

**American Bar Association
Forum on the Construction Industry**

**A DARK AND STORMY NIGHT:
THE LAWYER'S ETHICAL CONSIDERATIONS WHEN INVOLVED IN A
MULTI-JURISDICTIONAL, INTERNATIONAL PRACTICE**

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I. INTRODUCTION

Thanks to ubiquitous state CLE requirements, meetings of the ABA Forum on the Construction Industry regularly feature a segment on ethical issues confronted by construction lawyers. Many of the resulting papers have resurfaced as articles in the *Construction Lawyer*, so there is a wealth of excellent material available analyzing the ethical issues that arise at various points in the domestic practice of most construction lawyers.¹ But what are the rules when practicing internationally? The short answer is that all the same issues arise in international construction legal work, with two important caveats: first, there is an added layer of complexity due to the variety of potentially-applicable ethical codes, some of which differ from the ABA Model Rules of Professional Conduct in significant ways; second, there are additional legal and cultural issues with ethical implications not present in domestic work (*e.g.*, compliance with the Foreign Corrupt Practices Act).

The purpose of this paper is not to attempt an exhaustive analysis of ethical issues typically faced by construction lawyers practicing across borders. Such an analysis is daunting even in a domestic American context, where there is at least a degree of uniformity across jurisdictions that have adopted the ABA Model Rules; it is impossible in an international context involving literally hundreds of potentially-applicable local, state, federal, and regional norms.

¹ See, *e.g.*, Paul M. Lurie & Carl F. Ingwolson, *Arbitration and the Unauthorized Practice of Law*, 27 CONSTRUCTION LAWYER 14 (2007); Michael H. Rubin, *The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties*, 26 CONSTRUCTION LAWYER 12 (2006); Bruce C. King & Carol J. Patterson, *Representation of Multiple Parties in the Construction Arena: Ethical Issues*, 25 CONSTRUCTION LAWYER 5 (2005); James M. Bowie, *Ethical Issues in Construction Mediation: Are There Any Rules?*, 24 CONSTRUCTION LAWYER 33 (2004); Louis R. Pepe, *Compensating the Former Employee to Prepare and Prove Construction Claims*, 24 CONSTRUCTION LAWYER 19 (2004); Bryan A. Thames, *Inadvertent or Unauthorized Disclosure of Privileged or Confidential Documents: What Do You Do and What Is the Effect?*, 23 CONSTRUCTION LAWYER 38 (2003); Robert O. Dyer, *Ethical Considerations to Multiple Representation in Construction and Surety Bond Litigation*, 17 CONSTRUCTION LAWYER 14 (1997); Gerald B. Kirksey & Judith L. Maute, *MoneyMoneyMoney: Legal and Ethical Dilemmas in the Construction Payment Process*, 16 CONSTRUCTION LAWYER 3 (1996); Linda R. Beck, *Ethical Issues in Joint Representation Under Subcontract Requirements for Defense and Additional Insured Status*, 15 CONSTRUCTION LAWYER 25 (1995).

Instead, this paper provides a roadmap to (part of) the ethical landscape and considers how construction-specific issues might be viewed under different ethical regimes.

Before surveying the landscape, however, it is important to ask a threshold question, namely, whether a given activity amounts to the practice of law in the first place, such that the ethical norms of a jurisdiction other than the lawyer's home jurisdiction are triggered. Suffice it to say that the rules are not uniform, nor is it clear whether the rules on the books are the rules observed in practice. There is a range of activities that could reasonably be viewed as the practice of law, including contract drafting and negotiating, regulatory advice, claims consulting, and representation of clients in dispute resolution proceedings. At the risk of stating the obvious, practicing law abroad is more heavily regulated than being a tourist. Tourists need only a passport and (maybe) a visa and immunizations. Lawyers practicing abroad, on the other hand, must comply with the regulations applicable to tourists and more. This raises the question, "How do I know if I'm a tourist or lawyer or both?" Even in a purely domestic context with highly-developed norms of professional ethics, it is not always clear what amounts to the practice of law triggering the "host" jurisdiction's ethical norms and potential sanctions for their violation.²

A few rules of thumb are possible, however. First, as in domestic practice, the rules regarding what amounts to the practice of law tend to be clearer on the dispute-resolution side of the practice than on the transactional side. This is not surprising, because people routinely negotiate contracts on their own behalf, without the intervention of lawyers or other professionals. When a dispute arises that the parties cannot settle themselves, the machinery of the state becomes involved, either (directly) in the form of a state court or (indirectly) in the form

² See, e.g., Paul M. Lurie & Carl F. Ingwalson, *Arbitration and the Unauthorized Practice of Law*, 27 CONSTRUCTION LAWYER 14 (2007).

arbitration proceedings recognized by state law. It is doubtless this state interest in the fair resolution of disputes that helps account for the greater degree of regulation (including a greater degree of clarity regarding what amounts to the practice of law) in the context of dispute resolution than one finds in the context of transactional work, where states (at least in the West) generally allow parties to conduct their business affairs however seems best to them, subject to certain public policy restrictions, such as laws respecting competition and bribery.

Second, it is prudent to review both (a) the ethical rules of the lawyer's "home" jurisdiction and (b) those potentially applicable to lawyers practicing in the jurisdiction(s) in which the (arguably legal) services are to be rendered. Under the ABA Model Rules, it is clear that regard must be paid both to the ethical rules of the lawyer's "home" jurisdiction and those of the place where the lawyer is (or is deemed to be) working:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.³

Other ethical codes contain similar provisions, including the International Bar Association's International Code of Ethics⁴ and the Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe.⁵ Likewise, although only Chinese lawyers may practice law in China, foreign lawyers "conducting legal service activities" in China are subject to the same

³ MODEL RULES OF PROF'L CONDUCT R. 8.5 (2003) (hereinafter "ABA Model Rules").

⁴ See INTERNATIONAL BAR ASSOCIATION INTERNATIONAL CODE OF ETHICS R. 1 (1988) (hereinafter "IBA Code") ("A lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working.").

⁵ See Council of Bars and Law Societies of Europe, CODE OF CONDUCT FOR EUROPEAN LAWYERS Article 2.4 (hereinafter "CCEL") ("Respect for the Rules of Other Bars and Law Societies") (requiring lawyers in Member States to comply with the rules of Host Member States).

ethical obligations as Chinese lawyers and, “shall not endanger the State security, social and public interests in China.”⁶ The ABA Model Rules provide some guidance as to what law an American lawyer’s “home” jurisdiction will apply:

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.⁷

As Comment 7 to ABA Model Rule 8.5 makes clear, these choice of law rules apply to international work as well:

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.⁸

The net effect is that an American lawyer engaged in an international matter must, by definition, have regard to the ethical rules of the lawyer’s “home” jurisdiction and at least one “host” jurisdiction (more, if there is some doubt regarding where the lawyer’s “conduct” occurs or its “predominate effect” is felt). Just as no one would think of appearing in court (whether or not in a jurisdiction in which one is licensed) without reviewing the local rules, therefore, so one should

⁶ See Article 3, Regulations on Administration of Foreign Law Firms’ Representative Offices in China (promulgated by the Decree No. 338 of the State Council of the People’s Republic of China December 22, 2001, effective Jan. 1, 2002).

