, the two standards conflict on some issue . . . Absent any international ethical organization with binding authority to license and guide lawyers, a lawyer who practices outside of his licensed jurisdiction is likely to encounter a different ethical code. The lawyer has a duty to follow this new code, as well as the code in his home jurisdiction, and he is subject to discipline under both codes.[32]

A lawyer who is without any guidance, could use in the abstract "four standards":

> (1) his own moral standard;
>
> (2) the standard in the ethical code of the nation whose discipline he is definitely subject to (Home State);
>
> (3) the code of the state in which he is rendering services (Host State); or
>
> (4) some third party's code of conduct.[33]

The "inequality-of-arms" (or "unlevel playing field") problem occurs "when attorneys who are bound by different ethical rules participate in a

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30. *Id.*

31. Perhaps the most confusing issue confronting lawyers in transnational practice is the conflicting rules of ethical conduct that dictate pratitioners' [sic practitioners] conduct whenever they cross a national border. In addition to significant communication and logistical issues, these ethical rules bind lawyers regardless of whether they know or have studied the rules pertinent to every county represented in a given situation. As such, many lawyers feel there is little guidance on how to handle the differences in ethical rules. Specifically, lawyers can potentially face disciplinary action both at home and abroad, creating a serious problem called double deontology.
Matthew T. Nagel, *Double Deontology and the CCBE: Harmonizing the Double Trouble in Europe*, 6 WASH. U. GLOBAL STUD. L. REV. 455, 456 (2007).

32. *Id.* at 459.

33. *Id.* at 472.

single international proceeding" and because of those differences the proceeding may be "structurally unfair."[34] For example, one counsel may be free to communicate *ex parte* with the arbitrators, while another cannot do so because the ethics rules of that lawyer's jurisdiction prohibit such contacts, which is the typical situation for American lawyers.

If the disciplinary authorities do not discipline lawyers engaged in ICA for conduct that violates national rules, the playing field may be leveled by desuetude, but lawyers who violate their local rules would always be at risk that the disciplinary authorities may change their enforcement policies. If the bar authorities do begin to discipline lawyers for conduct in ICA that is permitted for lawyers in other countries, some clients may begin to avoid ICA (or avoid hiring lawyers subject to stringent ethical requirements) because the clients would fear that they would be at a disadvantage in ICA. In addition, reliance on lack of enforcement does not help lawyers who treat their ethical obligations as a personal responsibility.

B. Some Examples of Divergences in Ethics Rules

There are substantial differences in ethics rules that can be relevant from the perspective of both "double deontology" and "inequality-of-arms."[35] We focus on three examples of ethical disagreement.

1. Divergence in the Rules Regarding Witness Preparation[36]

The "clash between national ethical rules relating to pre-testimonial contact with [the] witness" is "the seminal and most familiar example used to illustrate the need for international ethical rules."[37] It is true that movement toward allowing ICA Lawyers to contact and prepare witnesses for testimony seems to be developing.[38] For example, Article 4(3) of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (which are often adopted in international arbitrations) provides that "*it shall not be improper for a Party, its officers, legal advisors or other representatives to interview its witnesses or potential witnesses*" and

34. Nagel, *supra* note 31, at 6.

35. Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 357-73 (2002).

36. By witness preparation we intend the "method used by a lawyer to discuss the witness's actual testimony prior to their testimony." Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 740 n. 287 (1998). *See generally* Roberta K. Flowers, *Witness Preparation: Regulating the Profession's Dirty "Little Secret,"* 38 HASTINGS CONST. L.Q. 1007 (2011). Witness preparation is distinguished from the "improper witness manipulation and intimidation—sometimes called witness 'coaching'." *Id.* at 1009. "Witness coaching" is improper, as stated in *Geders v. United States*, 425 U.S. 80, 81, 87 (1976) (holding that a lawyer is prohibited from influencing a witness, but not providing a definition of "improper influence"). Flowers, 38 HASTINGS CONST. L.Q.. at. 1010. For a discussion of the difference between witness preparation and improper coaching, *see id.* at 1011-16.

37. Rogers, *supra* note 28, at 3.

38. Ian Meredith & Hussain Khan, Commentary, *Witness Preparation in International Arbitration – A Cross Cultural Minefield*, *reprinted in* 26 MEALY'S INTERNATIONAL ARBITRATION REPORT 9, 1-2 (2011) (discussing institutional rules and guidelines).

to discuss their prospective testimony with them.[39] However, the IBA does not regulate lawyers; national courts and organizations do, and national standards are still controlling, even if national authorities might not be sanctioning ICA Lawyers for witness preparation. Ian Meredith and Hussain Khan stated the following in their commentary:

> Whilst there is now a broad consensus that it is permissible . . . to be contact between counsel and witnesses for the purpose of preparing witness evidence for admission in international arbitration, considerable differences continue to exist under both the ethical rules regulating the conduct of counsel and under the arbitration laws of different jurisdiction as to what constitutes permissible "witness preparation."
>
> . . . .
>
> . . . At present the position is, generally speaking, that national standards prevail, with national standards being driven by consideration of what is acceptable in national courts or professional bodies.[40]

Indeed, where witness preparation is forbidden by domestic ethics rules, if ICA Lawyers contact witnesses before the proceeding, they are still theoretically subject to discipline exactly as they would be for conduct in their jurisdiction, unless the jurisdiction provides an exception for ICA.

The national rules on contacts with witnesses are indeed quite different. While in the United States preparing a witness is part of a lawyer's duty,[41] the extent to which witness preparation is admissible in other countries (even other common law countries) is different.

In England, for example, communication with witnesses for the purpose of discussing evidence is generally not allowed. In the Barristers' Code of Conduct there is a prohibition for barristers "to rehearse practise or coach a witness" and to "communicate directly or indirectly about a case

39. Rogers, *supra* note 28, at 7 n. 23. For the text of the IBA Rules on the Taking of Evidence in International Arbitrations, *see* http://www.ibanet.org/Search/Taxonomy.aspx?Taxonomy=rules%20of%20Evidence&TaxonomyUid=283A3DDD-D500-4EBC-86C7-FB7BC364A36E (last visited Sept. 25, 2013).

40. Meredith & Khan, *supra* note 38, at 1-2 (discussing the "ethical, legal, and other considerations that arise from the different levels of witness contact viewed as permissible across several jurisdictions" and suggesting "ways that, in the absence of transactional standards, the tribunal might seek to deal with any asymmetry arising in the specific circumstances of the particular case").

41. "Witness preparation is considered . . . . to be an essential part of trial advocacy. Most American lawyers would laugh at the suggestion that witness preparation should be prohibited. American lawyers assert that witness preparation is an essential step in zealous representation." Flowers, *supra* note 36, at 1007-08.

with any witness, whether or not the witness is his lay client, once that witness has begun to give evidence."[42]

To be precise: While "[t]here is no longer any rule which prevents a barrister from having contact with any witness"[43] and neither a rule "which prevents a barrister from having contact with a witness whom he may expect to call and examine in chief, with a view to introducing himself to the witness, explaining the court's procedure (and in particular the procedure for giving evidence), and answering any questions on procedure which the witness may have,"[44] the possibility of discussing evidence with the witness is very limited. In short, in England, while discussing evidence is not blankly forbidden anymore, professional standards seriously limit the practice.[45]

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42. BARRISTERS' CODE OF CONDUCT R. 705, *available at* https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-vii-conduct-of-work-by-practising-barristers/#contact (last visited Sept. 25, 2013). A barrister must not:

> (a) rehearse practise or coach a witness in relation to his evidence;
>
> (b) encourage a witness to give evidence which is untruthful or which is not the whole truth;
> (c) except with the consent of the representative for the opposing side or of the Court, communicate directly or indirectly about a case with any witness, whether or not the witness is his lay client, once that witness has begun to give evidence until the evidence of that witness has been concluded.

Id.

43. WRITTEN STANDARDS FOR THE CONDUCT OF PROFESSIONAL WORK § 6.1.2, *available at* https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/written-standards-for-the-conduct-of-professional-work/ (this is "a guide to the way in which a barrister should carry out his work") (last visited Sept. 25, 2013).

44. *Id.* at § 6.1.3.

45. The guide also includes the following rules:

> Although there is no longer any rule which prevents a barrister from having contact with witnesses, for such purposes a barrister should exercise his discretion and consider very carefully whether and to what extent such contact is appropriate, bearing in mind in particular that it is not the barrister's function (but that of his professional client) to investigate and collect evidence.

