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## IN THIS ISSUE

Message from the Chair	2
Committee Events	
IBA 2004 Conference – Auckland	3
Miami Conference, 28-29 April 2005	5
Conference Report: Litigating Transnational Contracts, 17-18 June 2004, Madrid	6
Feature Articles	7
Current Developments	
Australia	37
England	39
European Union	49
Germany	53
Hong Kong	55
Ireland	58
Japan	61
The Netherlands	64
South Africa	68
Switzerland	69
United States	72
Publications of Interest	84
Other Conferences and Events	84
Listserve/Website Information	85
Finding Local Counsel Through the Committee's Online Directory	86
Committee Officers	87
Regional and Country Chairs	88
Publication Details and Committee Information	91

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## FEATURE ARTICLES

### International Litigation in New Zealand

*Ian Gault and Daisy Bell*

7

### Litigating International Commercial Disputes in Russia

*Dmitry Kurochkin, Simon Bushell and Ekaterina Eremina*

10

### Ethics in International Proceedings

*Sheila Block*

15

### Ethical Issues in International Litigation from a German Perspective

*Siegfried H Elsing*

23

### Privileges and Protection of Trade Secrets in Japan

*Masako Yajima*

29

### Legal Professional Secrecy and Privilege in Switzerland

*Peter Burckhardt*

33

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# Ethics in International Proceedings

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There is a psychological condition that sometimes overtakes travellers. They feel invincible in a foreign country, as though, being away from home, the normal restraints on their conduct no longer apply. Any rational observer would know that this approach was naive and fraught with potential danger but, somehow, being away from the familiar constraints of the home jurisdiction, is dangerously liberating.

There may be some element of this syndrome which applies to lawyers who practise occasionally in other jurisdictions. Each jurisdiction has its own set of ethical rules and codes of conduct. There are many common elements among them. But much of what constrains and shapes conduct derives from shared values of the Bar in which the lawyer typically practises. When operating outside that environment, some of the unwritten pressures which come from the shared values may seem less pressing. This is particularly true in international arbitration. As one commentator has said, 'international arbitration dwells in an ethical no-man's land', because the extraterritorial effect of national ethical codes is murky, particularly in a non-judicial forum such as arbitration. This is compounded by the fact that there is no supranational authority governing lawyers in these settings.<sup>1</sup>

This article is divided into two parts. The first examines the challenges which arise from the divergent ethical norms applying to lawyers from different countries who practise in the field of international arbitration. The second part examines the challenges arbitrators face in controlling the ethical behaviour of counsel before them.

## Divergent ethical norms

In the past, when those practising in the field of international arbitration were part of a relatively small community, there were implicit understandings and shared values which informally regulated the ethics of that Bar. With the explosion of international arbitration and the expansion around the world of lawyers appearing before international arbitration tribunals, it is argued by many that informal regulation of ethics is inadequate. But formulating and enforcing ethical norms is a tremendously daunting problem.

There are differing practices in different jurisdictions which reflect diverse ethical approaches to the practice of law. In her excellent article on legal ethics in international arbitration, Professor Catherine Rogers<sup>2</sup> has pointed out that there are diverse ethical

norms arising from the lawyer's differing roles in various societies. She gives the example of a German attorney who could be criminally punished for communicating with the witness before a hearing and a British barrister for whom such contact would be a breach of ethics. In contrast, a North American lawyer would consider it a dereliction of duty not to prepare a witness before putting her on the stand, often to the extent of videotaping mock direct and cross-examinations.

Other divergences arise in many areas. For instance, on issues of privilege, in-house counsel in many European systems do not enjoy privilege; North American in-house counsel do. One's obligation to produce documents involving in-house counsel will be very different, as will one's approach to communications with a corporate client, depending on which norms apply.

Professor Rogers points out that in Italy, Portugal and France, communications from other lawyers, including opponents, may be required to be kept confidential, even from one's client, if designated confidential. In the North American practice, a lawyer is obliged to keep his client informed and ought not, except in very limited circumstances, agree to receive information on the basis that it will be kept from the client.

Even styles of argument can raise ethical issues. A creative American jury lawyer may be seen to be unprofessional in the eyes of an opponent (or even worse, an arbitrator) who comes from a jurisdiction where lawyers apply the law as opposed to shape and mould the law in new directions (à la Lord Denning). Another example occurs in communications with arbitrators where differing cultural and ethical norms can raise conflicts. In Chinese med/arb, according to Professor Rogers, individual communication with arbitrators is common. She notes that in many continental systems, *ex parte* communications are permitted in some circumstances, in contrast to the position under English common law where an entire body of law would invalidate the decisions of arbitrators who did not follow the principle of '*audi alteram partem*' and require all communications to be in the presence of both parties. On top of these differences is the fundamental divergence between systems that permit contingency fees and those that do not. Indeed in my own jurisdiction, until recently, contingency fees were prohibited and considered completely unethical. They are now permitted and, almost overnight, are in very common use in class actions.