⁷ ABA Model Rules 8.5(b).

⁸ ABA Model Rule 8.5 cmt.

not plan to work on a multi-jurisdictional matter without considering what ethical rules might apply and seeing what they have to say.

Third, it will often be the case that local counsel is already engaged to assist with certain matters, whether on a transaction or dispute resolution matter. The prudent course is to seek their opinion regarding where the potential ethical landmines might be and how they might be avoided.

Important as the question of what triggers the ethical rules of a “host” jurisdiction undoubtedly is, this paper assumes that the activities are, indeed, subject to regulation under the various ethical regimes examined; otherwise, there would be nothing to say to the individual moving from one country to the next, except to make sure that you have your passport, visa, and inoculations. Part II of this paper focuses upon the broad categories of ethical principles, as reflected in four sources: the ABA Model Rules, the IBA Code,⁹ the CCEL,¹⁰ and China’s Law on Lawyers.¹¹ In addition, where relevant principles of Islamic law are known to exist, reference to those principles will be made. Part III of this paper considers typical ethical issues that arise in international construction transactions, while Part IV examines the ethical concerns that arise in resolution of disputes on international construction projects.

⁹ The IBA Code is currently under review. A draft of the revised Code is expected to be available at the IBA Annual Conference in Singapore in October 2007, and the final version is expected to be adopted at the IBA Council’s Amsterdam meeting in May 2008.

¹⁰ The CCEL supplements the ethical obligations imposed upon lawyers by their “home” jurisdictions.

¹¹ Law of the People’s Republic of China on Lawyers (promulgated by Order No. 67 of the President of the People’s Republic of China on May 15, 1996, and amended according to the Decision on Amending the Law of the People’s Republic of China on Lawyers on December 29, 2001) (hereinafter “Law on Lawyers”). The Standing Committee of the National People’s Congress began consideration of amendments to the Law on Lawyers, including amendments to the ethical rules, on June 24, 2007.

II. CATEGORIES OF OBLIGATION

As a general frame of reference for describing the areas of agreement among the ethical regimes considered in this paper, it will be convenient to refer to the “Charter of Core Principles of the European Legal Profession,” adopted in November 2006 by the Council of Bars and Law Societies of Europe:

The core principles are, in particular:

- (a) the independence of the lawyer, and the freedom of the lawyer to pursue the client’s case;
- (b) the right and duty of the lawyer to keep clients’ matters confidential and to respect professional secrecy;
- (c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;
- (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;
- (e) loyalty to the client;
- (f) fair treatment of clients in relation to fees;
- (g) the lawyer’s professional competence;
- (h) respect towards professional colleagues;
- (i) respect for the rule of law and the fair administration of justice; and
- (j) the self-regulation of the legal profession.¹²

¹² Council of Bars and Law Societies of Europe, CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION (2006). In September 2006, the IBA adopted a similar list of generally-recognized categories of obligation which, “aim at establishing a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world.” International Bar Association, GENERAL PRINCIPLES FOR THE LEGAL PROFESSION (2006). The IBA “General Principles” address (1) independence; (2) honesty, integrity, and fairness; (3) conflicts of interest; (4) confidentiality; (5) clients’ interest; (6) the lawyer’s undertaking; (7) clients’ freedom; (8) property of clients and third parties; (9) competence; and (10) fees.

A. Independence

One generally-accepted category of obligation is that the lawyer is to act independently.

Under Rule 2.1 of the ABA Model Rules,

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.¹³

Only in exceptional situations—for example, where the client has diminished capacity—do the Model Rules arguably qualify the lawyer's duty of independence.¹⁴

Rule 3 of the IBA Code, too, recognizes a general duty to act independently:

Lawyers shall preserve independence in the discharge of their professional duty. Lawyers practising on their own account or in partnership where permissible, shall not engage in any other business or occupation if by doing so they may cease to be independent.¹⁵

Like the ABA Model Rules and the IBA Code, the CCEL recognizes a general duty of independence:

2.1 Independence

2.1.1 The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties.

2.1.2 This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to

¹³ ABA Model Rule 2.1.

¹⁴ See ABA Model Rule 1.14 ("Client With Diminished Capacity") (permitting a lawyer to consult with individuals with "the ability to take action to protect" a client with diminished capacity).

¹⁵ IBA Code Rule 3. See also International Bar Association, STANDARDS FOR THE INDEPENDENCE OF THE LEGAL PROFESSION (1990).

serve his or her personal interests or in response to outside pressure.¹⁶

Depending upon the jurisdiction, the duty of independence may exclude certain possible activities, including fee splitting with non-lawyers,¹⁷ multidisciplinary practice with non-lawyers,¹⁸ restrictions on the lawyer's ability to practice,¹⁹ or other, "incompatible" occupations (*e.g.*, "commercial activities").²⁰

Perhaps not surprisingly, given the Chinese "Law on Lawyers" explicit imposition upon lawyers of a general duty to maintain state secrets,²¹ China eschews recognition of a general duty of independence in favor of recognition of a lawyer's duty to act independently in specific situations.²² Like the American and European codes, the Chinese Law on Lawyers restricts lawyers from engaging in certain types of professional activities (*e.g.*, restrictions on the ability of former prosecutors and judges to act as defense counsel in criminal matters).²³ It is unclear, however, whether such restrictions flow from recognition of a duty of independence or, rather,

¹⁶ CCEL Article 2.1.

¹⁷ *See, e.g.*, ABA Model Rule 5.4 ("Professional Independence Of A Lawyer") (prohibiting, *inter alia*, fee splitting and multidisciplinary practice with a non-lawyer).

¹⁸ *Id.*

¹⁹ *See, e.g.*, ABA Model Rule 5.6 ("Restrictions On Right To Practice") (prohibiting restrictions on a lawyer's right to practice, "except an agreement concerning benefits upon retirement.")

²⁰ *See, e.g.*, CCEL Article 2.5 ("Incompatible Occupations"). The "Explanatory Memorandum" to the CCEL notes the diversity of local rules prohibiting lawyers from engaging in other types of professional activity but observes that, "[t]he general purpose of rules excluding a lawyer from other occupations is to protect the lawyer from influences which might impair the lawyer's independence or his or her role in the administration of justice." *See* CCEL, "Explanatory Memorandum, Commentary on Article 2.5—Incompatible Occupations."

²¹ Law on Lawyers, Article 33.

²² *See, e.g.*, Law on Lawyers, Article 28 (obligating a lawyer representing a criminal defendant, *inter alia*, to present arguments to prove the innocence of his client); Article 30 (providing that a lawyer's right to present a defense shall be protected, "in accordance with law"); Article 32 (stating that, "[i]n practice activities, a lawyer's right of the person shall not be violated."). Note that there has been substantial criticism of the degree to which lawyer independence is recognized in practice in China. *See, e.g.*, Al Young, *The Continuing Lack of Independence of Chinese Lawyers*, 18 GEO. L. LEGAL ETHICS 1133 (2005).

