Leiden Journal of International Law, 24 (2011), pp. 491–512
 doi:10.1017/S0922156511000112

Holding Counsel to Account in International Arbitration

SAM McMULLAN*

Abstract
Counsel are regulated the world over in their dealings with a court of law through the enforcement of ethical duties that are owed by them. With the increased prevalence of arbitration in resolving disputes internationally, the question then arises: how are counsel kept in check when appearing before an arbitral tribunal? The issues involved are magnified when one considers the question in the context of international arbitral tribunals. This paper considers these issues by analysing them in three parts. First, is ethical regulation necessary in international arbitration? Second, does an arbitral tribunal have jurisdiction to consider and enforce ethical obligations owed to it by counsel? Third, what ethical obligations should be applied to counsel?

Key words
arbitrators' inherent jurisdiction; ethics; international arbitration; obligations of counsel; sanctions

1. Introduction

The idea of an ethical lawyer is often regarded as a contradiction in terms. Learned Hand J once opined '[a]bout trials hang a suspicion of trickery and a sense of a result depending upon cajolery or worse'.[1] Ethical obligations on counsel exist in part in order to mitigate any would-be cajolers. More broadly, ethical obligations exist by virtue of the lawyer's role. As such, ethical obligations also exist as a statement of the dominant forces in a society as to what is the correct behaviour for counsel in any given situation.

The bar to which a lawyer is admitted is generally the connecting factor to what ethical obligations that lawyer is held to. Therefore, a lawyer not admitted to practise in a jurisdiction cannot act as counsel in that jurisdiction. One of the major attractions for parties to international arbitration is that their general legal advisers are permitted to represent them regardless of the state in which the arbitration is held.[2] Naturally, this leads to the issue of opposing counsel's being admitted to practise in different jurisdictions. Each jurisdiction has a unique conception of the role of a lawyer and a nuanced approach to the regulation of its legal profession. This leads, prima facie, to opposing counsel's operating under different ethical norms. In days gone by, this was not an issue, for those practising in international arbitration

* Barrister and Solicitor of the High Court of New Zealand [sam.mcmullan@gmail.com].
1 G. C. Hazard, Jr, *Ethics in the Practice of Law* (1978), 1.
2 A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (1999), 358; W. L. Craig, W. W. Park, and J. Paulsson, *International Chamber of Commerce Arbitration* (2000), 277.

were few enough in number for self-regulation to be possible.[3] However, in a time in which there are ever-increasing numbers of lawyers involved in arbitral proceedings, this is no longer the case.

Further, the regulation of counsel by an institution can properly be categorized as the application of procedural law. Therefore, any direct substantive choice of law between the parties does not necessarily encapsulate a choice of law pertaining to ethical obligations. Thus, some commentators have asserted that a codified statement of ethical obligations is the only way to approach the issue.[4] However, major institutions have been reticent to espouse guidelines, even for arbitrators.[5] Notwithstanding the current undertaking of the International Law Association to form the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (the Hague Principles),[6] based on the rate at which similar initiatives have been developed at the international level in the past any such code may be years in the making.[7] Not only are there no concrete rules on which counsel can base their behaviour in international arbitration, but the ability of an arbitral tribunal to even consider ethical obligations is questioned. Ethical obligations are generally regarded as mandatory law,[8] mandatory laws being those laws from which one cannot derogate and which are therefore not arbitrable per se. Thus, there is an evident uncertainty in the area of the ethical obligations of counsel at international arbitration. This paper seeks to demystify that uncertainty and show, to the contrary, that counsel appearing before an arbitral tribunal may be held to account.

Drawing on the inherent nature of a lawyer's role and the interests of the institution of international arbitration, this paper first discusses why counsel appearing in international arbitration are required to be held to ethical obligations (section 2). This paper then shows the current vacuum of ethical obligations practically applicable to counsel. Concluding that neither locally promulgated norms, transnationally promulgated norms, nor internationally promulgated norms are entirely appropriate in the context of international arbitration, section 3 goes on to propose a solution to that vacuum, drawing on the inherent nature of a lawyer's role and

3 C. Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration', (2001–02) 23 Mich. JIL 341, at 355; D. F. Vagts, 'The International Legal Profession: A Need for More Governance?', (1996) 90 AJIL 250, at 250; see generally Y. Dezalay and B. G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

4 See generally C. A. Rogers, 'Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration', (2003) 39 Stanford JIL 1; C. Benson, 'Can Professional Ethics Wait? The Need for Transparency in International Arbitration', (2009) 3(1) DRI 78; cf. A. Boldizar and O. Korhonen, 'Ethics, Morals and International Law', (1999) 10(2) EJIL 279, at 287; H. W. Arthurs, 'A Global Code of Legal Ethics for the Transnational Legal Field', (1999) 2 *Legal Ethics* 59.

5 E.g., the Stockholm Chamber of Commerce, which ceased its ethics project because it encountered so many problems: Rogers, *supra* note 3, at note 268, although several proposals for such a code have been circulated recently – one at the ICCA Congress in Rio de Janeiro and another by the ILA Study Group on the Practice and Procedure of International Courts and Tribunals.

6 Completed on 27 September 2010, available at www.ila-hq.org.

7 See, e.g., the Council of Bars and Law Societies of Europe's (CCBE) Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, which was six years in the making: L. S. Terry, 'An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct', (1993) 7 *Georgetown Journal of Legal Ethics* 1.

8 P. C. Thomas, 'Disqualifying Lawyers in Arbitrations: Do the Arbitrators Play any Proper Role', (1990) 1 *American Review of International Arbitration* 562, at 562; Rogers, *supra* note 4, at 17.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

the nature of international arbitration itself. It then draws on the example offered below to show the efficacy of the approach suggested. Third, this paper discusses the effect of the classification of ethical obligations as mandatory law. Concluding that this does not prevent an arbitral tribunal from considering whether actions of counsel constitute an ethical discord, this part discusses and justifies the sources of jurisdiction for an arbitral tribunal to make rulings in this area (section 4).

By way of illustration, this paper addresses two duties that counsel owe to a court in most domestic jurisdictions: the duty not to be under a conflict of interest to clients and a duty of candour to a tribunal. The parties, prior to submitting their case to arbitration under their duly formed compromise, did not turn their mind to ethical issues and agreed to use International Chamber of Commerce (ICC) procedure. In this context, the claimant has submitted to arbitration a claim against Alpha for failure to perform a contract. A duly admitted attorney to the bar in New York represents the claimant. The respondent is represented by a solicitor duly admitted to the bar in Germany. The claimant has its siege social in Stockholm and the respondent has its siege social in London. The arbitral proceedings are before a tribunal with its seat in Paris. The claimant has two issues with the proceedings' continuing. First, Alpha's counsel (the lawyer) represented the claimant in a recent, unrelated matter. The claimant, on termination of its engagement of the lawyer, consented to the lawyer's representing any person against the interests of the claimant in the future. However, the claimant no longer wants the lawyer to act in the present arbitration, as the claimant now realizes that the lawyer was privy to sensitive commercial information. Second, the lawyer gave a document to the tribunal in evidence that is known by the claimant to be false. The claimant argues that the lawyer must have known of, or at least must have been reckless as to, that document's falsehood. The claimant now seeks to have the lawyer disqualified on that ground also.

2. Is there a need for ethical regulation of counsel engaged in international arbitration?

Tribunals often rely on implicit professional ethics and the reputation of counsel,[9] so, if counsel was once dishonest or otherwise unethical in her dealings with a particular tribunal, this may hamper counsel's ability to effectively advocate her client's case in the future. This may have once been true when there were few practitioners engaged in international arbitration. However, this is not so today. Now, even if counsel were to act unscrupulously before one arbitral tribunal, there are many more arbitrators to appear before in the future. In light of this reality, ethical obligations are required for two main reasons.