Id. at § 6.2.2.

> The guiding principle must be the obligation of counsel to promote and protect his lay client's best interests so far as that is consistent with the law and with counsel's overriding duty to the court (Code of Conduct paragraphs 302, 303).

Id. at § 6.2.3.

> A barrister should be alert to the risks that any discussion of the substance of a case with a witness may lead to suspicions of coaching, and thus tend to diminish the value of the witness's evidence in the eyes of the court, or may place the barrister in a position of professional embarrassment, for example if he thereby becomes himself a witness in the case. These dangers are most likely to occur if such discussion takes place:
>
> (a) before the barrister has been supplied with a proof of the witness's evidence or
> (b) in the absence of the barrister's professional client or his representative.
>
> A barrister should also be alert to the fact that, even in the absence of any wish or intention to do so, authority figures do subconsciously influence lay witnesses. Discussion of the substance of the case may unwittingly contaminate the witness's evidence.

Id. at § 6.2.4.

> There is particular danger where such discussions:
>
> (a) take place in the presence of more than one witness of fact; or
> (b) involve the disclosure to one witness of fact of the factual evidence of another witness.

In civil law countries witness preparation is generally even more restricted than in England. For example:

> [I]n civil law countries, witnesses are not prepared. Instead, the lawyer will nominate a witness for a particular topic and then argue the significance of that testimony. In Germany, contacting non-party witnesses is actually unethical. Under the circumstances, a lawyer is prohibited from preparing witnesses, and cannot even contact other witnesses to determine what they might say.[46]

France does not have a specific statute on witness preparation; however, it is a criminal offense to try to influence a possible witness to a criminal investigation. Because the investigating magistrates carry out an objective investigation, it is generally understood that any side investigation is likely to be obstruction of justice. We can say that the prohibition of witness preparation comes from the statute prohibiting influencing/pressuring witnesses (article 434-15 of the Criminal Code).[47] Because the word "influence" has a broad interpretation, it is difficult to differentiate between "influence" of and "advice" to a witness. Because French judges will evaluate lawyers' conduct on a case-by-case basis, without clear guidelines, witness preparation is a risk.[48]

In Italy, while it is not unethical for an attorney to contact witnesses, attorneys cannot discuss with them the object of their testimony or offer suggestions to obtain favorable testimony.[49] In addition, Italian judges may draw a negative inference from testimony that sounds rehearsed.

> These practices have been strongly deprecated by the courts as tending inevitably to encourage the rehearsal or coaching of witnesses and to increase the risk of fabrication or contamination of evidence: R v Arif (1993) May 26; Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1992] BCLC 1104, [1994] 1 /WLR 1271. . . .

Id. at § 6.2.5.

46. Robert D. Kolar & Katherine L. Haennicke, *The Hague Convention On Taking Evidence Abroad In Civil Or Commercial Matters*, *available at* http://www.thefederation.org/documents/kolar-su03.htm (last visited Sept. 25, 2013).

47. C. PÉN. art. 434-15:

> Le fait d'user de promesses, offres, présents, pressions, menaces, voies de fait, manoeuvres ou artifices au cours d'une procédure ou en vue d'une demande ou défense en justice afin de déterminer autrui soit à faire ou délivrer une déposition, une déclaration ou une attestation mensongère, soit à s'abstenir de faire ou délivrer une déposition, une déclaration ou une attestation, est puni de trois ans d'emprisonnement et de 45000 euros d'amende, même si la subornation n'est pas suivie d'effet.

48. Emails in 2013 with Stephane de Navacelle of Navacelle Avocts, Paris. We thank Stephane de Navacelle for his insights about French law.

49. *See* Article 52 of the Italian Code of Conduct, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Italy_EN_ethical__co1_1236161856.pdf (last visited Sept. 25, 2013). An attorney must avoid discussing with witnesses the facts object to the proceeding with suggestions aimed at obtaining favorable testimonies.

For completeness, we should point out that in *some* civil law countries, the peculiarity of ICA has been recognized, and these countries allow their lawyers to prepare witnesses in ICA.[50]

2. Divergence in the Rules Dealing with Client Communications

In the United States, communication with clients is one of the most fundamental duties of the attorney. Rule 1.4 of the Model Rules of Professional Conduct provides a broad duty to communicate with clients.[51] Lack of communication is a common basis for discipline of lawyers in the US.[52] Since the decision concerning the objects of the representation, such as whether to accept an offer of settlement, is reserved to client,[53] then the lawyer generally must promptly communicate to the client every new offer of settlement.[54]

In other countries the duty to communicate is subject to many exceptions. In the 1998 Explanatory Memorandum and Commentary[55] on the CCBE Code of Conduct for Lawyers in the European Community,[56] a comment to Article 5.3 states:

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50. Meredith & Kahn, *supra* note 38, at 3 ("In court cases in Belgium, France, Italy and Switzerland, all contact with witnesses is prohibited. Each of these countries has, however, implemented specific carve outs to their national ethical codes to provide for the situation when counsel are engaged in international arbitration proceedings").

51. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2012).

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id.

52. *See, e.g.*, Cleveland Metro. Bar Ass'n v. Axner, 135 Ohio St. 3d 241 (Ohio 2013) (grounds for discipline included violation of various provisions of Model Rule 1.4).

53. MODEL RULES OF PROF'L CONDUCT R 1.2(a) (2012).

54. See Model Rule 1.4, comment 1, providing that:

[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.

See also MODEL RULES OF PROF'L CONDUCT R.1.2(a).

55. *CCBE: Charter of Core Principles of the European Legal Profession and Code of Conduct for European lawyers,* Jonathan Goldsmith ed. 2010, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf (last visited Sept. 26, 2013) [hereinafter *Explanatory Memorandum*]. The Memorandum was issued when the 1988 Code of Conduct for European Lawyers was modified in 1998. The Code has also been modified in 2002 and 2006.

56. *See* explanation of the CCBE *infra* Part IV(C).

> In certain Member States communications between lawyers (written or by word of mouth) are normally regarded as to be kept confidential as between the lawyers. This means that the content of these communications cannot be disclosed to others, cannot normally be passed to the lawyers' clients, and at any event cannot be produced in court.[57]

For example:

> [T]he French doctrine *sous la foi du Palais* may require that an attorney maintain as confidential as against his own client a communication conveyed by opposing counsel, even if such communication contains a proposed settlement that U.S. ethical rules mandate that the attorney disclose to the client.[58]

While the "*sous la foi du Palais*" is not universal in Europe (and the CCBE Memorandum explains some differences among the member states)[59] it is nonetheless quite widespread.[60]

In a proceeding in which an ICA Lawyer is bound to share every communication with his or her client while other ICA Lawyers do not have this obligation (or are even forbidden to so sharing), negotiation might be extremely difficult.

3. Divergence in the Relationship Between Fellow Lawyers

The Model Rules have sparse regulation of the relationship among fellow lawyers: Rule 3.4 contains limited provisions on fairness to the opposing party and counsel; Rule 3.5 deals with improper attempts to influence the judge or jury; Rule 4.2 prohibits communication with persons represented by counsel; and Rule 4.4 includes general language dealing with respect for rights of third persons. These provisions are quite general and

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57. *Explanatory Memorandum*, *supra* note 55, at 30.

58. Rogers, *supra* note 28, at 4. Just to make another example, in Italy the correspondence with the attorney for the other party must also sometimes be kept secret from the client. Article 28 of the Code of Conduct provides: "The correspondence that have been qualified as 'confidential' and any correspondence containing a settlement proposal cannot be produced at trial or referred to."

59. *Explanatory Memorandum*, *supra* note 55, commentary to Article 5.3:

> In yet other Member States, the lawyer has to keep the client fully informed of all relevant communications from a professional colleague acting for another party, and marking a letter as "confidential" only means that it is a legal matter intended for the recipient lawyer and his or her client, and not to be misused by third parties.

60. The current CCBE Code of Conduct in Article 5.3 takes an intermediate position on the issue of communication with clients:

> 5.3.1. If a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice he or she would certainly express this intention prior to communicating the first of the documents.
>
> 5.3.2. If the prospective recipient of the communications is unable to assure their status as confidential or without prejudice he or she should inform the sender accordingly without delay.

often vague, and it is rare that US lawyers are sanctioned for their dealings with fellow lawyers.