²³ *See* Law on Lawyers, Article 36.

from a desire to deprive criminal defendants of lawyers with recent experience as prosecutors and judges.

B. Confidentiality

Closely related to the duty of independence is the duty to keep communications with a client confidential. Thus, under Rule 1.6 of the ABA Model Rules, the duty is general, subject only to specified exceptions:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.²⁴

²⁴ ABA Model Rule 1.6.

Similarly, the Rule 14 of the IBA Code provides that,

Lawyers should never disclose, unless lawfully ordered to do so by the Court or as required by Statute, what has been communicated to them in their capacity as lawyers even after they have ceased to be the client's counsel. This duty extends to their partners, to junior lawyers assisting them and to their employees.²⁵

Unlike the Rule 1.6(b) of the Model Rules, the IBA Code does not specify exceptions to the duty of confidentiality. Nonetheless, the general exception to the rule against non-disclosure where ordered by the Court or required by statute reflects a recognition that the duty of confidentiality is not absolute. Also unlike the ABA Model Rules, Rule 5 of the IBA Code also treats communications between lawyers as confidential, subject to certain exceptions:

Except where the law or custom of the country concerned otherwise requires, any oral or written communication between lawyers shall in principle be accorded a confidential character as far as the Court is concerned, unless certain promises or acknowledgements are made therein on behalf of a client.²⁶

The CCEL also recognizes a general duty of confidentiality:

2.3. Confidentiality

2.3.1. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

²⁵ IBA Code Rule 14.

²⁶ IBA Code Rule 5.

- 2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.
- 2.3.3. The obligation of confidentiality is not limited in time.
- 2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

Again, Article 2.3 of the CCEL does not list exceptions to the rule of confidentiality, presumably leaving the exact parameters of the duty to be determined locally, as suggested by Article 2.3.1's characterization of the duty as one "entitled to special protection by the State."²⁷

Whereas the Rule 5 of the IBA Code effectively presumes that lawyer-to-lawyer communications will be treated as confidential (at least "as far as the Court is concerned"), Article 5.3 of the CCEL appears to reverse the presumption:

5.3. Correspondence between Lawyers

- 5.3.1. If a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice he or she should clearly express this intention prior to communicating the documents.
- 5.3.2. If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he or she should inform the sender accordingly without delay.²⁸

Article 33 of the Chinese Law on Lawyers recognizes a general duty of confidentiality, but with a twist: a lawyer is charged with keeping confidential not only the client's "private affairs" but those of the other parties and those of the State:

²⁷ See also CCEL Article 1.3.2, which expresses, "the wish that the national rules of deontology or professional practice be interpreted and applied whenever possible in a way consistent with the rules in this Code."

²⁸ CCEL Article 5.3.

A lawyer shall keep confidential secrets of the State and commercial secrets of the parties concerned that he comes to know during his practice activities and shall not divulge the private affairs of the parties concerned.²⁹

Finally, although not codified in a set of ethical rules applicable to lawyers specifically, Islamic jurisprudence recognizes a general obligation to keep confidences:

You who believe, do not betray God and the Messenger, nor knowingly betray your own trusts. . . . And those who preserve their trusts and their pledge, and who attend their prayers, will be the heirs who shall inherit Paradise to live there forever.³⁰

C. Conflicts of Interest

Real and potential conflicts of interest are a pervasive aspect of the practice of law, so it is unsurprising that rules governing conflicts feature prominently in most ethics codes. The ABA Model Rules are rather elaborate, containing rules applicable to current clients,³¹ former clients,³² potential clients,³³ imputation of one lawyer's conflicts to another,³⁴ and conflicts unique to representation of organizations.³⁵ Rule 13 of the IBA Code, in marked contrast, contains only a brief statement of the basic principles:

Lawyers should never represent conflicting interests in litigation. In non-litigation matters, lawyers should do so only after having disclosed all

²⁹ Law on Lawyers, Article 33.

³⁰ Quoted in M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT'L L.J. 289, 312-313 (2000) (footnote omitted).

³¹ See ABA Model Rule 1.7 ("Conflict Of Interest: Current Clients"); ABA Model Rule 1.8 ("Conflict Of Interest: Current Clients: Specific Rules"); see also ABA Model Rule 2.3 ("Evaluation For Use By Third Persons") (permitting lawyer to "provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.").

³² See ABA Model Rule 1.9 ("Duties To Former Clients"); ABA Model Rule 1.11 ("Special Conflicts Of Interest For Former And Current Government Officers And Employees"); ABA Model Rule 1.12 ("Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral").

³³ See ABA Model Rule 1.18 ("Duties To Prospective Client").

³⁴ See ABA Model Rule 1.10 ("Imputation Of Conflicts Of Interest: General Rule").

³⁵ See ABA Model Rule 1.13 ("Organization As Client").

conflicts or possible conflicts of interest to all parties concerned and only with their consent. This Rule also applies to all lawyers in a firm.³⁶

Much more like the IBA Code than the ABA Model Rules, the CCEL addresses conflicts very succinctly:

3.2 Conflict of Interest

- 3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.
- 3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.
- 3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.
- 3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.³⁷

Article 34 of the Chinese Law on Lawyers is even more basic in its rule regarding conflicts of interest: "A lawyer shall not represent both parties involved in the same case."³⁸

D. *Dignity of the Profession*

Directly or indirectly, all of the ethical rules considered in this paper serve to enhance the dignity of the legal profession. The ABA Model Rules, for example, contain very specific provisions relating to lawyers' conduct toward third persons and lawyers' solicitation of

³⁶ IBA Code Rule 13.

³⁷ CCEL Article 3.2.

³⁸ Law on Lawyers, Article 34.

business. In the former category are rules regarding truthfulness of communications,³⁹ contact with individuals represented by counsel,⁴⁰ contact with individuals not represented by counsel,⁴¹ and a general obligation to respect the rights of third parties.⁴² In the latter category are rules regarding lawyer truthfulness in statements concerning the lawyer's services,⁴³ advertising by lawyers,⁴⁴ contact with prospective clients,⁴⁵ communicating areas of specialization,⁴⁶ use of letterhead,⁴⁷ and political contributions made to obtain legal work.⁴⁸ The Model Rules also prohibit lawyers from casting unwarranted aspersions on the characters of judges and judicial candidates.⁴⁹

The IBA Code likewise regulates lawyers' conduct toward third parties⁵⁰ and lawyers' solicitation of business.⁵¹ In addition, however, Rule 2 of the IBA Code makes explicit the duty to uphold the dignity of the legal profession:

³⁹ See ABA Model Rule 4.1 ("Truthfulness In Statements To Others").

⁴⁰ See ABA Model Rule 4.2 ("Communication With Person Represented By Counsel").

⁴¹ See ABA Model Rule 4.3 ("Dealing With Unrepresented Person").

⁴² See ABA Model Rule 4.4 ("Respect For Rights Of Third Persons"); see also ABA Model Rule 2.4 ("Lawyer Serving As Third-Party Neutral").