The first is by dint of a lawyer's role in a state's legal system. While all lawyers are required to adhere to some concept of legal ethics, the 'ethics' and their source

9 G. B. Born, *International Commercial Arbitration* (2009), 2304.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

have differing connotations, depending on the jurisdiction at issue.[10] This difference between jurisdictions is often explained by the function of the role of a lawyer in that jurisdiction.[11] Nevertheless, universalities can be derived from what is inherent in lawyers' functions generally.[12]

The duty of a lawyer as an officer of the court is explicit in common-law jurisdictions. The Council of Bars and Law Societies of Europe's Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers[13] (CCBE Code) also specifies some limitations on a lawyer's representation of a client when dealing with a court. For example, rule 2.1.1 of the CCBE Code requires a lawyer to 'avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties'. Therefore, a lawyer is generally perceived as independent, having rights and duties that do not necessarily derive from the client.[14]

Second, ethical obligations on counsel are required for pragmatic reasons arising out of the interests of the institution of international arbitration itself. It is perhaps easiest to define international arbitration by reference to its fundamental norms that derive from the jurisdiction of international arbitration. Arbitration's jurisdiction derives, first, from a nation-state by way of legislation allowing for the use of that state as the arbitration's seat.[15] This provides procedural support to the arbitration, but also prescribes limitations on the arbitration. One such limitation is that the ability for parties to have an award reviewed is, compared to a state's court, limited. This gives rise to a primary norm: finality in award. Arbitration could, however, sit outside of the state's concession to its existence; however, without such a concession, the winning party would be powerless to enforce any award rendered.[16] This gives rise to a second norm of international arbitration: enforceability of award.

Jurisdiction is also a product of the consent of the parties.[17] It is the parties who specify in an arbitral agreement that they wish to bypass a state's formal dispute resolution process – the courts – and have the dispute determined by a mutually, or otherwise, appointed arbitrator. This gives rise to another primary norm: neutrality

10 See generally Rogers, *supra* note 3; M. C. Daly, 'The Dichotomy between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by US and Foreign Lawyers', (1999) 32 Vand. JTL 1118.

11 See generally Rogers, *supra* note 3; F. C. Zacharias, 'Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?', (1993) 6 *Georgetown Journal of Legal Ethics* 903; T. Dare, 'Virtue Ethics and Legal Ethics', (1998) 28 VUWLR 141; cf. K. Weisenberger, 'Peace Is Not the Absence of Conflict: A Response to Professor Roger's Article "Fit and Function in Legal Ethics"', (2007) 25 Wisc. ILJ 89, at 107; Terry, *supra* note 7, at 53.

12 C. J. Whelan, 'Ethics Beyond the Horizon: Why Regulate the Practice of Law', (2001) 34 Vand. JTL 931, at 940; see generally P. S. Anderson, 'Remarks of Philip S Anderson', (1999–2000) 18 Dick JIL 43.

13 *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers* (2008) (CCBE Code).

14 Terry, *supra* note 7, at 52.

15 See *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd*, [1981] 2 WLR 141 (HL), per Lord Diplock.

16 J. Jakubowski, 'Reflections on the Philosophy of International Commercial Arbitration and Conciliation', in J. C. Schultsz and A. J. Van Den Berg (eds.), *The Art of Arbitration: Essays on International Arbitration* Liber Amicorum *Pieter Sanders 12 September 1912–1982* (1982), 175, at 178.

17 C. M. Schmitthoff, 'The Jurisdiction of the Arbitrator', in Schultsz and Van Den Berg *supra* note 16, at 285; E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), 11; see also Jakubowski, *supra* note 16 at 182.

of the adjudicatory process.[18] It is the parties who may choose how the process is conducted, from the selection of an arbitrator to the rules of evidence used. Thus, a primary norm of arbitration is party autonomy by dint of the parties' right to freedom of contract.[19]

It is apparent from the source of jurisdiction that party autonomy stands in the way of the enforcement of ethical obligations vis-à-vis counsel. The parties have consented to have their dispute decided by an arbitral tribunal and have abdicated their right, in good faith, to have the dispute adjudicated in a court.[20] If the parties are confronted with a decision that is unjust, due to the ethical breach of the opposing party's counsel, the above norms are subverted. This may not only damage the interests of the parties to the dispute, but may also adversely affect the perception of the institution of arbitration.[21] In this light, four reasons exist as to why counsel may be held to account in order to uphold the institution of international arbitration.

First, virtually all contemporary international agreements contain an arbitration clause.[22] To achieve this superiority, over the last two decades, international arbitral tribunals have undergone a process of transformation: from informal and ad hoc adjudicatory bodies, to more formalized and predictable adjudicatory bodies.[23] This movement's logical conclusion is as the pre-eminent transnational adjudicatory process.[24] Such a transformation will only occur if the institution of international arbitration can maintain its popularity. As its jurisdiction predominantly originates in the volition of the parties, the institution must pander to the will of the punter. Parties want a dispute resolution process that has legitimacy, predictability, fairness, and justice in its outcome.[25] In order to achieve these values, the responsibility of controlling the behaviour of counsel to ensure the institution is not brought into disrepute by the rendering of unfair or unjust awards is axiomatic.

Second, as jurisdiction is also conferred by the state seat, the continued success of international arbitration relies on the willingness of states to continue to provide jurisdiction to an arbitral tribunal.[26]

---

18 P. J. McConnaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration', (1998–99) 93 *Northwestern University Law Review* 453, at 500; M. Straub, 'Resisting Enforcement of Foreign Arbitral Awards', (1990) 68 *Texas Law Review* 1031, at 1036; W. W. Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration', (1989) 63 *Tulane Law Review* 647, at 701; L. W. Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration', (1995) 30 Texas ILJ 1, at 8.

19 The goal of party autonomy is fervently upheld in *ICC Case No. 1512 (Preliminary Award)*, (1971) 1 *Yearbook: Commercial Arbitration* 128, at 128–9.

20 J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (2007), 11.

21 Ibid.

22 Ninety per cent on the count of A. T. Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules', (1999–2000) 49 *Duke Law Journal* 1279, at 1280.

23 Rogers, *supra* note 3, at 352; E. Brunet, 'Replacing the Folklore Arbitration with a Contract Model of Arbitration', (1999) 74 *Tulane Law Review* 39, at 62; cf. T. J. Stipanowich, 'Future Lies Down a Number of Divergent Paths', (2000) 3 *Dispute Resolution Magazine* 16.

24 T. E. Carbonneau, 'Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions', (1985) 23 Col. JTL 579, at 580; Rogers, *supra* note 3, at 354.

25 C. Menkel-Meadow, 'Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?', in P. Gauch, F. Werro, and P. Pichonnaz (eds.), *Melanges en l'honneur de Pierre Tercier* (2008), 882, at 886.

26 Rogers, *supra* note 4, at 1; cf. J. Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin', (1981) 30 ICLQ 385, at 385.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

The interests of the nation-state are increasingly affected by arbitration, partly due to the increasing tendency on the part of states to use arbitration as a means of dispute resolution at the state level.[27] Further, over the past two decades, states have progressively allowed more mandatory law to be arbitrated.[28] Where such important decisions are now in the hands of arbitrators, it is of fundamental importance that the parties to the dispute have a decision that addresses all relevant issues. This could not occur where counsel acts unscrupulously in her dealings in arbitration, such as in producing false evidence.

Third, the advantage that arbitration has over any other form of dispute resolution is the enforceability of its awards by way of multilateral treaties. One example is the International Centre for Settlement of Investment Disputes (ICSID) Convention.[29] Under the ICSID Convention, each contracting state to the Convention must recognize any award rendered pursuant to the ICSID Convention.[30] Where a tribunal is not established under the auspices of a multilateral treaty, enforcement may also be effected. Provided the seat of the arbitration is in a state party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[31] a duly made arbitral award is enforceable in 145 states.[32] Under Article V(2)(b) of the New York Convention, enforcement of an award may be refused if it is established that recognition or enforcement of that award would be contrary to the public policy of the state where enforcement is sought.[33] 'Public policy' has been the topic of much scholarly debate, and consensus appears to interpret Article V(2)(b) to mean the narrow concept[34] of 'international public policy',[35] that is, 'the fundamental values, the basic ethical standards, and the enduring moral consensus of the international business community'.[36] While, Article V(2)(b) is not

27 See, e.g., the Arbitration between the Government of the Sudan and the Sudan People's Liberation Movement/Army on Delimiting the Abyei Area (Final Award), available at www.pca-cpa.org.