In the past it might have been the case that the relationship between fellow lawyers in the US was characterized by substantial comradeship, but this is not the situation today.[61] Probably the best evidence of the decline in relationships among lawyers in the US is the advent of civility or professionalism codes.[62] Several sections of the ABA and many jurisdictions have adopted these codes to supplement the rules of professional conduct.[63] The codes typically deal with three types of relationship: between lawyers and their clients, between lawyers and the courts, and between lawyers and other lawyers. The Model Rules include many provisions on the lawyer-client relationship, but few on the relationships between lawyers or with the courts. The civility codes—even if sometimes a very detailed and well inspired effort to regulate the relationship among lawyers—are merely precatory, as you can see from the use of the verb "should." In addition to the civility codes, some courts have introduced civility requirements in the lawyer's oath of office[64] and have started to sanction uncivil behavior,[65] but such proceedings are still uncommon.

The European regulation of the relationship among lawyers is much more substantial than in the US.[66] In Italy the relationship among lawyers is called "comradeship among lawyers" ("*rapporto di colleganza*") and is very important. For example, article 23 of the Italian Code of Ethics states: "In litigation an attorney must inspire his or her conduct to the duty of

61. As a curiosity: In 2003 in Massachusetts Nathan Crystal, one of the co-authors of this article, had a conversation with a seasoned practitioner. This practitioner lamented the modern practice of lawyers to send to fellow lawyers a letter or an email confirming the content of an oral agreement; he said that this practice would have been considered very uncivil when he was a young lawyer, in the mid-fifties or early sixties.

62. In 1997, Chief Justice Judith Kaye of the New York Court of Appeals wrote:

> [I]t is . . . undeniable that with our exploding numbers and increased bottom line pressure, the practice of law has grown tougher and meaner, eroding a core tradition of courtesy and civility. That we have in addition suffered a great loss in public trust and confidence is no secret. Now it is for us to do something about the situation.

Judith S. Kaye, *How do we make the Standard of Civility Work?, Preface to* NEW YORK STATE UNIFIED COURT SYSTEM STANDARDS OF CIVILITY (1997), *available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/2009_ethics_h.authcheckdam.pdf (last visited Sept. 26, 2013).

63. For a chart showing professionalism codes around the country, *see* ABA PROFESSIONALISM CODES, *available at* http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last visited Sept. 26, 2013).

64. *See, e.g.*, S.C. RULES OF PROF'L CONDUCT R. 402 (2013) ("Lawyer's Oath"), *available at* http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=402&subRuleID=&ruleType=APP (last visited Sept. 26, 2013). Among other commitments, the Oath requires:

> To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;
>
> . . . .
>
> I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law . . . .

65. *See, e.g.*, In re Anonymous Member of the South Carolina Bar, 709 S.E.2d 633 (S.C. 2011); In re White, 707 S.E.2d 411 (S.C. 2011).

66. *See generally* CCBE CODE OF CONDUCT art. 5.1–5.9.

defense but without affecting as far as possible the comradeship among lawyers." As one commentator on Italian practice has said:

> The principle of protecting the client must not be intended in an absolute way. Indeed, if it is certainly wrong the old principle that the fellow lawyer comes before anything else, it is also wrong [following] the opposite principle that the client's interest has to be pursued at all costs. As a matter of fact . . . pursuant to article 23, it is ethically improper and sanctionable for a lawyer to allow a hearing to start immediately after the scheduled time, so taking advantage of a slight delay by the other party;[67] or (art. 28) for a lawyer—in order to benefit his client's position,—to file with the court or to disclose to the court the confidential letters [received from the fellow lawyer] and always the correspondence among lawyers when this contain settlement proposals.[68]

As it is evident, an ICA Lawyer bound to adhere to a "comradership" principle and an ICA Lawyer not bound by that principle, have "unequal arms" in the same proceeding.

IV. DETERMINING THE RELEVANT SET OF ETHICS RULES

A. Theoretical Ways in which the Applicable Set of Ethics Can Be Identified

When lawyers perform their professional activities completely within the jurisdiction where the lawyers are admitted to practice, the determination of the applicable set of ethics rules is simple. The rules of ethics of the jurisdiction of the lawyer's admission ("home" jurisdiction) are the rules that obviously govern the conduct of the lawyer "at home." The identification of the applicable body of ethics rules becomes complicated when the lawyer is admitted in more than one jurisdiction, or when the lawyer is admitted in one jurisdiction but renders services in another ("host" jurisdiction"). For the purpose of this article we refer to these types of situations as "cross-border transactions." The problem is particularly serious when the two or more competing bodies of ethics rules are inconsistent with one another (the "double deontology" discussed above).

There are several possible answers to the question "which ethics rules should govern cross-border transactions:"[69] (1) The no-guidance approach;

67. While the principle is still valid, the case law has started to focus more on the client's interest. *See, e.g.*, CNF Mar. 8, 2002 no. 13, Rass. Forense n. 3/2002 (holding that a lawyer that had waited *only* two hours for the other party's counsel did not act unethically because after such unreasonable delay, it is not unethical for a lawyer to put the interest of his client first).

68. Antonino Ciavola, *La deontologia dell'avvocato all'interno del processo*, summary of the conference held in Catania by AIGA on Oct. 10, 2003, *available at* http://www.altalex.com/index.php ?idnot=1986 (last visited Sept. 26, 2013).

69. Nagel, *supra* note 31, at 472.

(2) the home-state approach; (3) Conflicts of Law approach; (4) the host-state approach; (5) the harmonized code approach.[70]

Under the first approach, the domestic jurisdiction offers no guidance to the lawyer involved in a cross-border transaction. The problem of "double deontology," if any, will simply be considered in any disciplinary proceeding that might arise. This is the approach suggested or implied by practitioners who claim that there is no need for ethical rules in international arbitration because practitioners know how to behave.[71] Under a home-state approach, lawyers make their own decisions and in case a disciplinary proceeding ensues in the host jurisdiction, the home state can intervene to support the lawyers.[72] Under the "conflict of law approach," every jurisdiction (or international association of domestic authorities) enacts its own conflict rule that hopefully will guide lawyers towards a certain set of ethics rules.[73] Under the host state approach, lawyers obey the ethics code of the host state, except for some rules of their home state that they are required to comply with.[74] Under the harmonized code approach, an international code is issued and lawyers engaged in international transactions are required to comply with it.[75] The current ways in which various countries identify the set of ethics rules that apply to ICA Lawyers are expressions, in one way or another, of the above five theoretical approaches (although in practice the approaches are sometimes combined).

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70. These are essentially the categories used by Nagel in *Double Deontology*, except that he called them: A. Ignore the Problem; B. Home State Assistance Approach; C. Conflicts of Law Approach; D. Positive List Approach; E. Harmonized Rules Approach. *Id.* at 473-77.

71. Evidence shows that these practitioners are wrong and there is a need for ethical standards in international arbitration. See Sussman & Ebere, *supra* note 4. See also Catherine A. Rogers, *Ethics in International Arbitration: Introduction and Chapter One* (Oxford University Press Accepted Paper Series), note 22.

72. Another response to double deontology problems allows the lawyer to make his own decision, but allows the Home State to make submissions in the lawyer's disciplinary proceeding to bolster his defense. The ABA-Brussels Bar Agreement is an excellent example of this approach. Nagel, *supra* note 31, at 474.

73. The theory behind the Conflicts of Law response to double deontology problems is that every state creates regulations which consider the weight and application of foreign elements in a case. For example, each licensing body develops a listing of how ethical rules apply to the situations in which a particular court may exercise its jurisdiction and which rule takes precedence when a conflict arises. The response resolves double deontology problems where one or both jurisdictions involved has previously specified the ethical code that applies when there is conflict. Notably, the parties involved (i.e., the Home State and Host State) need not make this decision because a third party may exercise this right. . . . .[I]f the ethical codes of the Home and Host States conflict, there is a high likelihood that their Conflicts of Law choices will also conflict. Therefore, implementing the Conflicts of Laws response to the double deontology problem creates additional conflict in multi-layered situation caused by each party insisting that both its ethical *and* conflicts of law rules constitute the appropriate method of resolution. *Id.* at 475-76.