⁴³ See ABA Model Rule 7.1 ("Communications Concerning A Lawyer's Services").

⁴⁴ See ABA Model Rule 7.2 ("Advertising").

⁴⁵ See ABA Model Rule 7.3 ("Direct Contact With Prospective Clients").

⁴⁶ See ABA Model Rule 7.4 ("Communication of Fields of Practice and Specialization").

⁴⁷ See ABA Model Rule 7.5 ("Firm Names And Letterheads").

⁴⁸ See ABA Model Rule 7.6 ("Political Contributions To Obtain Legal Engagements Or Appointments By Judges").

⁴⁹ See ABA Model Rule 8.2 ("Judicial And Legal Officials").

⁵⁰ IBA Code Rule 7, "It shall be considered improper for lawyers to communicate about a particular case directly with any person whom they know to be represented in that case by another lawyer without the latter's consent."

⁵¹ IBA Code Rule 8, "A lawyer should not advertise or solicit business except to the extent and in the manner permitted by the rules of the jurisdiction to which that lawyer is subject. A lawyer should not advertise or solicit business in any country in which such advertising or soliciting is prohibited." IBA Code Rule 9, "A lawyer should never consent to handle a case unless: (a) the client gives direct instructions, or, (b) the case is assigned by a

Lawyers shall at all times maintain the honour and dignity of their profession. They shall, in practice as well as in private life, abstain from any behaviour which may tend to discredit the profession of which they are members.⁵²

Similarly, the CCEL addresses lawyers' relations with parties represented by counsel⁵³ and solicitation of business;⁵⁴ like the IBA Code, Article 2.2 of the CCEL minces no words when describing the lawyer's obligation to uphold the dignity of the profession:

2.2 Trust and Personal Integrity

Relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.⁵⁵

The obligations regarding a lawyer's duty to uphold the dignity of the profession contained in China's Law on Lawyers are comparatively limited in scope:

Article 24 Law firms and lawyers shall not solicit business by unfair means such as slandering other lawyers or paying middleman's fees.⁵⁶

competent body or forwarded by another lawyer, or (c) instructions are given in any other manner permissible under the relevant local rules or regulations." *See also* International Bar Association, RESOLUTION ON PROFESSIONALISM VERSUS COMMERCIALISM (2000).

⁵² IBA Code Rule 2.

⁵³ *See* CCEL Article 5.5. Communication with Opposing Parties:

A lawyer shall not communicate about a particular case or matter directly with any person whom he or she knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

⁵⁴ *See* CCEL Article 2.6 Personal Publicity:

2.6.1. A lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.

2.6.2. Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.

⁵⁵ CCEL Article 2.2.

⁵⁶ Law on Lawyers, Article 24.

E. *Loyalty to the Client*

Like a lawyer's duty to uphold the dignity of the profession, a lawyer's duty of loyalty to the client is reflected in a number of specific obligations. Of particular interest are the lawyer's duties to obey the client's instructions and to safeguard the client's property. Thus, Rule 1.2 of the ABA Model Rules obligates a lawyer to abide by the client's informed decision "concerning the objectives of representation," subject to certain limited exceptions.⁵⁷ Likewise, ABA Model Rule 1.15 reflects a lawyer's fiduciary obligations with respect to the client's property, requiring, *inter alia*, the lawyer to segregate client funds from the lawyer's own funds and to be prepared to render an account of the lawyer's handling of client funds.⁵⁸ Like many of the lawyer's other obligations, however, the duty of loyalty to the client is not absolute. Under certain circumstances, such as where the representation will result in a violation of law, the lawyer may refuse to represent a prospective client or stop representing a current client.⁵⁹

The IBA Code and the CCEL contain similar rules regarding qualified loyalty to the client's interests⁶⁰ and safeguarding a client's property.⁶¹ Interestingly, while the CCEL requires lawyers to carry professional liability insurance (or disclose to their clients that they have no such coverage),⁶² it also permits lawyers to limit their potential liability to their clients.⁶³

⁵⁷ ABA Model Rule 1.2.

⁵⁸ ABA Model Rule 1.15.

⁵⁹ See ABA Model Rule 1.16 ("Declining Or Terminating Representation").

⁶⁰ See IBA Code Rule 10; CCEL Article 2.7 ("The Client's Interest").

⁶¹ See IBA Code Rule 15; CCEL Article 3.8 ("Client Funds").

⁶² See CCEL Article 3.9 ("Professional Indemnity Insurance").

⁶³ CCEL Article 2.8 ("Limitation of Lawyer's Liability towards the Client"); see also IBA Code Rule 21.

Article 27 of China's Law on Lawyers also obligates a lawyer to protect the client's interests,⁶⁴ while Article 29 permits a lawyer to refuse or terminate the engagement if the matter "violates law" or client seeks to use the lawyer's services to "engage in illegal activities."⁶⁵ Interestingly, Article 29 also permits a lawyer to decline representation where (as must often be the case), "the client conceals facts."

Finally, it has been noted with respect to Islamic law that,

[i]n contrast to the American system, the shari'a calls on individuals to promote what is just, good, and right for the community, not only for the client:

"Give full measure and do not cause [people] any losses. Weigh with honest scales; do not undersell people to cheat them of their things nor storm around the earth in order to spoil matters."⁶⁶

F. Fees

The basic principles of the ABA Model Rules regarding lawyers' fees are stated in Rule 1.5, which requires, *inter alia*, fees and expenses to be reasonable (based on certain enumerated factors).⁶⁷ Rule 1.5 also allows lawyers to charge fees that are contingent upon the outcome of the matter, a practice that has become increasingly common in commercial disputes:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) [relating to domestic relations and criminal matters] or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether

⁶⁴ Law on Lawyers, Article 27.

⁶⁵ Law on Lawyers, Article 29.

⁶⁶ McCary, *Bridging Ethical Borders* at 308 (footnote omitted).

⁶⁷ ABA Model Rule 1.5; *see also* ABA Model Rule 1.17 ("Sale Of Law Practice").

or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.⁶⁸

The IBA Code's most important fee provisions are contained in Rules 16-18. Rules 16 and 17, governing advances on fees and setting of the fee are generally consistent with the ABA Model Rules.⁶⁹ Rule 18 permits contingent fees, but makes explicit what is only implicit in ABA Model Rule 1.5(c), regarding court supervision of the reasonableness of any contingent fee:

A contract for a contingent fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case, including the risk and uncertainty or the compensation and subject to supervision of a court as to its reasonableness.⁷⁰

The CCEL contains provisions regarding regulation of fees,⁷¹ advance payment,⁷² and fee-sharing⁷³ that are generally consistent with the ABA Model Rules and the IBA Code. However, with respect to charging of contingency fees the contrast between the American and European ethical codes is striking. Contingency fees are generally prohibited under the CCEL:

3.3 Pactum de Quota Litis

3.3.1. A lawyer shall not be entitled to make a pactum de quota litis.

⁶⁸ ABA Model Rule 1.5.