28 See *Mitsubishi v. Soler Chrysler-Plymouth Inc.*, (1985) 473 US 614; E. A. Posner, 'Arbitration and the Harmonization of International Commercial Law: A Defence of *Mitsubishi*', (1998–99) 39 Vand. JIL 647; see also R. P. Alford, 'Arbitrating Human Rights', (2005) ASIL Proc. 233; see also *Jean Estate v. Wires Jolley LLP*, [2009] ONCA 339.

29 International Centre for Settlement of Investment Disputes (ICSID) Convention (18 March 1965), 575 UNTS 159.

30 Art. 54.

31 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38 (New York Convention).

32 Status of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at www.uncitral.org.

33 Art. V(2)(b); see M. S. Kurkela and H. Snellman, *Due Process in International Commercial Arbitration* (2005), 9; see generally H. Van Houtte, 'Counsel–Witness Relations and Professional Misconduct in Civil Law Systems', (2003) 14(4) *Arbitration International* 457; cf. Rogers, *supra* note 4, at note 167.

34 *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, (1974) 508 F2d 969 (2d Cir); *Fotochrome Inc. v. Copal Co.*, (1975) 517 F2d 512 (2d Cir); Gaillard and Savage, *supra* note 17, at 997; P. Sanders, 'Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', (1979) 13 *International Law* 269, at 272; see also International Law Association, Resolution on Public Policy as a Bar to Enforcement of International Arbitration Awards (6 April 2002), available at www.ila-hq.org, Recommendation 1.

35 Gaillard and Savage, *supra* note 17, at 996; International Law Association, *supra* note 34, Recommendation 1(b); cf. Rogers, *supra* note 4, at 48; cf. the conflict-of-laws approach of Professor Born in Born, *supra* note 9, at 2488.

36 A. Barraclough and J. Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration', (2005) 6 Melb. JIL 205, at 218.

frequently upheld,[37] a breach of due process has been held to be a breach of public policy.[38]

The purpose of due process is to ensure that the 'facts and issues in dispute are fully and completely elucidated and elaborated'.[39] Ethical obligations owed to an arbitral tribunal assist with that end. Obligations, such as candour to a tribunal, ensure, to the greatest extent possible, that the truth is found. An obligation to be free from a conflict of interest also assists, as counsel who cannot operate independently cannot effectively discharge their duties to the tribunal.

Fourth, international arbitration has now taken on an element of 'judicialization'.[40] Tribunals are becoming more formalized and predictable adjudicatory bodies. What has followed is a greater incidence in the publication of arbitral awards. This has led to the citation of, and reliance on, previous awards by arbitral tribunals.[41] Therefore, today, arbitration is said to set a 'persuasive precedent',[42] not binding per se, but a persuasive guide to subsequent tribunals considering an analogous issue.[43] This persuasive precedent is a further reason why counsel should be compelled to act ethically vis-à-vis the arbitral tribunal. Now, unscrupulous counsel may not only affect the right of access to justice by a party to the dispute, but such conduct that leads to the production of a bad decision by an arbitrator could have wider ramifications on a subsequent arbitral tribunal that applies that award.

3. What ethics?

Perhaps the most debated issue in this field is: how does one reconcile the very different approaches in differing states as to the content of ethical obligations? The possible options to remedy this deontological dilemma are discussed by this paper in three groups: the local (norms to be enforced against lawyers practising within a single state); the transnational (norms created to regulate lawyers practising between

37 Sanders, *supra* note 34, at 271; A. J. van den Berg, 'Why Are Some Awards Not Enforceable?', in A. J. van den Berg (ed.), *International Council for Commercial Arbitration Congress Series No. 12: New Horizons in International Commercial Arbitration and Beyond* (2005), 291, at 309; see also *Richardson v. Mellish*, (1824) 2 *Bing* 299, at 252, per Burrough J.

38 B. Hanotiau and O. Caprasse, 'Public Policy in International Commercial Arbitration', in E. Gaillard and D. di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008), 780, at 819; see Supreme Court of Hong Kong, High Court, 12 August 1992, *JJ Agro Industries (P) Ltd v. Texuna International Ltd*, XVIII *Year Book of Commercial Arbitration* 396 (1993), in which the Supreme Court refused to give effect to an award made in a case in which a witness statement had allegedly been obtained through duress from a witness kidnapped by a party to the arbitration; Gaillard and Savage, *supra* note 17, at 857.

39 Kurkela and Snellman, *supra* note 33, at 12.

40 See generally R. B. Lillich and C. N. Brower (eds.), *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity* (1994); Dezalay and Garth, *supra* note 3, at 55.

41 Rogers, *supra* note 3, at 354; 'Comparative Analysis of International Dispute Resolution Institutions', (1991) 85 *Society of International Law Proceedings* 64; the practice is very common under ICSID proceedings: see, e.g., *Siemens AG v. Argentine Republic*, (Jurisdiction) ICSID Case No. ARB/02/8 (ICSID, 2004, Sureda P, Brower, and Janeiro), in C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration* (2008).

42 See generally G. Kauffmann-Kohler, 'Arbitral Precedent: Dream, Necessity of Excuse? The Freshfields Lecture', (2007) 23(3) *Arbitration International* 357.

43 O. M. Pina, 'Systems of Ethical Regulation: An International Comparison', (1987) 1 *Georgetown Journal of Legal Ethics* 797, at 800.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

states, but only apply to practice across a select few states); and the international (norms created to regulate lawyers practising in any state).

3.1. Locally promulgated norms

Locally promulgated norms are generally established by local bar associations or, as in some common-law jurisdictions, a state court.[44]

In order to provide consistency in application between counsel and nullify the application of 'double deontology', while not treading on the sovereign toes of nations, a defined choice-of-law rule could be adopted.[45] There is, however, little analysis on choice-of-law principles applicable to legal ethics[46] and those who advocate for its use do not propose a choice-of-law solution.[47] However, that does not necessarily preclude an attempt to define an appropriate rule.

There are two main connecting factors used for prescribing jurisdiction under conflict-of-laws rules: territoriality and nationality.[48] With regard to conduct before a tribunal, both the American Bar Association's Model Rules of Professional Conduct[49] (ABA Model Rules) and the CCBE Code set forward a similar approach whereby the choice-of-law rule is based on the territoriality of the proceedings.[50] Rule 4.1 of the CCBE Code requires counsel to 'comply with the rules of conduct applied before the court or tribunal'. ABA Model Rules Rule 8.5(b)(1) requires counsel to be bound by 'the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise'. However, neither of these approaches is entirely helpful. As shown by this paper, international arbitral tribunals do not have any rules regarding ethical obligations per se. Thus, on the application of either approach to international arbitration, the result will require the application of the ethical obligations of the state seat. Merely adopting the rules of the seat does not provide a satisfactory solution to the situation for two main reasons.

First, the rules and institutions controlling lawyers' conduct comprise a complex system.[51] Some professional rules attempt to articulate ethical standards whereas others indicate a responsible model of assisting the courts.[52] These normative rules

---

44 See generally A. F. Lowenfeld, 'Introduction: The Elements of Procedure: Are They Separately Portable?', (1997) 45 *American Journal of Comparative Law* 649, at 654.

45 See Weisenberger, *supra* note 11, at 89; M. Majumdar, 'Ethics in the International Arena: The Need for Clarification', (1994–95) 8 *Georgetown Journal of Legal Ethics* 439; D. Vagts, 'International Legal Ethics and Professional Responsibility', (1998) 92 ASIL Proc. 378; D. F. Vagts, 'Professional Responsibility in Transborder Practice: Conflict and Resolution', (1999–2000) 13 *Georgetown Journal of Legal Ethics* 677, at 677.

46 R. J. Goebel, 'Lawyers in the European Community: Progress toward Community-Wide Rights of Practice', in M. C. Daly and R. J. Goebel (eds.), *Rights, Liability, and Ethics in International Legal Practice* (1995), 239, at 297; D. F. Vagts, 'Professional Responsibility in Transborder Practice: Conflict and Resolution', (1999–2000) 13 *Georgetown Journal of Legal Ethics* 677, at 690.

47 See, e.g., Weisenberger, *supra* note 11.

48 Vagts, *supra* note 46, at 689.

49 American Bar Association Model Rules of Professional Conduct (2002) (ABA Model Rules).

50 See L. S. Terry, 'An Introduction to the European Community's Legal Ethics Code. Part II: Applying the CCBE Code of Conduct', (1993) 7 *Georgetown Journal of Legal Ethics* 345, for an application of this rule.