There are tricky problems in determining what standards apply to lawyers licensed in one jurisdiction who are increasingly engaged in litigating or providing advice to clients in other jurisdictions. How are those lawyers disciplined? What standards are they held to?<sup>3</sup> The debate seems endless on how to fashion choice of law rules to solve conflicts among jurisdictions with some connection to the lawyer or the lawsuit. There is no clear rule to cover the transnational practice which answers the question: what standards apply to the lawyer engaged in international litigation? As one commentator described:

'In contrast to the problems of too many or conflicting standards of professional conduct encountered in domestic litigation, international litigation will often have no standards beyond those prescribed by his or her licensing jurisdiction – standards reflecting the cultural norms of this country [USA]. Such standards may conflict with expectations or norms of foreign clients or tribunals.'<sup>4</sup>

When you consider the amount of scholarship about the numerous issues abounding in the multijurisdictional practice just *within* the United States, where one assumes the divergences among ethical standards in the 50 states are relatively manageable, it can be seen that tackling the challenge of regulating international ethical issues is significant.<sup>5</sup>

On the international front, a number of countries have been involved in a global discussion of the transnational practice of law. Laurel S Terry provides a thorough account of the discussion by 105 lawyers from around the world at the Paris Forum on transnational practice for the legal profession.<sup>6</sup> The tremendous scholarship applied to the problem does not, however, solve it for the practitioner now engaged in international arbitration. Yet there are some principles and tools available to assist.

### Limitations of universal norms

At the conceptual level, all systems adhere to universal norms which inform all legal ethics. A lawyer from any jurisdiction would agree she is to be truthful, fair, independent, and loyal and must keep confidences. Lawyers would even agree, at the next level of detail, that truthfulness means avoiding perjury, not assisting a client to perjure himself and not misrepresenting to the tribunal. But as in most legal matters, the devil is in the detail and, as Professor Rogers points out, there is limited utility to these seemingly universally held norms. A number of Professor Rogers' examples follow.

### Witness preparation

- What may be one lawyer's duty to prepare a witness could appear to another to be witness tampering and a breach of the obligation to be truthful.

### Argumentation

- So too can divergences arise in the propriety of argumentation. North American lawyers can urge any interpretation or construction of law favourable to the client:

'without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.'<sup>7</sup>

...

'In Continental systems, by contrast, creative arguments that are not, in the attorney's professional opinion, likely to prevail, would be considered professionally irresponsible if not sanctionable.'<sup>8</sup>

### Communication with the tribunal

- Lawyers will fare no better on the fairness front. The impartiality of the tribunal providing an equal opportunity for parties to be heard is generally universally accepted. However, as noted, the Chinese med/arb practice has one party speaking to the decision maker in the absence of the other. The same will happen in North America with certain tripartite arbitrations.<sup>9</sup> Ethics may permit a party to communicate about strategy with its own appointee to the arbitration panel.

### Independence

- Independence of the Bar, another universal principle, has very different application in different legal systems. Barristers are not entitled to form firms because of the threat of stifling independence if tied to another partner's interests or judgments. North American attorneys not only can have partners – sometimes hundreds of them – but they can, in effect, 'own' part of the lawsuit through the mechanism of contingency fees. Though both the UK and US systems revere the independence of the Bar, the concept has very different applications and, accordingly, ethical implications in those different systems.

### Confidentiality

- Confidentiality is accepted as a general principle. But civil law countries<sup>10</sup> apply that principle to communications by the client but not to communications by the lawyer. Even in the 50 states in America, there is not agreement about what a lawyer is obliged to do in respect of disclosing client wrongdoing or potential wrongdoing.

### Loyalty

- You might think loyalty is a straightforward principle and easy to define. Everyone will agree that a lawyer must be loyal to his or her client. In one respect, this

is and has been true for centuries. A lawyer cannot represent opposing sides to the same dispute. However, the standards applied are quite different in character. The American regulation of conflicts is very formal and has spawned a huge amount of jurisprudence (not to mention a cottage industry of removal motions which has now, regrettably, spread to Canada).

- In Europe the regulation of conflicts is relatively informal. In the United States a lawyer must follow the client's instructions. In Europe the obligation is defined in a way which requires the lawyer to act in what he considers to be the client's best advantage. So, for example, counsel can be substituted without the client's specific consent in some countries.<sup>11</sup> Loyalty, in its application around the globe, can mean quite different things.