⁶⁹ IBA Code Rules 16-18; *see also* IBA Code Rule 19: "Lawyers who engage a foreign colleague to advise on a case or to cooperate in handling it, are responsible for the payment of the latter's charges except where there has been express agreement to the contrary. When lawyers direct a client to a foreign colleague they are not responsible for the payment of the latter's charges, but neither are they entitled to a share of the fee of this foreign colleague."

⁷⁰ ABA Model Rule 1.5.

⁷¹ *See* CCEL Article 3.4. ("Regulation of Fees"); *see also* CCEL Article 3.7. ("Cost of Litigation and Availability of Legal Aid"); CCEL Article 5.7 ("Responsibility for Fees").

⁷² *See* CCEL Article 3.5. ("Payment on Account").

⁷³ *See* CCEL Article 3.6. ("Fee Sharing with Non-Lawyers"); CCEL Article 5.4. ("Referral Fees").

- 3.3.2. By “pactum de quota litis” is meant an agreement between a lawyer and a client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.
- 3.3.3. “Pactum de quota litis” does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.⁷⁴

Predictably, perhaps, the Chinese Law on Lawyers gives the state a much larger role in regulating fees charged by lawyers:

Article 23 When lawyers undertake business, their law firm shall centrally accept authorization, sign written authorization contracts with the clients and, in accordance with State regulations, collect fees from the parties and truthfully enter them in its accounts.⁷⁵

As might be expected in such a regime, accepting fees or other compensation outside the state-sanctioned regulations is prohibited.⁷⁶

Islamic jurisprudence, like the CCEL, frowns upon American-style contingency fee arrangements:

Although its definition is highly disputed in almost every school of Islamic jurisprudence, Islamic jurists generally define riba as an interest, usury, uncertain payment, or unjust enrichment that is considered prohibited by shari’a provisions. Thus, by its very nature, provisions of riba run contrary to the uncertainty of American contingency fee arrangements.

The prohibition against charging riba inheres to the Qur’an:

Those who live off the interest of loans will never stand up Yet God has permitted trading and forbidden taking

⁷⁴ CCEL Article 3.3.

⁷⁵ Law on Lawyers, Article 23.

⁷⁶ Law on Lawyers, Article 35.

interest You who believe, do not live off usury which is compounded over and over again.”

* * *

Additionally, the riba prohibition may become problematic in any situation that requires a lawyer’s safekeeping of a client’s property. Since the lawyer is directed by Model Rule 1.15 to maintain a client’s funds in a separate account, the question becomes relevant as to whether or not those funds can gain interest and who is entitled to that interest.⁷⁷

G. Competence

Rule 1.1 of the ABA Model Rules establishes the basic obligation of competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁷⁸

In addition, the ABA Model Rules contain numerous provisions designed to ensure that clients receive competent advice, including requirements of lawyer diligence,⁷⁹ communication with the client,⁸⁰ supervision of lawyers and assistants,⁸¹ and prohibitions against the unauthorized practice of law.⁸²

Rule 20 of the IBA Code contains a similar prohibition on the delegation to unqualified persons of functions “which are by the law or custom of the country in which they practise only to be performed by a qualified lawyer.”⁸³

⁷⁷ McCary, *Bridging Ethical Borders* at 310-11 (footnotes omitted).

⁷⁸ ABA Model Rule 1.1.

⁷⁹ See ABA Model Rule 1.3 (“Diligence”).

⁸⁰ See ABA Model Rule 1.4 (“Communication”).

⁸¹ See ABA Model Rule 5.1 (“Responsibilities Of Partners, Managers, And Supervisory Lawyers”); see also ABA Model Rule 5.2 (“Responsibilities Of A Subordinate Lawyer”); ABA Model Rule 5.3 (“Responsibilities Regarding Nonlawyer Assistants”).

⁸² See ABA Model Rule 5.5 (“Unauthorized Practice Of Law; Multijurisdictional Practice Of Law”); see also ABA Model Rule 5.7 (“Responsibilities Regarding Law-Related Services”).

⁸³ IBA Code Rule 20.

Like the ABA Model Rules, Article 3.1. of the CCEL requires a lawyer to ensure that the client receives competent representation:

3.1.2. A lawyer shall advise and represent the client promptly, conscientiously and diligently. The lawyer shall undertake personal responsibility for the discharge of the client's instructions and shall keep the client informed as to the progress of the matter with which the lawyer has been entrusted.

3.1.3. A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it.

A lawyer shall not accept instructions unless he or she can discharge those instructions promptly having regard to the pressure of other work.⁸⁴

Article 26 of the Chinese Law on Lawyers contain an implicit, rather than explicit, requirement that lawyers represent their clients competently:

A lawyer acting as legal counsel shall provide opinions regarding legal issues to the person who has engaged him, draft and review legal documents, act as agent to participate in litigation, mediation or arbitration activities, handle other legal matters authorized by the person who has engaged him, and protect the lawful rights and interests of the person who has engaged him.⁸⁵

H. *Professional Courtesy*

The ABA Model Rules have two provisions, in particular, that reflect the general obligation of lawyers to deal professionally with each other. ABA Model Rule 3.4 (“Fairness to Opposing Party and Counsel”) and Rule 4.1 (“Truthfulness In Statements to Others”), in effect, codify the “Golden Rule” in lawyers’ dealings with each other. Somewhat more expansive is IBA Code Rule 4:

⁸⁴ CCEL Article 3.1. *See also* CCEL Article 5.2. (“Co-operation among Lawyers of Different Member States”); CCEL Article 5.8. (“Continuing Professional Development”).

⁸⁵ Law on Lawyers, Article 26.

Lawyers shall treat their professional colleagues with the utmost courtesy and fairness. Lawyers who undertake to render assistance to a foreign colleague shall always keep in mind that the foreign colleague has to depend on them to a much larger extent than in the case of another lawyer of the same country. Therefore *their responsibility is much greater*, both when giving advice and when handling a case. For this reason it is improper for lawyers to accept a case unless they can handle it promptly and with due competence, without undue interference by the pressure of other work. To the fees in these cases Rule 19 applies.⁸⁶

One interesting feature of this rule is that it imposes greater obligations upon lawyers with respect to giving advice and handling cases when rendering assistance to foreign colleagues, even though the lawyer giving the advice or handling the case does so without ever engaging in the practice of law outside the “home” jurisdiction. Article 5.1 (“Corporate Spirit of the Profession”) of the CCEL contains a general exhortation to lawyers to foster trust and cooperation between themselves, similar to that contained in IBA Code Rule 4.⁸⁷

I. *The Rule of Law*

The ABA Model Rules impose upon lawyers a number of obligations designed to promote the rule of law, including requirements for provision of legal services on a *pro bono* basis⁸⁸ and service as court-appointed counsel.⁸⁹ Likewise, IBA Code Rule 17 states that, “[l]awyers shall never forget that they should put first not their right to compensation for their services, but the interests of their clients and the exigencies of the administration of justice.”⁹⁰ More broadly, the CCEL begins with a general statement that, “[i]n a society founded on respect

⁸⁶ IBA Code Rule 4 (emphasis supplied).