51 P. A. Joy, 'The Relationship between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in Regulation of Lawyers', (2004) 37 *Loyola of Los Angeles Review* 765, at 797; see generally S. M. Cone, III, 'The Common Code of Conduct from an American Perspective', in Daly and Goebel, *supra* note 46, at 219.

52 Daly and Goebel, *supra* note 46, at 296.

are often supported by significant jurisprudence.[53] Therefore, when institutions apply ethical rules, they impose a 'substantive tilt' that is the product of their own institutional history and conceptual and cultural biases.[54] The arbitral tribunal would have to take this 'substantive tilt' into account and apply the rules accordingly, and counsel would have to take it into account when moulding their behaviour.

Second, international arbitration has an 'attenuated connection to the local procedural rules of the arbitral seat'.[55] This appears to have been accepted in international arbitration regarding ethics, where locally promulgated ethical obligations are not fully applied even to locally admitted counsel appearing in locally seated arbitration.[56]

Alternatively, perhaps the simplest solution to the issue would be to judge counsel by the standards of her own home state's bar.[57] While this approach gives certainty and familiarity, opposing counsel are not infrequently from different jurisdictional backgrounds. Therefore, opposing counsel will have different conceptions as to what constitutes ethical conduct. To hold that each lawyer is to adhere to her own ethical obligations would lead to an anomalous and unfair situation for the parties.[58]

The ABA Model Rules also pose an alternative for activities not in connection with proceedings before a tribunal, that is, the rules of the place where the lawyer reasonably believes the predominant effect of the conduct will occur. This means a particular law is applicable to a given factual situation only if that factual situation implicates the purpose of the law.[59] However, again, as the ethical duties discussed by this paper relate to counsel's conduct vis-à-vis an arbitral tribunal, this will generally direct the parties to apply the rules of the seat, if any rules can be homed in on at all. Consider, for example, the paradigm offered by this paper: will the predominant effect be in Sweden, where the claimant's siege social is located, France as the state seat, or Germany as the home state of the lawyer? Thus, an approach attempting to utilize conflict-of-laws rules would be a fruitless endeavour and would lead to an unnecessarily complex result.

3.2. Transnationally promulgated norms

Under this category, two main players exist: the CCBE Code and the ABA Model Rules.[60] The CCBE Code seeks to 'mitigate the difficulties which result from the application of double deontology' in the European Community.[61] While the CCBE

53 E.g., those in the USA.

54 D. B. Wilkins, 'Who Should Regulate Lawyers?', (1992) 105 *Harvard Law Review* 801, at 851.

55 Born, *supra* note 9, at 2318; Gaillard and Savage, *supra* note 17, at 635; see also *Braes of Doune Wind Farm (Scotland) Limited v. Alfred McAlpine Business Services Limited*, [2008] EWHC 426 (TCC).

56 Born, *supra* note 9, at 2318, referring to procedure around witness preparation where the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration (1999) now are accepted. See Professor Born's discussion on these issues at 2309–11.

57 J. Paulsson, 'Standards of Conduct in International Arbitration', (1992) 3 *American Review of International Arbitration* 214, at 214.

58 Born, *supra* note 9, at 2318; ibid., at 214.

59 See generally L. Kramer, 'The Myth of the "Unprovided-for" Case', (1989) 75 *Vanderbilt Law Review* 1045.

60 Both the ABA Model Rules Rule 1.0(m) and the CCBE Code Rule (4.5) extend their rules to a lawyer's relations with an arbitral tribunal as well as to the courts.

61 CCBE Code, Preamble.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

Code is full of choice-of-law provisions that mitigate the problem of double deontology, it was created solely to address issues surrounding cross-border practice in Europe.[62] The ABA Model Rules are similarly narrow in application, as they only address issues of lawyers admitted in the United States practising internationally. The interaction between the two is not, ostensibly, rectified by either. Therefore, any attempt to apply these transnationally promulgated norms at an international level would be mistaken.[63] Further, the bare selection of either would lead to the issues discussed above regarding the holding of lawyers to the obligations of the state seat.

3.3. Internationally promulgated norms

There are few proclamations of legal ethics at an international level. The only codes that purport to apply to all lawyers engaged in the international practice of law are the International Bar Association's Code of Ethics (IBA Code),[64] the International Bar Association's General Principles for the Legal Profession (IBA General Principles),[65] and the Hague Principles.[66] The IBA Code and IBA General Principles were compiled by studying the deontological rules of various countries and extracting principles of legal conduct that appeared to be universal.[67] None of the codes is a complete set of professional obligations. Rather, they are general statements of principles that operate as a guide to the conduct of counsel.[68] Thus, in their present states, none of the three could be a touchstone test.

3.4. An alternative approach

One alternative posited by several authors, in order to formulate a code of ethics, is a functional approach. This suggests that the ethical obligations that a lawyer ought to owe in society can be derived from a lawyer's role, or function, within that society.[69] The ethical obligations sourced in local jurisdictions must be separated from their cultural roots and checked for suitability within the new location before transplanting them in that new location.[70] Therefore, the role of a lawyer is not only determined by the procedural laws of a legal system, but also, and more fundamentally, as the procedural rules are a product of that legal system's culture, greatly influenced by the cultural norms of a society.[71]

---

62 Terry, *supra* note 7, at 1.

63 Cf. J. Toulmin, 'A Worldwide Common Code of Professional Ethics?', (1991–92) 15 Fordham ILJ 681.

64 International Bar Association, International Code of Ethics (1988); this code is currently undergoing review.

65 International Bar Association, General Principles for the Legal Profession (2006).

66 International Law Association, Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals, completed on 27 September 2010, available at www.ila-hq.org.

67 M. Majumdar, 'Ethics in the International Arena: The Need for Clarification', (1994–95) 8 *Georgetown Journal of Legal Ethics* 439, at 447.

68 E.g., under the IBA Code Rule 6, a lawyer must 'never knowingly give to the court incorrect information or advice which is to their knowledge contrary to the law'.

69 A. Boon and J. Flood, 'Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct', (1999) 2 *Legal Ethics* 29, at 49.

70 See also Boldizar and Korhonen, *supra* note 4, at 285, for a discussion on the philosophical underpinnings of the actor/object interaction that can be used to set ethical guidelines. See also Arthurs, *supra* note 4, at 64.

71 Boon and Flood, *supra* note 69, at 51; Arthurs, *supra* note 4, at 68; R. Terdiman, 'Translator's Introduction to P Bourdieu "The Force of Law: Toward a Sociology of the Juridical Field"', (1987) 38 *Hastings Law Journal* 805; Rogers, *supra* note 3, at 386.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

For example, the US judicial system is founded on values of individualism and due process, whereas the German system is characterized by a 'greater acceptance of authority and less tolerance for uncertainty'.[72] In the United States, a system has resulted whereby procedural and evidentiary rules exist to allow the parties to present their case to a relatively passive judge in a fact-finding capacity, whose decisions become law.[73] This sees counsel as an advocate urging a judicial officer to adopt counsel's conception of the law, which ultimately leads to more zealous advocacy. The German conception, on the other hand, has resulted in a judge-led fact-finding mission. Thus, the role of counsel is as a guide to the court.[74]

In order to derive ethical obligations for application in international arbitration, therefore, ethical obligations should reflect, and be moulded on, the institution itself and, in particular, the role of the lawyer therein. The functional approach allows one to be divorced from differences in nomenclature and seek the underlying foundations of ethical regulation.