74. [A] lawyer obeys the Host State's ethical code with the exception of certain rules specified in advance. Essentially, the Home State allows its lawyers to apply the other nation's ethical code to resolve most issues, but for certain issues, such as conflicts of interest, it requires compliance with its own code. *Id.* at 476-77.

75. [U]nder . . . [this approach] the multiple ethical codes are combined into a solitary guideline with the force of law. Every lawyer engaging in cross-border practice would be required to follow this code, effectively eliminating double deontology problems . . . . The CCBE Code is an attempt to implement this Harmonized Rules approach, but it faces major problems. The differences in legal traditions

B. *The "Home Country" Approach -Using National Standards*

One approach to identifying the ethics rules applicable to ICA Lawyers is to apply the ethics rules of the jurisdiction in which the lawyer is admitted.[76] However, the home country approach is clearly deficient as a method of identifying the ethics rules applicable to ICA Lawyers. This approach does not solve either the problem of "double deontology" or "unlevel playing field." Suppose a French lawyer is involved in an arbitration in Washington D.C. and attempts to prepare a witness for testimony. The lawyer's conduct is permitted in D.C., indeed competency would require such preparation under U.S. ethics rules.[77] However, witness preparation is unethical in France, and the lawyer could be subject to sanction there. Further, this approach results in an unlevel playing field. French lawyers involved in arbitrations cannot prepare their witnesses for testimony, while their American counterparts can ethically do so. The home county approach suffers from another flaw: By subjecting ICA Lawyers to standards of their home jurisdictions, it ignores the legitimate interest of tribunals to control the conduct of lawyers before the tribunal. On the other hand, the home country approach has two significant advantages: clear guidance to lawyers on how to act ethically[78] and it subjects lawyers to standards with which they should be familiar. However, in our opinion these advantages are outweighed by the substantial costs of the home country approach.

C. *"Host State" Standards: the CCBE Approach*[79]

When national jurisdictions (and international organizations) have tried to provide some direction, they have generally chosen the "host state"

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and ethical codes between nations are at the heart of the double deontology problems and will exist irrespective of any compromises that are made. *Id.* at 477-78.

76. If the lawyer is admitted in more than one jurisdiction, and the two sets of rules conflict, there might be a problem in identifying which one should apply. In some cases, this problem could be solved by applying the most restrictive rule. In some other cases, the problem could not be solved so easily (for example when the two sets of ethics rule prescribe an inconsistent behavior, so that the lawyer by complying with one rule, violates the other (e.g., duty to communicate with client and duty deriving from the "*sous la foi du Palais*" doctrine).

77. *See supra* note 41 and accompanying text.

78. With the exception of the case in which lawyers are subject to different standards because they have several admissions.

79. Nagel has characterized the CCBE Code as a harmonized approach but for the reasons discussed below we think it is more properly characterized as either a "host country" approach or perhaps a compromise solution that respects both host and home country rules. If you want to see the CCBE as a harmonized code, we should say that it is more a harmonized international private law code (i.e., a code that establishes and harmonizes conflict rules) than a harmonized ethics code (i.e., a code that positively establishes rules of ethics.) See Nagel, *supra* note 31, at 464. Despite the fact that the CCBE Code has not "harmonized" the legal ethics rules from all Member States so as to provide substantive provisions governing all issues, the CCBE Code has, in essence, attempted to harmonize the "conflicts of law" choices facing a lawyer. It has attempted (although not always successfully) to provide clear rules stating in which situations a lawyer's "Home State" ethics rule governs and in which situations a lawyer's "Host State" ethics rule govern. *See generally* Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct,* 7 GEO. J. LEGAL ETHICS 1, 45 (1993). As we said, in most cases, the "Host State" approach is the one chosen by the CCBE.

standard. The CCBE, an organization among European bars,[80] has promulgated a Code of Conduct for European Lawyers ("CCBE Code").[81] The CCBE Code was drafted with the intention of giving guidance to lawyers and dealing with the "double deontology" problem.[82] The CCBE Code dates back to October 28, 1988, and has been amended three times since then. (The latest amendment occurred on May 19, 2006.)[83] The CCBE Code applies "to lawyers as they are defined by Directive 77/249/EEC and by Directive 98/5/EC and to lawyers of the Associate and Observer Members of the CCBE."[84] The Code applies when a European lawyer engages in cross-border activities.[85]

The CCBE Code provides for a general duty to respect the ethics rules of the place where the activity is performed, thus opting for the "host state" principle. The Explanatory Memorandum to the CCBE Code contains an extensive discussion of several directives of the European Union that deal with cross border practice. Without going into the detail of these directives, they essentially require lawyers engaging in cross border practice to comply with the ethics rules of the host country.[86] If this were the only principle that the CCBE would follow, the issue of "double deontology" would be solved. Alas, this not the case: while the CCBE Code has a substantial strand of host country emphasis, the Code does not ignore the interests of the home country. Indeed, the CCBE Code does not exclude that the lawyer may be also subject to his or her "home state" ethics rules. Lawyers generally remain subject to home country rules even when bound to respect the rules of other countries. The Commentary to Article 2.4 states that in performing services on an occasional or temporary basis in another country, a lawyer pursuing these activities shall observe the rules

80. The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 11 further associate and observer countries, and through them around 1 million European lawyers. For further explanation of the Council of Bars and Law Societies of Europe (CCBE), see http://www.ccbe.eu/index.php?id=375&L=0 (last visited Sept. 26, 2013). For a list of member countries, see http://www.ccbe.eu/index.php?id=22&L=0 (last visited Sept. 26, 2013).

81. For the text of the CCBE Code, see http://www.ccbe.eu/fileadmin/user_upload/NTC document/EN_Code_of_conductp1_1306748215.pdf (last visited Sept. 26, 2013).

82. Realizing the growing inconsistency in ethical codes on the national level, the Council of Bars and Law Societies of Europe adopted the CCBE Code in 1998 to unify the legal profession in Europe and guide practitioners in the expanding transactional practice. The CCBE Code "is a framework of principles of professional conduct" that individual lawyers can use to structure their transnational practices. The CCBE intended that the Code be domestically binding, as well as governing all cross-border activities in the European Community; however, the CCBE Code is not binding unless the "rules are adopted as enforceable rules by [the] particular Bar [of both the Home and Host States]." Nagel, *supra* note 31, at 459-60.

83. See *Explanatory Memorandum supra* note 55, at 10.

84. *See* CCBE CODE art. 1.4, para.1.

85. *See id.* at art. 1.5, para 1. This provision is binding on all member States: all lawyers who are members of the bars of these countries (whether their bars are full, associate, or observer members of the CCBE) have to comply with the Code in their cross-border activities within the European Union, the European Economic Area, and the Swiss Confederation as well as within associate and observer countries. It is worth noting that even if the CCBE Code states that the Code is "binding," the Code is not binding in itself but it has become binding by adoption by the several national bars. Nagel, *supra* note 31, at 459-60.

86. See *Explanatory Memorandum*, *supra* note 55, at art. 2.4.

of professional conduct of the Host Member State, without prejudice to the lawyer's obligations in the Member State from which he or she comes.[87] The clash between the two principles is well expressed in Article 2.4 (**Respect for the Rules of Other Bars and Law Societies**):

> When practicing cross-border, a Lawyer from another member state *may* be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.[88] (emphasis added)

Another specific example of the "host country" approach is the Italian Code of Ethics, which has the following provision for an Italian attorney working abroad:

> *Code of Conduct Article 4—The activity abroad, and the activity in Italy of a foreigner.* In the performance of those professional activities abroad that are allowed by law, Italian attorneys must comply with the ethics rules of the jurisdiction in which they perform the activity.
>
> The foreign attorney performing their activities in Italy, when this performance is allowed, must comply with Italian ethics rules.[89]

Application of "host country" rules to ICA raises several problems. First, and most important, what is the "host country?" Is it the country where the arbitration panel conducts the hearing or where the arbitration institution (if there is one) has its principal office? The site of the arbitration or the principal office of the arbitration provider may not bear any significant relationship to the dispute, the parties, or the lawyers. For example, consider the case of American and Brazilian lawyers handling an arbitration under the ICC (International Chamber of Commerce) rules (ICC is based in Paris), between an American company and a Brazilian company, where the hearing is held in Mexico City. Under the "Host Country" approach, the lawyers would be bound by Mexican ethics rules (or maybe French rules), which do not necessarily have any reasonable relationship to the dispute or to the lawyers, and would require them to gain familiarity with a set of ethics rules that they are not accustomed to using. Indeed, in this example, American and Brazilian ethics rules would be irrelevant, which would surely strike the lawyers involved as strange. Second, unless home country authorities accept application of host country

87. *Id.*

88. *Id.*

89. ITALIAN CODE OF ETHICS, *available at* http://www.consiglionazionaleforense.it/site/home/area-avvocati/codice-deontologico-forense/articolo5792.html (last visited Sept. 26, 2013).

rules, lawyers face the "double deontology" problem. The "host country" approach does, however, have the advantage of solving the "inequality of arms" problem.