⁸⁷ CCEL Article 5.1.

⁸⁸ See ABA Model Rule 6.1 (“Voluntary Pro Bono Publico Service”).

⁸⁹ See ABA Model Rule 6.2 (“Accepting Appointments”).

⁹⁰ IBA Code Rule 17.

for the rule of law the lawyer fulfils a special role.”⁹¹ As we shall see in Part III, these general obligations to uphold the rule of law take on particular significance when a lawyer is confronted with situations in which something that is perfectly normal and expected in one jurisdiction is a criminal offense in another.

J. *Self-Regulation*

The ABA Model Rules contain a number of provisions codifying the principle of self-regulation of the legal profession, including such matters as ethical obligations of those seeking admission to the bar⁹² and mandatory reporting of violations of ethical rules.⁹³ Likewise, Article 5.9 of the CCEL reflects the principle of self-regulation, though it does not mandate reporting of violations to the appropriate authorities.⁹⁴ Chapter V of the Chinese Law on Lawyers (“Lawyers Associations”) also provides for lawyer self-discipline, as well as the usual

⁹¹ CCEL Article 1.1.

⁹² ABA Model Rule 8.1 Bar Admission And Disciplinary Matters:

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

⁹³ ABA Model Rule 8.3 Reporting Professional Misconduct:

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

⁹⁴ CCEL Article 5.9.

functions of continuing legal education and mediation of “disputes arising in lawyers’ practice activities.”⁹⁵

As the foregoing survey of the general categories of lawyers’ ethical obligations will have made clear, there is a high degree of uniformity on many subjects, at least at a high level of generality. More complex issues arise, however, when one descends from the high level of generality to consider specific cases under the different rules.

III. ETHICAL ISSUES IN A MULTI-JURISDICTIONAL TRANSACTIONAL CONSTRUCTION PRACTICE

Given the nature of a transactional practice, in which part of the lawyer’s role is to help facilitate relationships that will be beneficial to the client, it is perhaps more difficult to draw firm boundary lines between what is required (or prohibited) by good manners, prudent business tactics, and enforceable ethical obligations. In international transactions, where the parties involved may have very different ideas about what constitutes good manners, what are appropriate business tactics, and when either might run afoul of a lawyer’s ethical obligations, the lines can be even fuzzier. To take an obvious example, what, in one context, might be considered customary gift-giving or entertainment might, in another context, be considered a bribe.

As we have seen, ethical codes typically apply not only to those lawyers admitted to practice in the jurisdiction in which the codes are in force but also to lawyers carrying on legal activities within the jurisdiction.⁹⁶ It may be tempting to think that, if one simply adheres to the highest applicable standard, that should be sufficient. Provided one knows for sure which standards apply, such an approach makes perfect sense. The difficulty, however, is in knowing

⁹⁵ Law on Lawyers, Chapter V.

⁹⁶ See *supra* Part I.

what standards might apply. As noted at the outset of this paper, the clearest guidance for American lawyers is in Comment 5 to ABA Model Rule 8.5, which states that,

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.⁹⁷

It is not difficult to imagine a situation in which the predominant effect of a lawyer's action will occur in a jurisdiction other than the one in which the conduct itself occurred. Consider the case of an American lawyer working in Italy, marking up a draft agreement for equipment to be supplied to a power plant owned by a client in the Dominican Republic and emailing the draft to the supplier in Switzerland. The "predominant effect" of the lawyer's conduct will probably not occur in the United States or Italy, but it is far from clear whether the predominant effect of the conduct (note: not the effect of the contract) will be in Switzerland or the Dominican Republic. Technological improvements in means of communication not only permit lawyers to work virtually anyplace in the world but also encourage clients to call upon their preferred lawyers regardless of where the parties or the subject-matter of the transaction may be located, with the result that multiple ethical regimes may be implicated in any given situation. Perhaps more importantly, while, under ABA Model Rule 8.5(b)(2), a lawyer's reasonable belief about where the "predominant effect" will occur test may protect the lawyer from discipline in a jurisdiction that follows the ABA Model Rules, there may be no such "safe harbor" where the lawyer's conduct actually occurs or where its effects may be felt, so the prudent course is to consider whether there is any reason to suppose that the ethical obligations of the jurisdictions where the

⁹⁷ ABA Model Rule 8.5 cmt.

conduct or its effects might be felt will differ from those of the lawyer's home jurisdiction. If there is, then caution and further investigation of the potentially-applicable ethical rules are warranted.

With these considerations in mind, we now consider two sets of ethical issues confronted by transactional construction lawyers practicing internationally. As noted at the beginning of this paper, ethical issues in an international practice are distinguished from those encountered domestically by (a) the additional layer of "host" state ethical rules that may apply (which may be very different from the ABA Model Rules) and (b) the additional legal and cultural issues that are generally absent from domestic work, yet carry definite ethical implications. The first set of issues, therefore, focuses on classic ethical problems in domestic practice and considers how the analysis of each might change when the context shifts from domestic to international practice. The second set of issues is comprised of ethical issues that are peculiar to international construction transactions.

A. *Ethical Issues Common to Domestic and International Transactional Work*

One of the classic ethical dilemmas construction lawyers face involves representation of multiple parties. On the dispute resolution side, the potentially conflicting interests of a contractor and its surety, for example, may be obvious, even when the contractor and surety have a common enemy in the owner. On the transactional side, too, however, the interests of the separate co-venturers (for example) will not be identical, even though they may have common objectives when negotiating with the owner. In that situation, the lawyer's obligation to avoid conflicts of interest⁹⁸ and to exercise independent professional judgment⁹⁹ may require the lawyer to take specific steps to inform each client of the potential conflict, to obtain each client's

⁹⁸ See *supra* Part II.C.

⁹⁹ See *supra* Part II.A.

consent to the lawyer's representation despite the potential conflict, and to withdraw from representing one or all clients if the potential conflict becomes manifest.¹⁰⁰ Probably due to the fact that avoiding conflicts of interest is so basic, the ABA Model Rules, the IBA Code, and the CCEL all prohibit conflicts of interest in both transactional and dispute resolution matters.¹⁰¹

The simple prohibition of the Chinese Law on Lawyers that, “[a] lawyer shall not represent both parties involved in the same case,”¹⁰² suggests that it applies only to dispute resolution matters.

While this may appear odd at first, one should recall the Chinese rule regarding confidentiality:

A lawyer shall keep confidential secrets of the State and commercial secrets of the parties concerned that he comes to know during his practice activities and shall not divulge the private affairs of the parties concerned.¹⁰³

Taken together, the two rules suggest that there may be greater flexibility for lawyers to represent conflicting interests (at least in transaction) in China than elsewhere.

Other obligations, such as the lawyer's duty to maintain client confidences¹⁰⁴ and loyalty to the client,¹⁰⁵ may also be implicated in multiple-representation situations, as, for example, where a lawyer receives information in confidence from one of the parties that would adversely affect the venture if disclosed to the other party. Comment 31 to ABA Model Rule 1.7 provides some guidance to American lawyers in this situation:

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to

¹⁰⁰ See, e.g., ABA Model Rules 1.2, 1.4, 1.6, 1.7.