A starting point is, however, required. For any rule to be effective, it must be meaningful. The most effective way to ensure that ethical obligations are meaningful, in the international context, is by way of a general principle common to civilized nations.[75] In order for a rule to be a general principle, the rule must be observed by a 'representative majority' of nation-states.[76] The exercise of the importation of these general principles should not involve the importation of the rules in their totality from the states' laws. Rather, the exercise requires the transfer of all relevant elements of the general principle as found in national law to the international norm.[77] Thus, the special circumstances and requirements of the international plane must be taken into account.[78]

However, general principles, such as the doctrine of *res judicata*, good faith, or the impartiality of judges, are generally broad statements of law. Such a broad statement is unhelpful in the context of specific ethical obligations' achieving the purposes of ethical obligations on counsel. As discussed above, ethical obligations exist on lawyers by dint of their role in an adjudicatory system. Three main reasons for holding lawyers to such obligations can be developed. First, it is incumbent on a lawyer to uphold the rule of law in any legal system.[79] One aspect of upholding the rule of law is in protecting the integrity of proceedings before a tribunal and assisting

72 Rogers, *supra* note 3, at 394; see also L. R. Frank, 'Ethical Responsibilities and the International Lawyer: Mind the Gaps', (2000) 3 *University of Illinois Law Review* 957.

73 Rogers, *supra* note 3, at 390; see generally M. D. Schwartz et al., *Problems in Legal Ethics* (2003).

74 Rogers, *supra* note 3, at 389; see generally J. Merryman, 'Civil Law Tradition', (1987) 35(2) *American Journal of Comparative Law* 438.

75 General principles common to civilized nations are a source of international law: Art. 38 of the Statute of the International Court of Justice.

76 H. Mosler, 'General Principles of Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1995), 511, at 516; C. McLachlan, Lis Pendens *in International Litigation* (2009), 352.

77 Mosler, ibid., at 517.

78 Ibid., at 518.

79 G. C. Hazard, Jr, and A. Dondi, *Legal Ethics: A Comparative Study* (2004), 2; Lawyers and Conveyancers Act 2006, s. 4; *English Solicitors' Regulation Authority Code of Conduct* (2007), Rule 1.01; W. Bradley Wendel, 'Legal Advising and the Rule of Law' (2008), unpublished research paper, available at papers.ssrn.com/abstract=1175092; see also *Prosecutor v. Duško Tadić*, Case No IT-94–1-A-R77, ICTY Appeals Chamber, *Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin* (31 January 2000); R. A. Brand, 'Vertical Regulation in a Horizontal

in the search for justice in the dispute.[80] Second, lawyers guide counsel's behaviour in particular situations. Third, they provide a normative framework whereby counsel who transgress these standards can be brought to account. But, in order to achieve these aims, a mechanism is required to distil down the general principle to a tangible obligation on counsel.

In order to have a starting point for the use of the functional approach to refine the particular rule, it is submitted that existing normative rules should be utilized. As the IBA Code and IBA General Principles provide the best transaction of different jurisdictions' conceptions of ethical obligations, so these should be the starting point for the determination of the appropriate conduct. If the conduct is considered reprehensible under these broadly worded guides, the conduct should be controlled. Then, in order to refine general principles to apply in practice, the second step should be to consider whether counsel has acted in a way contrary to that which counsel ought to do by dint of her role within the institution of international arbitration.

In international arbitration, party autonomy reigns supreme. Accordingly, it is the parties who determine the procedure. This discretion is often exercised in favour of solid hybridized procedures such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration.[81] This rigidity in procedure means that arbitrators have more of an obligation to apply the substantive law.[82] Parties, generally, give counsel stewardship of those proceedings. Counsel, in exercising this stewardship, must persuade the arbitral tribunal to award in favour of her client. In order to do so effectively, counsel must appeal to an arbitrator's obligation to apply the substantive law. This creates a role for counsel within the institution in which the lawyer's obligation to the client must be broader than that of the civil system. However, it cannot be so to the same extent as in the United States. An arbitrator adjudicating a matter does not have the same resources available as a member of a state's judiciary to conduct her own research. The arbitrator, therefore, requires guidance on that law. In order to appropriately provide this guidance, the adversarial lawyer must be curtailed. Further, there are limits on post-award review and as finality in the award is a strong attraction to arbitration, restraint should exist on overzealous advancement of her client's position.[83]

Such an approach is in line with the norms of international arbitration. As discussed above, these norms are: neutrality in venue; effectiveness through finality of one's award and in enforcement; and party autonomy through the contractual nature of jurisdiction.

3.4.1. Application of the paradigm example

The alternative suggested above is perhaps best demonstrated by way of an illustration of the paradigm example offered in the introduction. Considering first

---

World: National Regulation of Global Legal Practice', *Journal of Private International Law Conference 2009*, New York University School of Law, 17–18 April 2009, 16.

80 G. Naón, 'Choice-of-Law Problems in International Commercial Arbitration', (2001) 289 RdC 159, at 159.

81 Rogers, *supra* note 3, at 411.

82 Ibid., at 417.

83 See generally T. Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers', (2004) 7 *Legal Ethics* 24.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

conflicts of interest, the paradigm gives rise to two main issues. First, are such obligations enforceable? Second, is a waiver enforceable in international arbitration? In order to lay the foundations, the IBA General Principles Principle 3 states that '[a] lawyer shall not place himself or herself in a position in which ... her client's interests conflict with those of ... herself ... unless otherwise permitted by law or, if permitted, by [a] client's authorisation'. The IBA Code Rule 13 states that 'lawyers should never represent conflicting interests in litigation'. Therefore, there is a prima facie breach where conflicting interests operate on counsel in proceedings.

Has counsel acted in a way contrary to the requirements of her role? The common thread in any situation of a conflict of interest is that some incentive is raised that threatens to impair a lawyer's functioning.[84] Here, that functioning relates to the lawyer's trial performance, that is, her duty of diligence vis-à-vis the client.[85] Counsel also has a corresponding duty of diligence to the tribunal when acting as a guide to that tribunal. In the present case, a duty not to be under a conflict of interest also protects the obligation of confidentiality to the claimant.[86] The existence of those conflicting duties conflicts with the role of the lawyer in that a loss of confidence in a client in the belief that nothing she said will be used against them to the advantage of the adversary would be detrimental to the integrity of the legal profession.[87]

Counsel must be able to advocate her client's interests to the tribunal to the fullest extent of her ability in order to satisfy counsel's role. Further, counsel must be able to guide the tribunal to assist in the just determination of an outcome. Thus, a lawyer must retain some independence from the client.[88] Where there is a competing obligation of confidentiality to another client, this will further impede the ability of a lawyer to act independently.[89] This is particularly so in circumstances where the tribunal has a limited ability to do its own research and must therefore take the remarks of counsel at face value. Nevertheless, it is unlikely in practice for a lawyer representing a client to fetter her zealous advocacy for her present client to the benefit of a former client. Where this issue is more likely to arise is when the lawyer discloses confidential information about the claimant to Alpha. Or, more probably, the lawyer does not disclose that information, but uses that knowledge to inform her strategy in the case. It is the basis of confidentiality that will likely cause a court to intervene in order to protect the fairness of proceedings.[90]

As posited above, this could lead to a breach of the lawyer's role where the confidential information obtained by the lawyer was that the claimant had low economic resources and the lawyer stalled proceedings in order to deplete

84 See K. McMunigal, 'Rethinking Attorney Conflict of Interest Doctrine', (1991–92) 5 *Georgetown Journal of Legal Ethics* 823, at 831.
85 S. Holland et al., 'Conflicts of Interest: Time for a Change?', (2000–01) 3 *Legal Ethics* 132, at 134.
86 *Prince Jefri Bolkiah v. KPMG*, [1999] 2 AC 222, at 234, (HL) Lord Millett.
87 *MacDonal Estate v. Martin*, (1991) 77 DLR (4th) 249 (SCC), at [18].
88 Hazard and Dondi, *supra* note 79, at 158.
89 See, e.g., *Russell McVeagh v. Tower Corp*, [1998] 3 NZLR 641 (NZCA).
90 Holland et al., *supra* note 85, at 134; *Prince Jefri Bolkiah v. KPMG*, [1999] 2 AC 222, at 234, (HL) Lord Millett; Thomas, *supra* note 8, at 575.

the claimant's resources so that the claimant had to withdraw its claim. This would be a breach of the lawyer's role as a guide to the tribunal. For obstructing the determination of proceedings completely cannot result in a just determination.