D. The Rule in the United States: a Conflicts-of-Law Approach

Rule 8.5(b) of the ABA Model Rules is the basic rule to identify the ethics rules applicable to cross-border transactions in the US:[90]

> (b) **Choice of Law**. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment 7 makes it clear that the drafters intended for Rule 8.5 to apply to international as well as domestic matters: "The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise." However, Rule 8.5(b) fails to offer guidance to ICA Lawyers because the Rule is filled with ambiguity when applied to ICA.

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90. Of course, some US jurisdictions have adopted modifications of Rule 8.5, but we cannot deal with the several versions in this paper. Because the departure from the basic Model Rule 8.5 is important, we want to mention New York Rule 8.5, which provides as follows:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

At first glance it appears that Rule 8.5(b)(1) should apply to ICA. Without a doubt ICA panels are "tribunals" for the purpose of Rule 8.5(b)(1). Applying this provision (which we can call the "local rules" rule), however, does not clearly identify the set of ethics rules applicable to ICA Lawyers because it leaves open a number of important questions.

First, where does an arbitration tribunal "sit." For example, if the parties choose to arbitrate under the auspices of the ICC, but pursuant to the parties' arbitration clause ("The arbitration shall be held in Buenos Aires, Argentina.") the arbitrators hold their meetings in Buenos Aires, it is unclear whether the place where the tribunal "sits" is Paris, where ICC is located, or Buenos Aires, where the arbitrators meet. The situation can become more complex if the arbitrators hold hearing in several places, when authorized by the arbitration clause or ordered by the arbitrators. We note that the place where the arbitrators actually meet can have nothing to do with the parties or the matter. As noticed above, the parties might have chosen a place only for travel convenience rather than relationship to the matter (e.g., it is half way between party A and party B or it is the place where the majority of the arbitrators live), or the parties might have chosen (as it is often the case) a "neutral" site that has nothing to do with the dispute, or the parties might not have identified the place, which is then chosen by the arbitrators according to their convenience. In these cases is the place of the meeting of any significance? And what if the arbitrators do not "meet" in one place and instead simply hold their meetings via conference call while physically located in different jurisdictions? In this situation, where does the arbitration panel "sit"?

Defining the place where the "tribunal sits" looking at the principal location of the institution under which rules the arbitration takes place (i.e., Paris in the case of the ICC) is also unsatisfactory. The parties may not choose to have their arbitration conducted under the auspices of any organization; if they choose this "free standing" model of arbitration, Rule 8.5(b)(1)'s tribunal would not have a seat—an absurd result. In addition, some international arbitration organizations provide that the "place of arbitration" is the place chosen by the parties for the meetings of the arbitrators, with some default rules in case the parties have not chosen the place, in which case we return to the problems discussed in the previous paragraph.[91]

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91. *See, e.g.*, Article 18 of the International Chamber of Commerce Rules of Arbitration, which provides in relevant part:

Article 18—Place of the Arbitration

1 The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.

2 The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.

3 The arbitral tribunal may deliberate at any location it considers appropriate.

Or see Rule 18 of the SIAC Singapore International Arbitration Center Rules:

Rule 18 - Seat of Arbitration

Second, to what extent is the conduct of ICA Lawyers governed by the "local rules"? Rule 8.5(b)(1) refers to "*conduct in connection with a matter pending before a tribunal.*" This language leaves open the question of which conduct is "in connection with" the matter? Obviously, by this very language ("in connection with"), "local rules" should not be limited to ICA Lawyers' conduct in hearings before the tribunal: conduct that is not in the presence of the tribunal but is *directly related* to the *proceeding* would be covered. For example, interviewing witnesses to prepare for the hearing would clearly be covered by the local ethics rules. But a substantial grey area remains for ICA Lawyers' conduct that is *less directly* related to the matter. For example, would an agreement by an ICA Lawyer with a litigation funder be subject to local ethics rules and what if those rules do not deal with litigation funding?[92]

Third, does the language "*unless the rules of the tribunal provide otherwise*" allow the "local rules" to be overridden by an agreement between the parties when approved by the tribunal for a different set of rules to apply? For example, suppose an ICA between a US company and a Brazilian company both of whom are represented by American lawyers. Suppose the panel consists of two Americans and one Brazilian. Suppose further the place of ICA is in Brazil. The arbitration agreement provides that New York law governs. The lawyers agree that the ABA Model Rules of Professional Conduct should apply to the proceeding, and the arbitrators are willing to accept this agreement. Is the agreement valid thereby making the ABA rules applicable under Rule 8.5(b)(1)? Under Rule 8.5(b)(1), we do not know. As more fully discussed below, we think the agreement should be valid because arbitration is fundamentally a matter of agreement.

Fourth, what rules apply if the "local rules" specify that they do not apply (for example, there is an express exception in local ethics rules for ICA), or direct to the ethics rules of another jurisdiction which redirects back to be "local rules"? This is called the "*renvoi*" problem.)

For the above reasons, it is our opinion that Rule 8.5(b)(1) cannot be applied to ICA. If Rule 8.5(b)(1) does not govern, then Rule 8.5(b)(2) applies. This Rule points to the ethics rules of the jurisdiction where "*the lawyer's conduct occurred*" unless "*the predominant effect*" is in another jurisdiction, in which case the rules of that jurisdiction control. However, the rule is subject to an exception; the lawyer is not subject to discipline "*if*

18.1 The parties may agree on the seat of arbitration. Failing such an agreement, the seat of arbitration shall be Singapore, unless the Tribunal determines, having regard to all the circumstances of the case, that another seat is more appropriate.

18.2 The Tribunal may hold hearings and meetings by any means it considers expedient or appropriate and at any location it considers convenient or appropriate.

92. Litigation funding is a growing phenomenon around the world, and a number of litigation funders are actively involved in funding international commercial arbitration. See the websites of two public litigation funding companies, Burford Capital, http://www.burfordcapital.com/litigation-finance/case-studies/ (last visited Sept. 26, 2013), and Juridica Investments, Ltd., http://www.juridicainvestments.com/about-juridica.aspx (last visited Sept. 26. 2013).

the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

Even if we think that Rule 8.5(b)(2) should be applied, it also suffers from ambiguities. Under Rule 8.5(b)(1), it was necessary to determine where the tribunal "sits." Under Rule 8.5(b)(2) lawyers must determine (1) where their conduct occurred, (2) where the predominant effect of their conduct took place, and (3) where they reasonably believe the predominant effect of their conduct occurred. These determinations are not easy in case of ICA. Consider a situation in which an ICA Lawyer, with offices in Washington, D.C., drafts a brief to be submitted to an arbitration panel in Shanghai on behalf of a Virginia company; the adverse party is a Chinese company represented by New York counsel, and the panel consists of two Chinese and one American arbitrator. Where does the lawyer's conduct occur? Where is the predominant effect of the conduct? Where does the lawyer reasonably believe that the predominant effect will occur? In summary, in ICA where the location of the ICA Lawyers, the clients, the arbitrators, the site of the arbitration, and the seat of the arbitration providers may all be in different countries (and especially now that modern technology allows lawyers to perform activities remotely), the place where conduct occurs and where the lawyer has a reasonable belief that the predominant effect of that conduct will be, are all difficult if not impossible to determine.

Moreover, while Rule 8.5(b)(2) deals poorly with the problem of "double deontology," it is completely silent on the problem of "leveling the playing field." Rule 8.5 only applies to American lawyers; lawyers from other countries will be subject to different rules, which may be more or less restrictive.