¹⁰¹ See *supra* Part II.C.

¹⁰² Law on Lawyers, Article 34.

¹⁰³ Law on Lawyers, Article 33.

¹⁰⁴ See *supra* Part II.B.

¹⁰⁵ See *supra* Part II.E.

each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.¹⁰⁶

Given the similar recognition of the obligation of confidentiality and loyalty to the client in the IBA Code and the CCEL, it seems likely that a similar result would obtain under those rules. Less clear is the outcome under the Chinese Law on Lawyers or the Islamic shari'a. In the former, the obligation of client confidentiality is complicated by the lawyer's additional duties to the State; in the latter it is complicated by additional duties to God. In both there is a dearth of accessible commentary on the extent of the obligation in the context of representation of multiple parties.

As noted above, lawyers generally have certain duties with respect to third parties who are not the lawyer's clients, as part of the lawyer's general obligation to maintain the dignity of the profession.¹⁰⁷ Given that many participants in the construction process may have a natural preference for "keeping the lawyers out," it frequently happens that a construction lawyer must deal with unrepresented counter-parties. In such a situation the lawyer may have a duty to make clear to the unrepresented party the lawyer's role in the transaction and to suggest that the

¹⁰⁶ ABA Model Rule 1.7 cmt.

¹⁰⁷ *See supra* Part II.D.

unrepresented party obtain counsel.¹⁰⁸ Indeed, under ABA Model Rule 4.3, a lawyer has an affirmative duty to make reasonable efforts to correct any misunderstanding an unrepresented third party may have regarding the lawyer's role in a matter.¹⁰⁹ Although the IBA Code and CCEL do not address a lawyer's duties to unrepresented third parties in the same level of detail as the ABA Model Rules, it seems safe to assume that the general obligations to "maintain the honour and dignity" of the profession¹¹⁰ and to keep the "lawyer's personal honour, honesty and integrity" beyond doubt¹¹¹ carry with them the duty to exercise at least the same level of circumspection and disclosure when dealing with unrepresented third parties as ABA Model Rule 4.3.

The lawyer's general obligation to uphold the dignity of the profession may also restrict the lawyer's ability to stretch the truth when negotiating with an adverse party.¹¹² At first blush, ABA Model Rule 4.1 would seem to state an obvious principle that is at least implicit in the IBA Code, the CCEL, and, indeed, every unwritten schoolyard code of conduct, "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."¹¹³ And yet, how many times have lawyers engaged in negotiations with opposing counsel stated that their clients cannot accept "X," knowing perfectly well that the statement is not true and is made only as a bargaining tactic?¹¹⁴ What negotiating styles are acceptable and effective in various parts of the world is well beyond the scope of this paper. The

¹⁰⁸ See, e.g., ABA Model Rules 4.2, 4.3.

¹⁰⁹ ABA Model Rule 4.3.

¹¹⁰ IBA Code Rule 2.

¹¹¹ CCEL Article 2.2.

¹¹² See ABA Model Rule 4.1.

¹¹³ ABA Model Rule 4.1(a).

¹¹⁴ For a helpful discussion of a lawyer's ethical obligations in negotiations, see Michael H. Rubin, *The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties*, 26 CONSTRUCTION LAWYER 12 (2006).

important point for present purposes is that some tactics—*e.g.*, lying—may not only be unacceptable or ineffective (to the contrary, they may be perfectly accepted, expected, and highly effective), yet nonetheless contrary to the applicable rules of professional conduct in both the “home” and “host” jurisdictions.

Upholding the dignity of the profession may also mean that the lawyer cannot claim any special influence with relevant government figures (*e.g.*, zoning and permitting officials or building inspectors).¹¹⁵ ABA Model Rule 8.4(e) defines misconduct by a lawyer to include, *inter alia*, stating or implying “an ability to influence improperly a government agency or official.”¹¹⁶ As with lying in negotiations, implying an ability exert improper influence upon a government official may not only be an effective negotiating tactic, it may be the very reason a lawyer was retained for a particular matter. Needless to say, even if not as explicit as ABA Model Rule 8.4(e), it is difficult to imagine any code of ethics countenancing *improper* influence of government officials. What is improper in a given context is a thorny question, and one that we take up in the next section.

Other ethical issues may arise in the course of a construction transaction. As a given construction deal unfolds, it may become apparent that there are more areas of the law that are relevant than the lawyer is competent to advise on. Thus, for example, the lawyer’s general obligation to provide competent representation¹¹⁷ may require the involvement of specialists in subjects such as mechanics liens, government contracts, environmental law, real estate, or project finance. Given that no one anywhere, including the State and God, has an interest in protecting incompetent lawyers, it is perhaps not surprising that the duty to provide competent

¹¹⁵ See ABA Model Rule 8.4.

¹¹⁶ ABA Model Rule 8.4(e).

¹¹⁷ See *supra* Part II.G.

representation is universal. The consideration, rather, is a practical one for the lawyer involved, namely, knowing one's limitations and alerting the client when additional expertise is required.

B. *Ethical Issues Peculiar to International Transactional Work*

Each of the situations described in the foregoing section raises ethical issues familiar to construction lawyers working domestically.¹¹⁸ What differentiates these issues when working internationally is the additional layer of potentially-applicable ethical norms that may require the lawyer to take additional or different steps when the ethical issue arises. There are, however, ethical issues that, if not unique to international transaction work, are at least made peculiarly complex when working internationally. Despite the great deal of uniformity one finds across the different ethical systems surveyed in this paper, there are points of real difference, many of which flow from fundamentally different ideas about the role of the state in policing private bargains.

A lawyer's duty of loyalty to the client and the closely-related duty of independence are universally subject to the requirement that the lawyer obey the law.¹¹⁹ Similarly,

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.¹²⁰

Construction transactional lawyers who practice domestically are already familiar with several potential pitfalls in advising clients, including the possible application of anti-indemnification statutes, the validity of exculpatory clauses, and the enforceability of advance waivers of lien and claim rights. When negotiating construction contracts internationally, there are additional

¹¹⁸ See *supra* note 1.

¹¹⁹ See ABA Model Rule 1.16; IBA Code Rule 10; CCEL Article 2.7; Law on Lawyers, Article 29.

¹²⁰ ABA Model Rule 1.2(d).

compliance-with-law issues that may conflict with an American lawyer's ideas about independence and loyalty to the client.

As noted above,¹²¹ the Chinese Law on Lawyers obligated both Chinese lawyers and foreign lawyers conducting legal service activities in China to protect not only the confidences of their clients but also the confidences of the State and (apparently) even the confidences of other parties to a transaction:

A lawyer shall keep confidential secrets of the State and commercial secrets of the parties concerned that he comes to know during his practice activities and shall not divulge the private affairs of the parties concerned.¹²²

Exactly how far a lawyer's obligation not to disclose information received "during his practice activities" may extend is not clear, but the fact that the lawyer is charged with keeping the secrets of the Chinese state and "the commercial secrets of the parties concerned" is different from what most American lawyers would expect in a wholly domestic context.