There is also the issue of a past waiver by the claimant. Both the IBA Code and IBA General Principles are unhelpful on this issue, as the IBA General Principles suggest that there is no commonality throughout civilized nations with regard to a waiver.[91] While at first glance this may be the case, a general principle may be found in an alternative way. Harmony can be found between the ABA Model Rules and the CCBE Code. Under the CCBE Code, the availability of a waiver is not discussed. However, the fact that the concept of conflicts of interests is much narrower in European nations[92] lends weight to the proposition that a waiver would be upheld under the CCBE Code. In the United States, the ability of a client to waive a conflict of interest is not unfettered. Further, in international arbitration, it is common practice, in the selection of both counsel and arbitrators, to choose 'wise elders',[93] that is, those who have both arbitral and industry experience with 'many interconnecting relationships to the parties'.[94] Therefore, the norm of party autonomy should operate to allow a waiver by a party. For to not uphold an informed waiver would go against the norm of party autonomy by overly inhibiting the situations in which counsel of choice can appear. Further, it cannot be said that justice is not seen to be done when the, ostensibly, disadvantaged party gave informed consent to the lawyer's acting in such a matter in the future.

With regard to the issue of candour to the tribunal, the IBA General Principles Principle 2 states that '[a] lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the court'. The IBA Code Rule 6 states that 'lawyers shall never knowingly give to the Court incorrect information or advice which is to their knowledge contrary to the law'. For, broadly, in all jurisdictions, the lawyer's duty to find the truth is just as important as the lawyer's duty to loyally pursue a client's interests.[95] Therefore, there is a prima facie breach of this obligation of honesty whenever counsel hands to a tribunal documents that she knows to be false.

Has counsel acted in a way contrary to the requirements of her role? Counsel must be able to advocate for her client to the full extent of her ability in order to satisfy her role. However, the bar on counsel's offering information that is false is stronger than counsel's duty to advocate for a client. As arbitrators rely on much of what counsel says in order to guide their decisions and due to the lack of post-award review, it is vitally important that lawyers are truthful.

91 Principle 3.
92 M. C. Daly, 'The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century', (1998) 21 Fordham ILJ 1239, at 1289.
93 Menkel-Meadow, *supra* note 25, at 903.
94 Ibid.
95 See, e.g., Terry, *supra* note 50, at 389.

4. Does an arbitral tribunal have the power to regulate?

The goals of ethical obligations are to guide, punish, and deter in order to ensure, among other things, the proper functioning of a state's judicial apparatus. As such, ethical obligations are generally regarded as mandatory law.[96]

Mandatory laws are those laws from which one cannot derogate, that is, those imperative laws of the forum that apply irrespective of the intention of the parties.[97] Examples of mandatory laws include both procedural laws (e.g., laws requiring due process) and substantive laws (e.g., tax, competition, and import/export laws).[98] The mischief avoided by asserting that such categories are mandatory law is that arbitrators, who are unfamiliar with important and complex laws, may not apply them correctly.[99] Therefore, mandatory laws are jealously guarded by the state and not arbitrable per se. This provides a potential hurdle for the ability of an arbitral tribunal to consider, and make orders with regard to, ethical obligations.

As a preliminary observation, the traditional exclusion on the arbitrability of mandatory law is now applied flexibly. Whether mandatory law will interfere with the arbitrability of a matter depends on the *lex arbitri* of the seat.[100] Some states, such as the United States, have shown flexibility in allowing arbitral tribunals to consider issues of mandatory law.[101] Further, in the recent Ontario Court of Appeal decision in *Jean Estate* v. *Wires Jolley LLP* (*Jean Estate*), Weiler JA held that even though public policy prevents the parties' contracting out of the statutory protections under the Solicitors Act 1990 (Ontario, Canada), that does not prevent the parties' contracting to have the matter determined by an arbitrator.[102] This paper submits that as the approach of the Ontario Court of Appeal upholds freedom of contract and allows a dispute to be decided on its merits,[103] it should be the preferred approach. However, most civil-law countries, and indeed most jurisdictions generally, are less inclined to allow arbitral tribunals to consider issues of mandatory law. For example, French arbitration law prohibits arbitration of claims affecting public policy and claims over which national courts are deemed to have exclusive jurisdiction.[104]

Even if states' willingness for arbitrators to consider mandatory law, generally, is not relaxed, ethical obligations vis-à-vis an arbitral tribunal should not be considered in the same light as other mandatory laws such as competition rules. The regulation of counsel is properly considered a *sui generis* form of procedural law and therefore

96 Thomas, *supra* note 8, at 562; Rogers, *supra* note 4, at 17.

97 O. Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994), 180; McConnaughay, *supra* note 18, at 455; see also P. Mayer, 'Mandatory Rules of Law in International Arbitration', (1986) 2 *Arbitration International* 274, at 275.

98 Barraclough and Waincymer, *supra* note 36, at 205; Poudret and Besson, *supra* note 20, at 521; cf. the conflict-of-laws approach in Born, *supra* note 9, at 2175–7.

99 Rogers, *supra* note 4, at 16; see generally Guzman, *supra* note 22, at 1292.

100 Poudret and Besson, *supra* note 20, at 521; cf. the conflict-of-laws approach in Born, *supra* note 9, at 2175–7.

101 See *Mitsubishi v. Soler Chrysler-Plymouth Inc.*, *supra* note 28; Posner, *supra* note 28, at 647; see also the French Court of Appeal decision in *International Contractors Group v. X*, cited in J. Paulsson, 'Standards of Conduct in International Arbitration', (1992) 3 *American Review of International Arbitration* 214, at 215–17; *Jean Estate v. Wires Jolley LLP, supra* note 28; *A.-G. v. Mobil Oil NZ Ltd*, [1989] 2 NZLR 649 (HC).

102 *Supra* note 28, at 360.

103 Ibid.

104 Rogers, *supra* note 4, at 18.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

states should make the consideration of ethical obligations an exception to the general prohibition on the arbitrability of mandatory law. This paper asserts three reasons in support.

First, the state seat is not necessarily the most convenient jurisdiction from which to derive ethical obligations,[105] one reason being that a single state's professional regulation of counsel does not necessarily adhere to transnational public policy – transnational public policy being the policy concerns of all or most states.[106] Therefore, adhering to the seat's ethical obligations would not necessarily mean that transnational public policy is adhered to. Arbitrators owe a duty to the international community.[107] Therefore, an arbitrator should not accede to any mandatory rules that conflict with transnational public policy.[108] Ethical obligations exist to protect the sanctity of the proceedings.[109] There is no transnational or domestic public interest in being represented by someone who acts unethically when the sanctity of proceedings might be jeopardized.

Second, decisions such as *Jean Estate*, in which it was held that that public policy prevents the parties' contracting out of the statutory protections under the Solicitors Act 1990, can be distinguished. The mischief sought to be avoided by defining laws as mandatory laws does not have the same effect when the protection of an institution is at issue. Rules concerned with the protection of a client in that client's dealings with counsel may be properly construed as mandatory laws, as obligations to protect a client also exist to protect that state's citizens.[110] However, an ethical discord by counsel in their dealings with a tribunal is necessarily an institutional matter, not a state matter, for these obligations exist to protect the proper functioning of that institution. In any event, allowing arbitrators to disqualify counsel would not interfere with the jurisdiction of the courts[111] or bar review boards[112] from disciplining lawyers. Such institutions still have their proper role in the regulation of lawyers.

Third, the concept of mandatory law in international law exists to regulate that which is an established and concrete part of domestic law, such as competition or securities law, and rules that are discretionary are not generally classified as mandatory laws.[113] Therefore, sole consideration is reserved by state institutions to prevent deviation from these known rules. The consideration of ethical obligations requires the balancing of competing interests in particular circumstances – in the case of the disqualification of counsel, between the right of a party to be represented by counsel

105 See section 3.1, *supra*.
106 *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7 (ICSID, 2000, Guillaume P, Veeder, and Rogers), in McLachlan, Shore, and Weiniger, *supra* note 41, paras. 141–142.
107 Chukwumerije, *supra* note 97, at 193; P. Mayer, 'Mandatory Rules of Law in International Arbitration', (1986) 2 *Arbitration International* 274, at 291.
108 Barraclough and Waincymer, *supra* note 36, at 218; Chukwumerije, *supra* note 97, at 193; see also *World Duty Free Company Limited v. Republic of Kenya, supra* note 106.
109 Thomas, *supra* note 8, at 575.
110 See *Jean Estate v. Wires Jolley LLP*, *supra* note 28, where it was found that even though these are mandatory law, an arbitrator may still adjudicate on the result.
111 Thomas, *supra* note 8, at 562; Naón, *supra* note 80, at 160.
112 Thomas, *supra* note 8, at 582.
113 Ibid.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

of choice and the requirement of fair proceedings. Therefore, the determination of an ethical dispute necessarily involves the exercise of discretion.[114] An arbitrator, properly acquainted with the institution, is in the optimal position for determining such issues.