E. Do We Need an International Code of Ethics for ICA Lawyers?

Since the 1970s a number of scholars have recognized the need for uniform ethical standards in ICA.[93] More recently, Professor Catherine Rogers has argued for an international code of ethics to govern ICA[94] and for arbitrators to have the power to enforce such a code.[95] In 2010 Doak Bishop, one of the leading practitioners in the ICA field, advocated for such a code in his keynote address at the ICCA ("International Council for Commercial Arbitration") conference.[96]

In the last few years several attempts have been made to develop codes that could apply to ICA.[97] In 2013 the International Bar Association

93. See Sussman & Ebere, *supra* note 4, at 616-18.

94. *See, e.g.*, Rogers, *supra* note 35. For a bibliography of Professor Rogers' work in international arbitration, see http://law.psu.edu/faculty/resident_faculty/rogers (last visited Sept. 26, 2013).

95. Catherine A. Rogers, *Context and Institutional Structure in Attorney Discipline: Developing an Enforcement Regime for Ethics in International Arbitration*, 39 STAN. J. INT'L L. 1 (2002).

96. Doak Bishop, *Ethics in International Arbitration*, http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf (last visited Sept. 26, 2013).

97. See Sussman & Ebere, *supra* note 4, at 618-20.

issued "Guidelines on Party Representation in International Arbitration."[98] In 2011 the International Law Association Study Group on the Practice and Procedure of International Tribunals issued the Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals.[99] Cyrus Benson has offered a unique approach by proposing a checklist of ethical standards that lawyers for the parties could choose to adopt either in full or standard-by-standard at the commencement of the arbitration.[100]

Without examining the substantive merits of each of these proposals, they nonetheless suffer from some major difficulties: (i) Most importantly, they have not been adopted by arbitration institutions or panels, and there appears to be little likelihood that this will happen in the near future. The only important situation that we know of in which an international code became binding was the CCBE Code.[101] However, that code is not a satisfactory solution to the ethical problems facing ICA Lawyers because it only applies to European lawyers, is not specific about international arbitration, and seems to require lawyers engaged in cross-border practice to comply with both home and host country rules.[102] (ii) As for the other efforts of uniform codes (such as the IBA), even if they might be clear, well-drafted, and comprehensive, bluntly stated a code that does not apply to actual ICA because of lack of adoption is not very helpful. (iii) Moreover, even if such a code were accepted by arbitration institutions, there is no guarantee that the disciplinary authorities in the various countries will accept the authority of an international code. However, in these codification ideas we have found seeds of support for the proposal we present in the next section.

We do not think that Mr. Benson's idea of an ethics checklist will become widely accepted, because it will be cumbersome and time consuming for parties to negotiate over ethical standards at the beginning of an arbitration when other procedural and substantive matters are likely to occupy their attention, and when the parties might have fundamental disagreement. Nonetheless, at the core of Mr. Benson's proposal is the idea of

98. See http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited Sept. 26, 2013). The IBA is working on Guidelines for Conflicts of Interest in Arbitration. The IBA has previously issued Principles on Conduct for the Legal Profession, Rules of Ethics for International Arbitrators, and Rules on the Taking of Evidence in International Arbitration, all of which are available on the IBA website (http://www.ibanet.org/)

99. PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, *available at* http://www.pict-pcti.org/ (last visited Sept. 26, 2013).

100. *See* Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78 (Mar. 2009), *available at* http://www.gibsondunn.com/publications/Documents/Benson-CanProfessionalEthicsWait.pdf (last visited Sept. 26, 2013).

101. See *supra* note 81. As said above, the CCBE Code is not in itself binding but it has become binding by adoption by several national bars.

102. See *supra* text accompanying notes 86-87. Similarly, the IBA Principles on Conduct for the Legal Profession provide in Art. 2.3:

> A lawyer who undertakes professional work in a jurisdiction where the lawyer is not a full member of the local profession shall adhere to applicable law and the standards of professional ethics in the jurisdiction of which the lawyer is a full member, and the lawyer shall practice only to the extent this is permitted in the host jurisdiction and provided that all applicable law and ethical standards of the host jurisdiction are observed.

parties' agreement on ethical standards, the principle on which our proposal is based.

Parties' power to establish rules of evidence by agreement[103] provides further support for our proposal. Based on this power the International Bar Association has issued Rules on the Taking of Evidence in International Arbitrations ("IBA Rules of Evidence").[104] The IBA Rules of Evidence, first issued in 1999, have become widely used in international arbitrations.[105] The Rules were drafted to deal in part with cross-cultural issues that arise in arbitration: "The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures."[106] Importantly, the Rules become operative by party agreement.[107] Paragraph 2 of the Preamble states:

> Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.[108]

The drafters offer lawyers the language of a provision that they can incorporate in their arbitration agreements to adopt the IBA Rules of Evidence:

> If parties wish to adopt the IBA Rules of Evidence in their arbitration clause, it is recommended that they add the following language to the clause, selecting one of the alternatives therein provided:
>
> *"[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].*[109]

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103. *See infra* Part V(A).

104. *See IBA Rules on the Taking of Evidence in International Arbitration* (May 29, 2010), *available at* http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx (last visited Sept. 26, 2013).

105. *See Id.* at 1.

106. *Id.*

107. *Id.* at 2.

108. *Id.* at 4, ¶ 2. *See also* Article 1 of same on the Scope of Application of the Rules.

109. *Id.* at 2-3.

V. THE CONTRACTARIAN APPROACH TO THE DETERMINATION OF ETHICS RULES APPLICABLE TO ICA LAWYERS

Let us repeat the question from which we have started: must the situation of ICA Lawyers necessarily be like the life of the main character of *One, No one, One Hundred Thousand* after the discovery of his tilted nose? Thinking about the differences of ethics rules and the issues of "double deontology" and "inequality-of-arms," should ICA Lawyers really become crazy for loss of identity? Not necessarily.

While waiting for the approval of a comprehensive set of rules, which we hope will not be like Beckett's play, *Waiting for Godot*, we suggest a different approach, one that is practical to accomplish, reasonably clear in application, and leads to uniformity in the ethics rules applicable to ICA. We call it a "contractual approach to ethical obligations in international arbitrations." Simply said, our approach is that parties to an ICA may choose the rules of ethics governing the conduct of the lawyers in the proceeding, just as they are free to agree on the substantive and procedural law applicable to the proceeding.

A. Justifications for the Contractarian Approach

Our theory has several grounds for support, coming both from the general theory of arbitration, from recent modifications to the ABA Model Rules of Professional Conduct, from the transformation of the relationships between lawyers and corporate clients, and from the practicality of its implementation, particularly when compared to the proposal for an international code of ethics for ICA.

First, the validity of arbitration flows from the agreement of the parties. The US Supreme Court has more than once used a "contractarian" approach to solve issues connected to arbitration clauses.[110] Within the limitations of freedom of contract, parties are free to establish the scope, substantive law, and procedural rules governing their arbitration. In doing so they may limit the rights that would otherwise exist. Thus, parties to an arbitration may limit or forego discovery entirely, may change rules of evidence, and may designate the substantive law that governs their dispute. Why should parties also not be able to select the rules of ethics that apply to lawyers in their proceeding? Whether these rules are considered procedural or substantive[111] should be irrelevant because parties to an arbitration may agree on both procedural and substantive rules. Parties' freedom to choose rules of ethics governing their dispute is especially appealing

110. *See e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742 (2011); Rent-A-Ctr., W., Inc. v. Jackson, 130 S. Ct. 2772, 2774 (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 (2006); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

111. We think that Rules of Professional Conduct are substantive rather than procedural for number of reasons: 1. Procedure deals with the way a tribunal handles a matter. Rules of ethics are not limited to matters before tribunals; they deal with obligations that lawyers have to clients, other lawyers, third parties, and tribunals. 2. Rules of ethics by their own language show they are not procedural. The rules often incorporate by reference as standards of conduct rules of procedure, but they go beyond those rules.

given the vacuum and uncertainty in the situation as it exists now. It might be argued that rules of ethics are fundamental obligations of lawyers that are not subject to agreement or modification by clients. This argument is however unconvincing. Many rules of ethics are subject to waiver or consent by a client. Consider the number of rules that are subject to informed client consent.[112] In addition, the argument ignores the fundamental basis of arbitration, which is agreement of the parties.