Professor Rogers argues that because of these divergent ethical norms, the individual codes of ethics cannot peacefully coexist in the absence of a code that applies in international arbitration. In her earlier work, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration,' she proposes that such a code be developed and provides a scholarly analysis of the conceptual framework for such an undertaking. Again, despite the scholarship, in which she so brilliantly articulates the problems arising from the diverse ethics which apply from country to country, the practitioner is without an immediate solution. In her later article, 'Context in Institutional Structure in Attorney Regulation,' Professor Rogers has undertaken 'the constructive project of mapping a regime for integrating professional discipline mechanisms into the international arbitration system'.<sup>12</sup> She has done much to advance the thinking in this area, but it is clear the development of a comprehensive solution will be decades in the making. The practitioner must still cope with the challenge of gingerly navigating the ethical quicksand of international arbitrations. Are there any stopgap measures that help us today?

### Alternatives for stopgap measures

#### *CCBE Code*

In his helpful article, 'A World-wide Code of Professional Ethics,' John Toulmin QC describes the challenging task of developing the 1988 Code of Conduct in the European Union (the 'CCBE Code').<sup>13</sup> This Code was originally adopted at the CCBE plenary session held on 28 October 1988. It was amended at subsequent plenary sessions on 28 November 1998 and 6 December 2002. It is a 16-page document dealing with general principles, relations with clients, relations with the courts and relations between lawyers. For all the effort and, no doubt, agony that it has taken to develop this fine piece of work, it is still on a level of generality that leaves much to fill in. Consider that the index alone to the Model Rules of Professional

Conduct published by the American Bar Association is longer than the entire CCBE Code. The text of the American Model Rules itself runs to 123 pages. In my own province in Canada, our professional conduct handbook is more than 100 pages long. The compromises that are required by those valiant enough to undertake the development of a code such as the CCBE dictate a level of generality and abstraction that domestic codes do not require. There is not, and one wonders how there will ever be, the commentary and interpretation found in codes such as that of the ABA and the Ontario professional conduct rules, since there is not a body of published jurisprudence on ethical issues emanating from international arbitrations. Yet nevertheless, the CCBE Code provides a starting point and a basic ethical framework which parties can voluntarily adopt and agree will bind them in their arbitrations.

That still leaves significant issues which need to be hammered out. For example, CCBE Code Article 2.3, Confidentiality, requires that the lawyer maintain the obligation of confidentiality. However, as we have seen, different jurisdictions have different norms for what material is and is not confidential. This is not answered by the CCBE Code. Parties would need to articulate and agree on the particular rules that will apply in any given case and have any dispute about which set of norms will govern, determined by the tribunal in advance.

The drafters of the code approached the core issues somewhat tautologically. Consider Clause 2.4: it requires lawyers to inform themselves 'as to the rules which will affect them in the performance of any particular activity'. This does not answer the question as to which ethical codes apply. Clause 4.2 provides: 'to the extent not prohibited by law a lawyer must not divulge or submit to the court any proposals for settlement of the case ...'. Again, what law governs this conduct is precisely the issue.

The inevitable compromises which have to be made in an endeavour such as the code can be seen throughout its text. An attempt is made in Clause 3.3 to tolerate some contingency fee arrangements, 'if this is in accordance with an officially approved fee scale' in the lawyer's jurisdiction and if they are fees charged 'in proportion to the value of the matter handled by a lawyer'. This would shock some continental lawyers, disappoint trial attorneys from Texas but would be consistent with rules which apply to the Paris Bar and lawyers in Portugal.

Article 5.3, dealing with correspondence between lawyers, provides that 'if a lawyer is sending a communication to a lawyer in another Member State and wishes it remain confidential or without prejudice he should clearly express this intention when communicating the document'. In 1988, when the Code was first published, Denmark, Germany, the Netherlands, the United Kingdom and the United

States were all states in which lawyers could not withhold without prejudice correspondence from their clients. Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain *required* lawyers to withhold such correspondence from their clients. Article 5.3 is an attempt at a practical solution.

As can be seen, although heroic in its attempt, the CCBE Code only gets participants so far along the road to defining an ethical framework which will apply in a particular arbitration involving lawyers from different jurisdictions.

#### *IBA Rules of Evidence*

A second set of guidelines which can significantly help in delineating the ethical responsibilities of lawyers in international arbitrations is found in the IBA Rules on the Taking of Evidence in International Commercial Arbitration. This was adopted by the IBA Council on 1 June 1999. The rules are designed 'to supplement the legal provisions and the institutional or ad hoc rules according to which the parties are conducting their arbitration'. It is recognised that if the IBA Rules of Evidence and the general rules 'are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal may conduct the taking of evidence as it deems appropriate ... .' (Article 2(4)).