4.1. Jurisdiction

While the traditional conception of ethical obligations as mandatory law does not, of itself, prevent an arbitral tribunal from considering them, the source of an arbitral tribunal's jurisdiction to do so has been severely questioned.[115] Ammunition for that approach is primarily given by that fact that in civil-law countries, such as France, there is no proceeding available in the courts analogous to a motion to disqualify.[116] The issue therefore arises, if a court cannot consider such issues in these states, how can an arbitral tribunal?

The fact that a domestic court in the seat does not have jurisdiction to consider issues of professional regulation should not be a complete bar to the consideration of ethical obligations by an arbitral tribunal. To bar consideration by an arbitral tribunal fails to recognize the flexibility of arbitration. Often, an arbitral tribunal may have wider powers than those of a judge.[117] This is because the jurisdiction of a tribunal flows, for the most part, from the consent of the parties. Further, both the ABA Model Rules and the CCBE Code recognize that a tribunal should be provided with a degree of respect and ethical obligations should be owed.[118] This shows that there is an implicit acknowledgement that adjudicatory systems must have the ability to regulate counsel's participating in their proceedings.[119]

Notwithstanding that, in the New York Supreme Court Appellate Division decision of *Bidermann Industries Licensing Inc.* v. *Avmar*, the issue of the jurisdiction of an arbitrator to disqualify counsel was considered in circumstances under which there was a conflict of interest.[120] In holding that 'the issue of attorney disqualification is not appropriate for arbitration',[121] the Court stated:

> [T]he regulation of attorneys, and determinations as to whether clients should be deprived of counsel of their choice as a result of professional responsibilities and ethical obligations, implicate fundamental public interests and policies which should be reserved for the courts and should not be subject to arbitration.[122]

This decision has further been reinforced by the New York Supreme Court Appellate Division decision in *Matter of Erdheim* v. *Selkowe*, which held that matters of attorney

114 See generally *Jean Estate v. Wires Jolley LLP*, *supra* note 28, at 360; Boldizar and Korhonen, *supra* note 4, at 299.
115 See, e.g., Rogers, *supra* note 4, at 4; *Bidermann Industries Licensing Inc. v. Avmar*, (1991) 570 NYS 2d 33 (1st Department).
116 Daly, *supra* note 10, at 1154. Where, such as in France, issues over conflict of interests are for the state bar to decide: O. d'Ormesson, 'French Perspectives on the Duty of Loyalty: Comparisons with the American View', in Daly and Goebel, *supra* note 46, 29, at 35.
117 Redfern and Hunter, *supra* note 2, at 366.
118 ABA Model Rule 8.5; CCBE Charter Rule 4.5.
119 Rogers, *supra* note 4, at 24.
120 (1991) 570 NYS 2d 33 (1st Department).
121 Ibid.
122 Ibid., at 23.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

discipline are 'beyond the jurisdiction of arbitrators'.[123] And, indeed, one tribunal regarded such claims as not arbitrable, even when they were, ostensibly, encompassed by the arbitration agreement.[124] In another, jurisdiction was found to be lacking, as a ruling regarding professional responsibility would require 'adjudication on the criminal consequences of alleged advocate misconduct'.[125]

To the contrary, this paper argues that the jurisdiction of an arbitral tribunal to consider ethical issues derives from two sources. First, the power of state courts to regulate counsel comes generally from their inherent power to enforce their process and to maintain their dignity and respect. An arbitral tribunal also has an inherent jurisdiction to use powers necessary to ensure the fulfilment of the proper functioning of the tribunal.[126] The recent amendment to the United Nations Commission on International Trade Law (UNCITRAL) Model Law lends weight to that argument. Under the 2006 amendment to Article 17(2), paragraph (b) was inserted. Article 17(1) provides for the power of an arbitral tribunal to grant interim measures against a party to the arbitration. Article 17(2)(b) defines an interim measure as a measure that orders a party to take an action that would prevent or restrain that party from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself. While this is an order aimed at the parties to the arbitration and could not be properly used to restrain counsel, it does show the increased importance recognized in a tribunal's ability to ensure the sanctity of its proceedings. This is also reinforced by the fact that most institutional arbitral rules, when chosen by the parties, give some degree of discretion to an arbitrator to determine those aspects of procedure that the rules are silent on and where there is not an agreement between the parties.[127]

Second, ethical obligations vis-à-vis an institution exist to protect the sanctity of the proceedings by promoting the future enforcement of an award.[128] As such, the consideration of ethical obligations is a provisional measure.[129] The jurisdiction for an arbitrator to order provisional measures generally derives from the *lex arbitri* of the seat or from an interpretation of the arbitration agreement.[130] An arbitral tribunal may then make an interim order as against counsel. Under most arbitral institutions' rules, arbitrators may make interim orders. For example, the ICC Rules empower an arbitrator to render an award[131] and define the term 'award' to include 'an interim, partial or final award'.[132] In some jurisdictions, an arbitral tribunal

123 (1976) 51 AD 2d 705 (NY, 1st Department).
124 Partial Award of 1997, ICC Case 8879 (unpublished) in Naón, *supra* note 80, at 158.
125 Naón, *supra* note 80, at 159.
126 *Nuclear Tests (Australia v. France)*, [1974] ICJ Rep. 253, at 259; see, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, ICTY Appeals Chamber *Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin* (31 January 2000), para. 13; C. Brown, 'The Inherent Powers of International Courts and Tribunals', (2005) 76 BYIL 195, at 228; cf. L. Collins, 'Provisional and Protective Measures in International Litigation', (1992) 234 RdC 9.
127 See, e.g., UNCITRAL Rule Art. 15(1); ICC Rules Art. 15(1); see also the approach of the Iran–United States Claims Tribunal in *E-Systems, Inc. v. Iran*, (1983) 2 Ir-USCTR 51, at 57.
128 See generally Kurkela and Snellman, *supra* note 33.
129 Poudret and Besson, *supra* note 20, at 520.
130 Ibid., at 521.
131 International Chamber of Commerce Rules of Arbitration, Art. 25.
132 Ibid., Art. 2(iii).

may order an astreinte,[133] which is a procedural order accompanied by a sanction, generally in the form of pecuniary penalty. However, in others, such as Sweden, arbitrators are prohibited from imposing sanctions, such as fines, in order to enforce procedural orders. It is reasoned that these activities are public, not private, interests; therefore, they can only properly be administered by government agencies that are empowered to act in the public interest.[134]

An order as to the ethical discord of counsel is appropriately viewed as a dispute between the parties with respect to a procedural aspect concerning the integrity of the proceedings. The order is then enforceable against counsel by dint of her role. Counsel fulfil certain obligations vis-à-vis an arbitral tribunal in order to maintain the integrity of proceedings,[135] such as to 'help and assist in the search for the right resolution of the dispute'.[136] The disqualification of counsel is thus a remedy aimed at protecting 'the integrity of ongoing proceedings' as between the parties.[137] While it could be argued that ordering sanctions could have a prophylactic effect, only remedies that actually protect the sanctity of proceedings should be used,[138] such as the disqualification of counsel from the immediate proceedings.

This approach has some precedent to support it. The tribunal in one ICC award did not question the ability of an arbitral tribunal to make an order against counsel; the tribunal reasoned that the integrity of the proceedings must be protected.[139] Further, an arbitrator has a duty to ensure fairness in proceedings.[140] This goes hand in hand with an arbitrator's responsibility to oversee the arbitral proceedings. It is generally accepted that these responsibilities include the responsibility to oversee the parties' presentation of their cases.[141] Naturally, counsel's role is to present the case of her client, who is a party to the proceedings; that is her specialty. Without any power to protect the sanctity of proceedings where there is a breach of the ethical obligations that counsel owe to the tribunal, an arbitrator cannot effectively discharge this duty. Further, arbitrators are responsible for ensuring party compliance with the rules of international public policy.[142] As reasoned above, international public policy includes 'fundamental aspects of ethical regulation'.[143] As counsel is the agent who has command of her client's case, this must include an arbitrator's responsibility to ensure that counsel complies with these obligations.