Second, the recent amendment by the ABA to Model Rule 8.5 provides further support for the contractual approach that we advocate. At its February 2013 meeting, the ABA House of Delegates amended comment 5 to Rule 8.5 to include the following provision:

> With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

The rule in essence says that where there is doubt about which jurisdiction's ethics rules govern a conflict of interest, a written agreement between lawyer and client obtained with the client's informed consent that reasonably specifies a jurisdiction may be considered in determining whether the lawyer was acting reasonably in following the rules of that jurisdiction. To be sure the rule is hedged about with many qualifications and it is limited to conflicts of interest. Nonetheless, the comment provides support for our proposal that the parties should have the authority to choose the ethics rules applicable to ICA. The new comment shows that the ABA has concluded that an agreement between lawyer and client is relevant to determine the appropriate ethics rules to govern a transaction when it comes from a conflict of interest, at least when there is doubt about what the relevant rules are.

Third, a slow but constant trend towards the "privatization" of the ethics rules is occurring between corporate clients and their attorneys.[113] Two authors (Whelan and Ziv) examined many outside counsel guidelines and "other formal terms of engagement, as well as informal norms that shape the relationship between lawyers and clients."[114]

Our main finding is that corporate clients, and in particular global corporations, are gaining influence and control over lawyers' practices at a scope significantly above and beyond what had been customary in the past.

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112. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (scope of representation); 1.6 (confidentiality); 1.7 (concurrent conflicts of interest); 1.8(a) (business transactions with clients); & 1.9 (former clients).

113. Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2578 (2012).

114. *Id.*

In particular, *norms relating to lawyers' practice that had formerly been under the domain of professional and state bodies, or left to the discretion of lawyers and their firms, are increasingly incorporated into "guidelines," "procedures," "codes of conduct," "manuals," or "best practices" memoranda, which lawyers are expected to follow.* (Emphasis added).[115]

Whelan & Ziv's article shows that ethical obligations of law firms are increasingly becoming a matter of agreement between lawyers and clients. This development provides support for our "contractarian" approach, particularly in ICA, which is a matter of agreement between sophisticated parties.

Finally, establishment of the ethics rules governing ICA Lawyers by agreement is practical. The IBA Rules on the Taking of Evidence in International Arbitration are widely adopted by agreement of the parties.[116] With certain modifications discussed in the next section, this model can be used for ethical obligations of lawyers in ICA.[117]

B. The Contractarian Approach to Determining the Governing Ethics Rules in ICA: the Six Steps

The contractarian approach that we advocate has six steps:

1. The Parties may specify in their arbitration agreement the rules of ethics that govern their arbitration. Such a specification could be quite general (for example: "The New York Rules of Professional Conduct exclusive of Rule 8.5 shall apply to this arbitration.") or it could be quite precise detailing the specific ethical obligations that would apply (for example, "The following New York Rules of Professional Conduct shall apply to this arbitration: . . .") Parties should be free to chose the applicable set of ethics rules or specific rules applicable to the arbitration so long as their choice is not clearly unreasonable.[118]

The contractarian approach is fully consistent with the development of codes of conduct to govern ICA Lawyers as recommended by Professor Rogers and other scholars. The parties could incorporate by reference a set of ethics rules that had already been prepared by some organization (e.g., the IBA Guidelines on Party Representation in International Arbitration) or by a scholar.

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115. *Id.* at 2578-79.

116. See *supra* text accompanying note 105.

117. See *supra* text accompanying note 100. Mr. Benson's idea of an ethics checklist goes in the same line as our proposal, except that our proposal is more efficient because while in his proposal the agreement of the parties on ethics rules should intervene immediately before the start of the arbitration proceeding, in our model the agreement is anticipated at the time of the contract formation and while in Benson's proposal the agreement has to happen rule by rule, in our model parties may simply choose one entire set of ethics rules.

118. The reasonable connection is required—at least in case an American ICA Lawyer—to justify the "reasonable belief." See MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) ("Disciplinary Authority; Choice of Law") (2012). *See also infra* Part VI.

2. In the absence of selection by the parties of a specific set of ethics rules to govern the arbitration, if the arbitration agreement selects an arbitration provider that has adopted a set of ethical rules, then those rules apply to the arbitration.

3. If the provider chosen by the agreement has not adopted a set of ethics rules or if no provider is chosen, but the agreement contains a choice of law clause, then the ethics rules that apply will be the ethics rules of the jurisdiction whose law was chosen. If the agreement provides for the law of several jurisdictions, then the ethics rules of the jurisdiction whose law governs the predominant number of issues in the case shall apply.

4. If neither 1, 2, nor 3 applies, then the ethics rules that govern shall be the rules of the jurisdiction whose law controls the predominant number of issues in the case as determined by the arbitrators using conflict of law principles.

5. In any case not covered by the first four principles (e.g., when the parties have agreed that the arbitration should be decided by general mercantile law or UNIDROIT principles or similar references) or in cases not covered by the relevant body of ethics rules, the necessary ethics rules should be determined by the arbitrators, either by general order adopting a set of ethics standards or by order dealing with specific issues either on motion of either party or on the arbitrators' own motion. Arbitrators should select a reasonable set of rules, either followed in a jurisdiction, adopted by a reputable international organization, or advocated by a scholar.[119]

6. Once a set of ethics rules is identified pursuant to this "contractarian" method, the domestic ethics rules different from the identified set of rules should not be applicable to ICA Lawyers. An ICA Lawyer who complied with the rules so identified should not be sanctioned for violation of an ethics rule of the jurisdiction in which he or she is admitted or in the jurisdiction where the arbitration occurs, when there is no violation of the identified set of rules. This last step is, of course, dependent on the actions of national authorities of the home and host jurisdictions of the ICA Lawyer. We would hope that national authorities would conclude that ICA Lawyers should not be subject to discipline for following a reasonable set of ethics rules, even if those rules are different from those of the host jurisdiction or the lawyer's home jurisdiction, either as a matter of deference to arbitration, comity, or efficient use of resources. In the next section (Part VI), we explain why in the U.S. Rule 8.5(b)(2), properly interpreted, should bar domestic authorities from discipline of ICA Lawyers who comply with the ethics rule chosen by the parties. Disciplinary authorities of home or host countries would retain authority to take disciplinary action against an ICA Lawyer in extreme cases, for example bribery of an arbitrator.

119. This is required for the same reason why the parties should choose a set of rules that has a reasonable relationship to the arbitration as explained in the preceding footnote.

VI. IS THE CONTRACTARIAN APPROACH PERMISSIBLE UNDER MODEL RULE 8.5?

The ABA Ethics 20/20 Commission had the opportunity to modify Rule 8.5 to provide guidance to U.S. lawyers engaged in ICA. The Commission had a Working Group on Uniformity, Choice of Law, and Conflicts of Interest ("Working Group"), which considered a number of ethics issues arising from the globalization of the practice of law.[120] The Working Group concluded that "*Lawyers need clearer guidance when they engage in cross-border practice and encounter rules of professional conduct that impose conflicting obligation. For this reason, the Commission seeks input into whether amendments to Model Rule 8.5 or other action would be advisable False.*"[121]

The Working Group considered three possible solutions, one submitted by the Association of the Bar of the City of New York, one by Professors Laurel Terry and Catherine Rogers, and one coming from the Restatement (Third) of the Law Governing Lawyers, which "contains an extended discussion of choice of law considerations and proposes the following approach, which could be reflected in Model Rule 8.5 and its comments."[122] In the end, however, the Commission chose not to address the issue of modification of Rule 8.5 or to recommend any changes in the comments to the rule, except for the amendment to comment 5 on the specific point of conflict of interest, discussed above.[123]

While the 20/20 Commission chose not to modify Rule 8.5 or its comments to deal with the determination of applicable ethics rules in ICA, we believe that our contractarian approach is consistent with the current version of ABA Model Rule 8.5(b). Rule 8.5(b) provides: "*In any exercise of*

120. ABA Commission on Ethics 20/20, *Working Group on Uniformity, Issues Paper: Choice of Law in Cross-Border Practice* (January 18, 2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/gpsolo/choice_of_law_in_cross_border_practice.authcheckdam.pdf (last visited Sept. 26, 2013).

121. *Id.* at 8 (emphasis added).

122. *Id.* at 7.