#### **Production of documents**

The IBA Rules of Evidence set out a procedure for the production of documents. Each party submits documents available to it on which it relies, 'including public documents and those in the public domain'. Then, to obtain further documents, either party can submit a request to produce. A procedure is set out for dealing with objections to documents requested. Procedures are also set out for obtaining documents from third parties. No doubt the vast differences between documentary production in North America and the Continent will be manifest in the approach to the requests to produce by lawyers from those different jurisdictions. Yet the whole process is under the control of the arbitral tribunal so that divergent approaches can be monitored and moderated by the decision makers and not left to be controlled (or not, as is more likely the case) by differing ethical norms.<sup>14</sup>

#### **Witnesses**

The IBA Rules of Evidence also provide rules for dealing with witnesses of fact. The rules specifically address one major ethical difference among legal systems. Article 4(3) provides: 'It shall not be improper for a Party, its officers, employees, legal advisers or other representatives to interview its witnesses or

potential witnesses.' Although it may be hard for lawyers in some jurisdictions to get used to this, at least the rule is clear.

#### **Expert witnesses**

The expert rule, Article 5, provides for an interesting approach. The tribunal may order 'that any party-appointed experts who have submitted expert reports on the same or related issues meet and confer on such issues'. The experts are mandated to 'attempt to reach agreement on those issues as to which they had differences of opinion ... and shall record in writing any such issues on which they reach agreement'. This would be a rare sight indeed on this side of the ocean but is an interesting idea which the North American advocate would be required to accommodate if the IBA Rules were adopted in a case.

#### **Examinations**

Another adjustment needs to be made by lawyers who come from a tradition which allows for virtually unbridled cross-examination.<sup>15</sup> Article 8 on the evidentiary hearing gives to the arbitral tribunal 'at all times' 'complete control' over the evidence. The tribunal can exclude questions or answers which it finds 'irrelevant, immaterial, burdensome, duplicative' or objectionable. Objections are listed in Article 9 (and include the intriguing objection based on 'special political or institutional sensitivity' and the indefinable one based on 'considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling').

#### **Adverse inferences**

The tribunal is entitled to draw an adverse inference if a document is not produced or testimony not made available.

#### **Filling in the gaps**

Because these rules deal with the specifics of developing and putting before the tribunal the evidence in support of a case, they control a significant dimension of activity that has ethical components. Yet there are still gaps when used by lawyers and parties and arbitrators from different countries. It would be possible to address the gaps by picking the ethics code of one particular country and agreeing that it would apply to all participants but this seems to be a poor solution. For one thing, it would give an unfair advantage to the fortunate person from the chosen jurisdiction. But more than that, it would be very difficult for a foreign lawyer to operate effectively, in a nuanced way, in accordance with ethical rules with which he is unfamiliar. It may be more realistic to

suggest that parties agree to adopt the CCBE Code (itself a compromise) and the IBA Rules of Evidence, and resolve specifically to articulate ethical issues which they believe may arise in the context of their particular arbitration. Each side could propose rules to fill any gaps. It is likely to be the case that American attorneys will propose American-type rules; European lawyers will favour their procedures. However, each side would have the opportunity to advocate a particular position rather than have the issues remain unarticulated, which could perhaps lead to ethical conflicts with each side abiding by a different set of principles.<sup>16</sup>

### **Ethics component in continuing legal education**

Although, in theory, it would be ideal to have a code of ethics which applied in international arbitrations and governed all counsel from all jurisdictions, the likelihood of such a code appearing in the near term, at a level of detail that truly makes it functional, is low. Experience in other jurisdictions shows that the development of the detailed rules – a task which itself is major – only provides the starting point. What breathes life (and utility) into such codes is the jurisprudence, built up over decades, that teaches lawyers, in excruciating detail (which is usually the way we need to have things spelled out), how to behave. In international arbitration, there is not a body of jurisprudence, nor is there likely to be, that gives this type of guidance to practitioners. It may be that, over time, the CCBE Code could be expanded and annotated. It is possible that arbitrators could issue advisory opinions so that a body of jurisprudence about ethical issues could develop. Professor Rogers, in her recent article, ‘Context and Institutional Structure in Attorney Regulation,’<sup>17</sup> proposes that arbitral tribunals which determine that a violation of ethical norms incorporated into arbitral rules has occurred should publish the relevant findings in a sanction award that fines the attorney and, if appropriate, refers the matter to the attorney’s local Bar Association. As she points out, unlike substantive arbitration awards which are confidential, sanction awards should be published, as that would ‘aid in the interpretation and refinement of ethical norms’.<sup>18</sup>