---

133 Poudret and Besson, *supra* note 20, at 540.

134 See also the development of the acceptance for United States Courts to award punitive damages in Born, *supra* note 9, at 2485.

135 Naón, *supra* note 80, at 159.

136 Ibid.; cf. Born, *supra* note 9, at 2320–4.

137 Thomas, *supra* note 8, at 563.

138 See, e.g., *In re Arbitration between R3 Aerospace Inc and Marshall of Cambridge Aerospace Ltd*, (1996) 927 F Supp. 121 (SD NY), at 125; Thomas, *supra* note 8, at 563.

139 Partial Award of 2000 ICC Case 10776 (unpublished), in Naón, *supra* note 80, at 158.

140 Born, *supra* note 9, at 2320; Kurkela and Snellman, *supra* note 33, at 186; H. Gabriel and A. H. Raymond, 'Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards', (2005) 5 *Wyoming Law Review* 453, at 458.

141 Born, *supra* note 9, at 2323.

142 *Société Ganz v. Société Nationale des Chemin de Fers Tunisiens*, Revue de l'arbitral 478 CA Paris (1991), cited in T. E. Carbonneau and F. Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability', (1994) 2 TJICL 193, at 218.

143 Rogers, *supra* note 4, at 52.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

Finally, it would be naive to think that an arbitrator who thought that counsel was acting unscrupulously would not take steps to nullify the effects. Some commentators suggest that currently arbitrators implement de facto sanctioning powers by way of the ordering of costs against the losing party or by not giving evidence due weight where there is a belief that the evidence is false.[144] If this is the case, it is surely a breach of natural justice for the suffering party. Not only are the powers that arbitrators have to implement orders, such as costs, being abused against the parties for an indiscretion that they did not necessarily cause,[145] but the parties do not even have the opportunity to put forward arguments on the matter.

4.1.1. Application of the paradigm example: is action required on the part of the tribunal in these circumstances, having regard to the norms of international arbitration?

First dealing with the conclusion on conflicts of interest, as the claimant has provided a valid waiver in the past, the lawyer cannot be disqualified in the present case, for there is no breach of any ethical obligations. However, if a valid waiver was not made, the situation would be different. Here, as the conflict relates to a former client of the lawyer's, there cannot be any real risk that the lawyer might readily change sides or not discharge her obligations to Alpha.[146] Further, the previous matter that the lawyer acted on for the claimant was unrelated; therefore, it may be assumed that no information is held by the lawyer that could be used to bring the institution into disrepute. However, where information is held about the claimant's financial situation more generally, like that posited above, this paper suggests that dismissal would be appropriate. While avoiding a conflict of interest would breach the institution's norm of party autonomy, that is, the parties should be entitled to counsel of choice, this is outweighed by the norm of effectiveness. However, due to the high price placed on party autonomy in international arbitration, disqualification should not be permitted unless real prejudice is evidenced. Here, disqualification is required for one main reason: to uphold the interests of the arbitral tribunal. Much like a court of law, an arbitral tribunal is concerned with the administration of justice in the particular case and generally in preserving confidence in the arbitral tribunal.[147] Justice must not only be done, but should 'manifestly and undoubtedly be seen to be done'.[148] The effectiveness of the tribunal generally will be compromised where the appearance of justice is subverted.

Second, turning to the presentation of material that the lawyer ought to have known was false, having regard to the norm of effectiveness, if an arbitrator cannot

144 Born, *supra* note 9, at 1919; ibid., at 56–7; see, e.g., *Pope & Talbot Inc. v. Government of Canada in NAFTA Decision of 27 September* (27 September 2000) (Dervaind P, Belman, and Greenberg), in McLachlan, Shore, and Weiniger, *supra* note 41.

145 Cf. *Pope & Talbot Inc. v. Government of Canada in NAFTA Decision of 27 September*, ibid., para. [12], in which the tribunal suggested that counsel voluntarily assume the costs.

146 Cf. the discussion of S. Goubran, 'Conflicts of Duty: The Prennial Lawyer's Tale – A Comparative Study of the Law in England and Australia', (2006) 30 *Melbourne University Law Review* 88.

147 With regards to the judicial system, see *Black v. Taylor*, [1993] 3 NZLR 403 (NZCA); *Grimwade v. Meagher*, [1995] 1 VR 446 (Victoria, Australia); *Everingham v. Ontario*, (1992) 88 DLR (4th) 755 (Ontario, Canada); and *MacDonal Estate v. Martin*, (1991) 77 DLR (4th) 249 (SCC).

148 *Black v. Taylor*, [1993] 3 NZLR 403 (NZCA), at 408.

rely on what counsel is saying as true and accurate, how can an effective decision be made in the interests of justice for the contracting parties? When 'enforcement against procedural abuse is lax, a party who has suffered from procedural abuse has little recourse except retaliation'.[149] States will be unwilling to cede further jurisdiction to an institution where awards become a competition for the most believable approach, regardless of its truthfulness. Generally, if an adjudicator distrusts a lawyer, that lawyer will have difficulty in any future interactions with the adjudicator.[150] However, what is restraining a lawyer when there is the likelihood that there will be no future interaction with that particular adjudicator?

The taint placed on the proceedings by the withholding of the truth of material aspects of a case could lead to an award that is not enforceable under the New York Convention. The rendering of an award that is based on evidence that is false and designed to mislead that tribunal would be against the interests of international public policy, as this would have denied the claimant due process in the rendering of a just award. Further, action on the part of counsel that leads to re-litigation of the same matter does not uphold effectiveness in the institution. To be sure, where such conduct is identified prior to the rendering of the award, this has the effect of mitigating any negative effects. The competing interest of party autonomy should, therefore, prevent the disqualification of counsel. That is because only remedies that protect the sanctity of proceedings, such as the disqualification of counsel, should be used. However, as the adjudicator is unlikely to trust what is said by counsel in the future, it would be wise for Alpha, of her own volition, to engage new counsel.

5. Conclusion

In international arbitration, the role of the lawyer is balanced between the inquisitorial civil-law model and the zealous advocate known to the American common law. As parties entrust counsel with stewardship of the course of proceedings in international arbitration, that tips the balance on the side of the lawyer advocate. As such, those ethical obligations that can be derived must uphold the lawyer as advocate, zealously pursuing the interests of her client. However, the system must compensate for the lack of safeguards that exist to protect the award from overzealous behaviour on the part of counsel. While this may act as a guide to counsel as to how to conduct oneself, from time to time, this behaviour may transgress the prescribed norm. This may lead to a taint over the proceedings to the extent that an award may not be enforceable or the very integrity of the institution of international arbitration could be jeopardized. It is under these circumstances that an arbitrator may need to consider and enforce ethical obligations so derived from a lawyer's role. However, regulation on the international plane involves a balancing of the competing interests of states and, as such, involves the conduct of lawyers from a variety of local beginnings and so should not be overly prescriptive. Therefore,

149 Hazard and Dondi, *supra* note 79, at 239.
150 Ibid., at 237.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press

ethical regulation should merely act as a net to catch those who transgress the ultimate bounds of morality, in the form of general principles.

In the common-law world, a court has the power to regulate counsel, as such powers are necessary for the proper functioning of the courts.[151] Likewise, an arbitral tribunal should have the power to control the functioning of lawyers who otherwise could frustrate and corrupt the processes of the tribunal. All adjudicatory bodies have a proper interest in regulating their own proceedings, whether conferred expressly or assumed as being inherent. This is vital in upholding natural justice in the institution. While there are impediments in the road to assertion of jurisdiction, these are but mere obstacles. Without such power, a risk to the continued popularity of arbitration and the willingness of cession of states' sovereignty exists, to the detriment of international arbitration.

151 *Board of Overseer of the Bars v. Lee* (1980) 422 A 2d 998, at 1002 (ME, Supreme Judicial Court); see also C. W. Wolfram, *Modern Legal Ethics* (1986), 26.

https://doi.org/10.1017/S0922156511000112 Published online by Cambridge University Press