123. On March 1, 2013, one of the coauthors (Francesca Giannoni-Crystal)—while a speaker at the *Symposium Ethics 20/20—The Future of Professional Responsibility* (organized by the Mississippi College Law Review in Jackson, Mississippi), to present this paper—had an opportunity to exchange some thoughts with Ellyn S. Rosen, Senior Lead Counsel, Ethics 20/20 Commission, who delivered the keynote speech. Ms. Rosen explained that the Commission considered with attention the report of the Working Group on Uniformity, Choice of Law, and Conflicts of Interest and the comments received on that report. Following the "minimalist" approach that the Commission had adopted at its inception, the Commission resolved to take action only on the specific point of conflict of interest; from the comments received, the Commission decided that conflicts of interest were the most urgent area to be clarified. The Commission, however, did not disagree with the conclusion of the Working Group on the necessity for clarification of other cross-borders rules; it was a matter of prioritization. The Commission felt that conflicts of interest were a priority, other areas of cross-border practice were not. Ms. Rosen confirmed that the Commission evaluated the topic of arbitration with interest. In response to a specific question, in Mrs. Giannoni-Crystal's understanding, Ms. Rosen agreed that Rule 8.5(b)(2) could be applied to the situation of international arbitration and that the new addition to comment [5] on conflicts of interest could be used as a persuasive authority to justify the contractarian proposal of this paper. Ms. Rosen was speaking in her personal capacity, not on behalf of the Commission.

the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows . . . ." (emphasis added). Pursuant to this language, the rule only applies to the exercise of disciplinary authority by the lawyer's home jurisdiction. Nothing in the rule would prevent parties from agreeing on the ethics rules that would apply in a proceeding before an international arbitration panel because that panel is not exercising disciplinary authority of any jurisdiction. Rule 8.5 would intervene only at a later stage, i.e. if an ethics complaint is raised against an ICA Lawyer.

Suppose a complaint is leveled against a lawyer for complying with the ethics rules determined under the contractarian approach because the lawyer's conduct, although permitted by the contractually chosen rules, violates the rules of a jurisdiction in which the lawyer is admitted. In this case, Rule 8.5(b) (or the equivalent in the state) would apply. How would the rule apply in this setting? We think that the disciplinary authority should make the following analysis:

> (1) Rule 8.5(b)(1) does not apply because the jurisdiction in which the tribunal "sits" is either unclear or arbitrary with regard to ethics conduct.[124]
>
> (2) Under Rule 8.5(b)(2) in an international arbitration the predominant effect of the lawyer's conduct is also unclear.[125]
>
> (3) Therefore, the last sentence of 8.5(b)(2) should govern what rules would apply in a disciplinary proceeding. When the parties have chosen a set of ethics rules under the contractarian approach, and where the lawyers in the proceeding have followed those rules, the lawyer has a reasonable belief that the predominant effect will be in the jurisdiction whose ethics rules were chosen, so long as that jurisdiction has a reasonable relationship to the proceeding. Indeed, the ABA in its recent amendment to comment [5] to Rule 8.5 has used similar reasoning to support the contractarian approach with regard to the issue of choice of law regarding conflicts of interest.

An additional argument for the contractarian approach that we propose can be based on the principle of comity by disciplinary authorities to international arbitration. Parties to an ICA have the right to choose the *substantive law* governing their arbitration: "The right of parties to themselves identify the law to apply and the obligation on arbitrators to respect

124. *See supra* section III(D).

125. *See id.*

that choice is the one overwhelming and truly international conflict of laws rule which [sic] has developed in international commercial arbitration."[126]

Similarly, parties have the right to determine the *procedural rules* applicable to the arbitration. The basic international treaty governing arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly called the "New York Convention."[127] Because there is no general international treaty for enforcement of judgments, the New York Convention, which entered into force in 1959, has been a powerful force in the development of international arbitration.

Article V of the New York Convention provides that a Contracting state may refuse to enforce an arbitral award rendered in another state on very limited grounds, one of which is that: "The composition of the arbitral authority *or the arbitral procedure was not in accordance with the agreement of the parties* . . ." (emphasis added).[128]

Thus, in international commercial arbitration, with few limits, the parties have the right to choose both the substantive law and the procedural rules governing the arbitration. Therefore, it should not matter whether ethics rules are considered as procedural or substantive; in either case the parties should be free to determine the applicable rules by agreement.

Of course, a disciplinary action against a lawyer involved in ICA is not an enforcement of an arbitration award so the New York Convention is not strictly applicable to such a proceeding, and a disciplinary body is not bound to follow any agreement of the parties regarding arbitration. Nonetheless, the contractual foundations of ICA are so fundamental[129] that a disciplinary body, in exercising its authority, should take this factor into account. The most direct way of doing so is as a matter of comity. A disciplinary body can refuse to entertain proceedings against an ICA Lawyer when the lawyer's conduct it in accord with the contractually agreed upon ethics rules governing the proceeding.[130]

An indirect way for a disciplinary body to apply the parties' agreement to adopt a certain set of ethical rules is by interpreting the "predominant

126. Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 59 n. 2 (2006) (quoting Julian D. M. Lew, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 69 (1978)).

127. *1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the "New York" Convention*, UNCITRAL, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.Html (last visited Sept. 26, 2013).

128. See *id.* for the text of the Convention.

129. See Supreme Court cases cited in note 110 *supra.*

130. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 629 (1985) (the US Supreme Court has recognized the concept of comity in international arbitration when it stated "[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.").

effect" of the lawyers' conduct under Rule 8.5(b) as occurring in the jurisdiction whose ethics rules were chosen under the contractarian approach that we advocate.[131]

VII. Conclusion and Proposal for Revision to the Comments to Model Rule 8.5

The need for a set of ethics standards to govern lawyers in international commercial arbitrations is substantial. The absence of such standards runs the risk of undermining the legitimacy of such proceedings. The idea of a special set of ethical standards tailored to international commercial arbitration is appealing, but the practical problem is that it may be difficult if not impossible to agree on such a set of standards. At best the development of such a code is a long time away. What is needed *now* is an approach with the following characteristics:

- It must be practical to implement;
- It must be reasonably clear;
- It must provide for a level playing field in which the lawyers are subject to the same set of standards;
- It must solve (or at least diminish) the "double deontology" problem of subjecting lawyers that adhere to these standards to discipline in the jurisdictions where they are admitted;
- It must be reasonably acceptable to national disciplinary authorities.

We believe that the contractarian approach advocated in this article meets these requirements. Moreover, it provides a path for the development of an international code of ethics like the one favored by many scholars because it allows parties or arbitrators to adopt proposed codes to govern their proceedings, thus creating a body of experience that can help refine these codes.

The ABA Ethics 20/20 Commission decided not to revise either Model Rule 8.5 or its comments to deal with the issue of determining what ethics rules apply to ICA. The Commission has finished its work, but the issue remains. Other sections of the ABA have in the past proposed changes in the Model Rules to the ABA House of Delegates, and this method for revision of Rule 8.5 could still be used. For example, either the Section of International Law or the Section of Litigation would be natural candidates to propose such a revision. In our opinion, only a modest change in the

131. Not every jurisdiction in the U.S. has adopted Model Rule 8.5(b) in the version that we have discussed. For example, New York has a nonuniform version of Rule 8.5. See *supra* note 90. Under the New York rule, "predominant effect" analysis is only used if the lawyer is licensed to practice in more than one jurisdiction. If the lawyer is licensed only in New York, New York rules govern the lawyer's conduct. Therefore, if a New York lawyer was the target of a disciplinary proceeding in connection with an ICA and the lawyer followed a contractually agreed on set of ethics rules that differed from the New York rules, the predominant effect analysis discussed in the text would not apply. However, New York disciplinary authorities could as a matter of comity refuse to entertain such a proceeding if the lawyer's conduct conformed to a contractually agreed on reasonable set of ethics rules. The comity argument can be used whatever version of Rule 8.5(b) is adopted in the jurisdiction.

comments to Rule 8.5 would be necessary to clarify which rules apply in ICA. We offer the following addition to comment 7 for consideration by the ABA:

> In international arbitrations, the place where the tribunal "sits," the place where a lawyer's conduct occurs, and the location of the predominant effect of a lawyer's conduct may all be unclear. A lawyer engaged in an international arbitration should not be subject to discipline if the lawyer follows ethics rules agreed upon by the parties or orders established by an arbitration tribunal. The agreement between the parties may be explicit or may be inferred from a choice-of-law agreement by the parties.