It will take time for a body of jurisprudence to develop. In the meantime, counsel will need to be alive to the potential ethical issues that arise in international arbitrations and actively propose rules, in advance, for dealing with problem areas. Forums like this, with ethical components, could prove a helpful supplement to the ongoing academic scholarship in the area. Practitioners could add their two cents’ worth from ‘la vie quotidienne’ before international tribunals and thereby build up an informal library of advice so problem areas could be identified and addressed by others about to start arbitrations. In this way, we could develop, from each other’s experiences, an informal

checklist of ethical areas which prudence dictates be addressed at the outset of a case. A number of such points are noted above from Professor Rogers’ work and can be found in the academic literature. These could be supplemented by specific examples that could be developed into ethics vignettes and included and expanded on in the ethics components of IBA and other international educational gatherings. American continuing legal educational (CLE) programmes are mandated to include an ethics component – international CLE could voluntarily include one and, from the ground up, practitioners could, over time, do what may be impossible for international bodies to do: develop a working code of ethics for practitioners in international arbitrations.

### **Challenges for arbitrators in controlling the ethics of parties before them**

The ethical challenges in international arbitrations arise not only because of diverging ethical norms among practitioners from different jurisdictions. Those differences are magnified in the international arbitration arena because of the challenges facing tribunals in reining in and controlling unethical behaviour. There are three aspects to the issue of arbitrator control of ethics in international arbitration. The first arises because of conflicting ethical and cultural values reflected in the differing approaches to litigation in different jurisdictions. The second is one that is endogenous to all judicial proceedings – controlling abuse. The third aspect arises because arbitrators are in business to do more arbitrations than the one in question. They may, at times, hesitate to come down hard on counsel who may have need of their services in the future. All of these features make the difficult problem of controlling proceedings even more challenging in the case of international arbitrations.

The first challenge, namely identifying what is unethical and distinguishing it from what is just a different ethical norm from the lawyer’s home jurisdiction, is the subject of the first part of this article. Let me address aspects two and three since, in order to find ‘ethical peace’ on the battlefield of international arbitration, tribunals must come to terms with them.

Controlling abuse is becoming a significant challenge in common law courtrooms where lawyers are expected to direct the action and shape the testimony that goes before the trier of fact (judge or jury) so that a determination on the merits can be made. Part of the escalating problem may be the loss of civility perceived to be experienced at the Bar in several jurisdictions.<sup>19</sup> That in turn may arise because of the high stakes involved in litigation. Lawsuits are extremely costly and clients expect a ‘no holds barred’ approach. Whatever the cause, some celebrated cases in Canada have put the issue of control of the trial

under the bright light of judicial scrutiny, with little illumination coming from the appellate judgments on how to achieve civil and well-ordered proceedings in the face of misconduct by lawyers in the courtroom.

Consider the conduct of defence counsel in the *Marchand* case, an infant brain injury case in Ontario that was tried before the superior court for 165 days over a two-year period. The Court of Appeal found:

‘defence counsel accused plaintiffs’ counsel of a “complete lack of integrity”; of cheating and abuses of the *Rules of Civil Procedure*; of using and abusing solicitor-client privilege as a “mask for deception” to “conceal misconduct”, “as a manipulative device”, and as a “shield for deceit”; of “manipulating” the evidence and facts; of deliberately misinforming an expert witness; of “flatly lying” to the court; of “trickery” and “sleight of hand”; of using the *Rules* as an “excuse to permit unchecked, grossly improper manipulation of the whole litigation process”; of “flagrantly subverting” the *Rules*; of “suppressing” facts and information; of “contrivance and manipulation” in the delivery of expert reports; and knowingly attempting to deceive the court. Defence counsel also said of one of the plaintiffs, “she’s a liar”, and taunted her during cross-examination.’

The Court of Appeal held that, ‘in the face of this misconduct, the trial judge chose to remain “relatively passive, indeed, probably too passive” and “largely to ignore [it]”.’ The Court of Appeal also held that, ‘the case tarnished the reputation of the administration of justice.’<sup>20</sup> Yet, even in face of these findings, the very well run judicial system in Ontario was at a loss to do anything about it except comment in the judgment.

A second recent case highlights the same impotence which the judicial system seems to display in the face of disruptive conduct by lawyers at trial. This time the conduct was in connection with a criminal prosecution in the celebrated international fraud surrounding the Bre-X gold mine (or non-gold mine) in Indonesia. Her Majesty the Queen had had enough of defence counsel’s incessant attacks on the prosecutor’s integrity that she was driven to seek removal, in the middle of trial, of the provincial judge hearing the case. The application was unsuccessful but defence counsel (unwilling to leave well enough alone) made the unusual request for costs against the prosecutor. Like *Marchand*, this case (known in Canada as *Felderhof*) lasted for months and displayed behaviour by defence counsel which was described by the reviewing judge, Justice Archie Campbell, as ‘appallingly unrestrained and on occasion unprofessional’. It included relentless attacks on Crown counsel, alleging prosecutorial misconduct, malicious and improper motivations for the prosecution and the withholding of evidence. Much of this abuse was delivered with what the judge described as ‘theatrical excesses’ by defence counsel. Yet the only sanction, if it can be called that, which flowed from the judicial review of this conduct, was a

denial of costs to the defence (costs to the defence being an extremely rare event in cases of this nature). That and published reasons condemning the conduct. But none of that changed the course of the protracted and unpleasant hearing.<sup>21</sup>

You may think such issues will not arise in the civilised precincts of international arbitration. But consider the fact that in *Marchand* and *Felderhof* the counsel in question did not operate at the margins of the profession – to a man they were significant players in their areas of practice with substantial reputations. If they can behave in a way that attracts this kind of judicial comment, then even those who practise in the seemingly more benign arenas of international commercial arbitration can face behaviour which to the attorney dishing it out may seem zealous but to the recipient, abusive.<sup>22</sup> The courts seem strangely powerless to control this growing phenomenon while it is happening. Judges fear the appellate courts; they recognise, at least under the common law system, that clients are entitled to vigorous representation; that cross-examination is not to be interfered with by the judge; and that a great deal of leeway is to be given to counsel. The inability of trial judges to draw the line between appropriate control of improper behaviour and interference (which will result in a rap on the knuckles by the Court of Appeal) has resulted in the current paralysis.

### Advantages of arbitration

International arbitrators are in a much more advantageous position. They rarely have to worry about an appeal (either because there is no right of appeal or, if there is, it is so circumscribed they are pretty much left to themselves on most matters). Very often, the procedures that govern the hearing give more, not less, control to the tribunal. Unlike the common law judge, arbitrators usually do not feel they must sit like sphinxes, letting the tidal wave of evidence wash over them. Indeed, often they feel free to ask the very question counsel carefully avoided putting to the witness, because they feel they wanted to hear more than counsel has chosen to put before them. They can and do cut off examinations and control the time frames in which counsel are permitted to question and argue. This gives them the ability to prevent the kind of abuse we see criticised in *Marchand* and *Felderhof*.

### Judicialisation of arbitration

There is, however, a concerning trend at play in commercial arbitration. Commentators warn of the judicialisation of arbitration.<sup>23</sup> There have always been arbitrators who operate on the common law trial model and who approach the arbitration hearing much like the *Marchand* and *Felderhof* judges – sitting back and hoping for the best but not doing anything to rein

in exuberant counsel when the best is not on offer. But is there a trend towards this judicialised model? Gerald Phillips, an arbitrator and academic, surveyed a group of experienced commercial arbitrators on this question and found that many feared that arbitration is becoming more like litigation (American style), largely owing to the role lawyers play in the process.<sup>24</sup> 'Because arbitration is a consensual process crafted by the parties, generally through their attorneys, they are in the driver's seat when it comes to the process that they get. If they seek continuances, file multiple motions, and seek extensive discovery, then the process will seem like a court proceeding.'<sup>25</sup>

The arbitrator-respondents to the survey pointed out that in large, complex litigation with high stakes, litigators and parties with deep pockets produce a more judicial-like procedure. If the judicial process being modelled is inquisitorial, the prospect of abuse by the lawyers is reduced but, what is more frightening to the North Americans, abuse by the decision maker is enhanced. However, with the increasing presence in international arbitration of common law lawyers, who are used to shaping their cases in what they perceive to be their clients' best interests, procedures which involve extensive discovery, motions and potentially contentious confrontations between lawyers or abusive examinations of witnesses at the hearing may be on the rise. In the absence of shared values and common ethical norms, there will be a need for decisive action by arbitral tribunals.<sup>26</sup>

In the Phillips survey, some respondents acknowledged that arbitrators will at times allow counsel to abuse the process. Those respondents urge more proactive and firm management of the process by the tribunal and recommend that arbitrators be strong, assertive and push for speed and efficiency. As with ethical norms, what may be one person's model of strength and assertion may be another's denial of justice. It is necessary for arbitrators and parties alike to sort out the extent to which the arbitrator will 'interfere' with counsel's plan for the case. This can be done subliminally by the setting of deadlines, the predetermination of page limits for pre-filed outlines, the imposition of time limits on discovery, witness examinations and argument and other management techniques commonly employed. These constraints need to be enforced in order to achieve the desired results.

It is here that the third element looms large. We have all experienced the frustrating situation of playing by the rules while our opponent appears to get away with murder. In the arbitration arena one cannot help but suspect that the cause is, as they say in baseball trades, 'future consideration'. Is the rogue not being controlled effectively because his firm is perceived to be a source of significant future business? Sometimes one feels that way, although it is clear that good arbitrators realise that if they have the reputation of

being fair-minded and yet able to deliver an efficient product (ie a well-run hearing where the 'unethical' counsel is kept under control), they will gain far more business than they will be alienating with the occasional 'iron hand'. Most skilled arbitrators seem to have an ample supply of 'velvet gloves' and they deftly navigate the tricky waters of conflicting interests (current hearing versus future prospects) without incident. Yet the lack of clearly defined ethical standards makes this balancing act more difficult than it needs to be. In an ideal world one would have an international arbitration bar with shared values and clearly delineated ethical norms. At the moment, the international arbitration bar is a glaring misnomer as the practitioners in the field are a random collection of lawyers from around the world with no central organising authority. This makes the role of international arbitrators all the more important. The challenge for them is to do what it seems well schooled judges in respected judicial systems still struggle with – impose from the arbitrator's 'bench' sufficient control over the ethical conduct of counsel appearing, that the ultimate product provides the party with the right combination of control and opportunity to plead. When done well, the result will be that even the losing party will leave the arena with the sense that his story was told and the process was fair.

#### Notes

- \* The author is grateful for the research assistance provided by Julia Cornett and Danielle Townley, students-at-law in Torys' Toronto office, and for input from Patrick Flaherty of Torys and David Roney of Schellenberg Wittmer, Geneva.
- 1 Catherine A Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2002) 23 Mich J Int'l L 341 at 342. Much of the discussion in the first part of this article derives from Professor Rogers' comprehensive work in the area. See also by the same author, 'Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration' (2003) 39 Stan J Int'l L 1 (hereinafter referred to as 'Context and Institutional Structure').
- 2 *Supra*, n 1.
- 3 The intricacies of this are covered in a thoughtful article by Robert E Lutz, 'Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners' (1992) 16 Fordham Int'l LJ 53.
- 4 T S Collett, 'Ethics in the Multijurisdictional Practice of Law: Foreword' (1995) 36 S Tex L Rev 657 at 659.
- 5 Charles W Wolfram, 'Expanding State Jurisdiction to Regulate out-of-state Lawyers' (2002) 30 *Hofstra Law Review*; Peter R Jarvis, 'Where you Stand Depends on Where you Sit: One Litigator's View of Multijurisdictional Practice Issues and Related Policy Questions' (Center for Professional Responsibility, ABA 2000); William L Reynolds and William M Richman, 'Multi-Jurisdiction Practice and the Conflicts of Law' (Center for Professional Responsibility, ABA 2000); Robert A Creamer, 'Private Practitioner Issues With Multijurisdictional Law Practice in Litigation Matters' (Center for Professional Responsibility, ABA Symposium on the Multijurisdictional Practice of Law, 2000); Joseph R Lundy, 'Private Practitioner Problems With Multijurisdictional Law Practice in Transactional and Other Non-Litigation Matters' (Center for Professional Responsibility, ABA); Anthony E Davis, 'Multijurisdictional Practice by Transactional Lawyers – Why the Sky Really is Falling' (Center for Professional Responsibility, ABA); Stephen Gillers, 'Lessons From the Multijurisdictional Practice Commission: The Art of Making Change' (2002) 44 Ariz L Rev 685; William T Barker, 'Extra-jurisdictional Practice by Lawyers' (2001) 56 Bus Law 1501.

- 6 1999, 'Introduction to the Paris Forum on Transnational Practice for the Legal Profession' 18 *Dickinson Journal of International Law*, see also L. Terry, 'GATS' applicability to Transnational Lawyering and its Potential Impact on US State Regulation of Lawyers' (2001) 34 *Vanderbilt J of Transnational Law* 989. Jay L. Krystinik, 'The Complex Web of Conflicting Disciplinary Standards in International Litigation' (2003) 38 *Tex Int'l LJ* 815 at 831, commented: '[t]he Paris Forum, while noble in concept, does little to answer the questions at hand. ... Answers are indefinite at best, often contradictory, and sometimes simply non-existent. Given the ever-changing nature of international legal practice, a lawyer should be careful to obtain the most recent information regarding disciplinary and ethical rules in international litigation. Without scrupulous attention to the intricacies inherent in international practice, the unwary attorney may find himself trapped in a web of conflicting disciplinary and ethical principles.'
- 7 Rogers, *supra* n 1 at 361.
- 8 *Ibid*.
- 9 Labour panels come to mind where management and union each appoint one member; the members then choose a neutral chair.
- 10 Except France; see Rogers, *supra* n 1 at 371.
- 11 For all these examples, see Professor Rogers' article, *supra* n 1 and her extensive citations.
- 12 'Context and Institutional Structure and Attorney Regulation', *supra* n 1 at 5.
- 13 (1992) 15 *Fordham Int'l LJ* 673.
- 14 David Roney points out that North American counsel encounter difficulty in explaining the far-reaching disclosure obligations in North American litigation to Continental European or Asian clients who are not familiar with this type of procedure and may have difficulty accepting it or complying with it. Conversely, it is sometimes difficult for Continental European lawyers to explain to North American and English clients that they simply cannot get disclosure of many documents from the opposite party.
- 15 Adjustment may also be needed in the area of 'impassioned addresses'. Even in 1915 in Canada (not known for its high-flying advocacy), an Ontario judge declared: 'counsel has the right to make an impassioned address on behalf of his client – nay, in no few cases it may be a duty to make an impassioned address – mere earnestness, fervour and even passion, is not in itself objectionable – so long as counsel does not transgress the decorum which should be observed in His Majesty's Court ... – Courts do and must give considerable latitude even to extravagant declamation': Riddell J in *Dale v Toronto Railway Co* (1915) 34 *OLR* 104 at 108. This was long before *LA Law* and *Law & Order* which have only encouraged more flourish among advocates.
- 16 See, for example, the piece by Laurence Newman, a New York practitioner who suggests in an article in the *New York Law Journal*, 31 July 2000, that the environment in international arbitration is 'less vigorous' and, as a result lawyers will sometimes sit silently while their witness testifies falsely. He suggests they have failed in their ethical obligations. The solution, he says, is to count on the arbitrators to draw adverse inferences concerning the credibility of the case and the witness. Another approach could be to raise the issue of the obligation of counsel to deal with evidence which counsel may believe is untruthful. Different approaches can be taken but, if raised before witnesses are called, at least all participants would know what the obligations of counsel were should such a situation arise.
- 17 See *supra* n 1.
- 18 *Ibid* at 35, 36.
- 19 Nagorney, 'A Nobel Profession? A Discussion of Civility Among Lawyers' (1999) 12 *Geo J Leg Ethics* 815 at 815, 819-820; Cooper, 'President's Message: Courtesy Call: It is Time to Reverse the Decline of Civility in Our Justice System' (March 1997) 83 *ABA J* 8; Demarest, 'Civility in the Courtroom: From a Judge's Perspective' (June 1997) 69 *NYSB J* 24; 'Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit' (Hon Marvin E Aspen, US District Judge, Northern District of Illinois, Chairman) (June 1992); Advocates' Society, 'Civility in the Legal Profession: A Policy Forum' (31 October 2000); Slaght, 'Whatever Happened to Civility?' (July/August 2000) 11:10 *The Advocates' Brief* 1 at 1-2; Honsberger, 'Civility Within the Profession' (1991) 25 *LSUC Gaz* 176 at 179-180; MacKenzie, 'Lawyers and Ethics: Professional Responsibility and Discipline' (loose-leaf updated to 2000) at §§ 4.7 and 8.
- 20 *Marchand v Public General Hospital of Chatham* (2000) 51 *OR* 3d 97 (SCC) leave to appeal to SCC
- 21 *The Queen v Felderhof*, unreported, Ontario Superior Court of Justice, 13 February 2003 on costs. The matter is currently working its way through the appeal courts. Attachment 2 contains excerpts from the application, [2002] OJ No 4103 referencing the impugned conduct during the hearing.
- 22 It is naive to think international arbitration is 'safe' from abuse. For example, it is important in international tribunals to be attuned to the risk of corruption. Indeed, one continental practitioner advised that some parties will fabricate a dispute so as to use international arbitration tribunals to obtain consent awards to provide a cover for bribes. Can theatrics in the hearing room be far behind?
- 23 See Gerald F Phillips, 'Is Creeping Legalism Infecting Arbitration?' *Dispute Resolution Journal*, February/April 2003, 37.
- 24 This provides support to one of Professor Rogers' theories that the prevailing ethical norms are a function of the role a lawyer plays in the particular legal system.
- 25 Phillips, n 20 at 38.
- 26 Professor Rogers observed that the world of international arbitration used to be an old boys' club (my words, not hers) where people behaved in accordance with accepted norms. It is because that is no longer the case, with the expansion of the field, that the need for more formal mechanisms arises.