There are other situations where the requirements of local law may be very different from what lawyers trained in the West might expect. The prohibition on interest under Islamic law¹²³ is one that has obvious implications for contractual provisions that purport to impose interest on late payments. Perhaps more subtle is the general principle under Islamic law that lawyers and clients both have a duty to preserve the sanctity of contract obligations:

In theory, the contract relationship under principles of the shari'a is much more stringent than the 'efficient breach' concept to which an American attorney might be accustomed. Instead of promoting breach when a financial incentive to breach exists, Islamic contract law is viewed more strictly. Chapter Five of the Qur'an deals specifically with Islamic contracts:

¹²¹ See *supra* Part II.B.

¹²² Law on Lawyers, Article 33.

¹²³ McCray, *Bridging Ethical Borders* at 310-12.

You who believe fulfill any contracts [that you make]. . . . Fulfill God's agreement once you have pledged to do so, and do not break any oaths once they have been sworn to. You have set God up as a Surety for yourselves.

* * *

Breaching a contract with a Muslim party could thus be considered both an ethical and legal violation of shari'a principles. Under Model Rule 1.16, a lawyer is instructed that he or she must decline or terminate representation if the representation will result in 'violation of other law.'¹²⁴

A general prohibition on committing economically "efficient" breaches may be relevant when negotiating fixed-price construction agreements, for example; even if labor and material costs make a contractor's performance more expensive, an efficient breach may not be a prudent option if Islamic law might apply.

A similar problem may arise if and to the extent that construction lawyers counsel their clients to require their counterparties to adhere to Western-style regulatory norms, such as policies and procedures regarding employment, health, and safety:

Under the shari'a and the principles of the Qur'an, Muslims have long debated the issue as to whether government regulations inhibit God's divine authority or actually lead to God's rule through man. This debate is contentious within the Muslim community; it becomes even more complex when Western legal communities inject it with issues of foreign regulation. To a Muslim, it would seem inappropriate to import standards that are not provided for by Qur'anic provisions or, at the very least, discussed in the varying schools of Islamic jurisprudence. As a result, the international practitioner becomes an unwitting catalyst to this debate. By advocating compliance with U.S. standards in a contract agreement, even when there is a Western consensus on the issue, legal scholars circumvent principles of Islamic law in international discussion.¹²⁵

As we have seen, American-style devotion to the client may be inconsistent with legal norms abroad. By the same token, however, uncritical adherence to the business customs of a

¹²⁴ McCary, *Bridging Ethical Borders* at 305-06 (footnotes omitted).

¹²⁵ McCary, *Bridging Ethical Borders* at 314-15 (footnotes omitted).

foreign jurisdiction may also create problems in the lawyer's home jurisdiction. Probably the clearest example arises in attempting to navigate the requirements of the Foreign Corrupt Practices Act¹²⁶ and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹²⁷ What may be "innocuous traditions of foreign gift-giving"¹²⁸ in the Middle East, for example, may be considered a violation of the FCPA or the OECD Convention in the West. Lawyers advising parties involved in international construction projects will readily appreciate the role of government at various levels; in obtaining work permits, business licenses, drawing approvals, safety inspections, and in satisfying a host of other regulatory requirements, owners, contractors, subcontractors, and suppliers must win the cooperation and support of local officials in order to succeed. The potential for bribery and corruption in such a situation is self-evident.

In between the two extremes of violating the law abroad or at home is the issue of knowing what norms are, in fact, followed, even if not legally binding. The general obligation of providing competent representation, discussed above,¹²⁹ presumably requires a lawyer—particularly a transactional lawyer—to become familiar with the way business is done in the jurisdiction in which the "predominant effect" of the lawyer's conduct occurs. For example, it is sometimes suggested that clauses providing for liquidated damages in the event of delay, while generally enforceable in Europe, are rarely enforced by owners in practice. The potential reticence of owners to insist upon payment of liquidated damages for delay is a factor that a

¹²⁶ Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-3, 78ff (2000)).

¹²⁷ Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, opened for signature Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999).

¹²⁸ McCary, *Bridging Ethical Borders* at 315.

¹²⁹ *See supra* Part II.G.

competent transactional lawyer should take into consideration when advising a client during the negotiation of a construction agreement. If neither party seriously believes that liquidated damages for delay will be assessed or paid, what other contractual incentives are in place to keep the project on schedule?

A final cluster of issues that the international construction lawyer must consider when advising a client in a transaction is how disputes will be resolved. What ethical norms may apply in the actual resolution of a dispute is the subject of the next section. For present purposes, however, it is important to note several considerations in connection with a dispute resolution provision. First, if (as is typical) the dispute resolution mechanism is arbitration, does the counterparty have the capacity to arbitrate? The benefits of arbitration over litigation in local courts are lost if the arbitration agreement is unenforceable because the counterparty has no authority to submit disputes to arbitration, as is often the case with state-related entities.¹³⁰ Second, will any resulting award be enforceable where the counterparty's assets are located? Examination of the grounds for recognition and enforcement of international arbitration awards is beyond the scope of this paper, but suffice it to say that both the law of the place of arbitration and the law where enforcement of the award is sought are relevant, and an arbitration award rendered under a contract that is contrary to the law of either place may not be enforceable.¹³¹ Third, is the place of arbitration in a jurisdiction that is familiar with and friendly to arbitration? Counseling a client to agree to a dispute resolution provision that calls for arbitration someplace where experienced advocates may not be available (or, if foreign, permitted to act) undermines the client's ability to seek meaningful enforcement of its other contractual rights.

¹³⁰ See generally, EMMANUEL GAILLARD, *STATE ENTITIES IN INTERNATIONAL ARBITRATION* (2006).

¹³¹ See generally, Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention, With Particular Reference to Construction Disputes*, 24 J. INT'L ARB. 9 (2007).

IV. MULTI-JURISDICTIONAL DISPUTE RESOLUTION PRACTICE

A. *Ethical Concerns in Communicating with Adverse Parties and Counsel*

In this subsection it is intended to examine some of the issues that arise out of differing international conceptions of confidentiality. It is sometimes said that these differences stem from the difference between the adversarial common law systems (*i.e.*, where a neutral adjudicator chooses between competing cases) on the one hand and the inquisitorial civil law system (where a judge or group of judges will investigate the case) on the other. This analysis is probably too simplistic—a distinguished English academic has commented, “... *English judges are becoming less willing to accept two corollaries of the adversary system, namely that the courts’ principal concern lies with procedural rather than substantive justice, and that they have neither the power nor the duty to seek to establish the truth.*”¹³² Indeed it would not account for the significant differences between some common law jurisdictions. It is likely that a complex interaction of factors accounts for the differences, including the nature of the procedural environment, but also extending to historical, cultural and economic influences.

1. *Privilege & Confidentiality*

It is a threshold question for any lawyer preparing to advise any client involved in an international dispute how far his advice to his client may be open to the scrutiny of his opponents and the tribunal. He will also be concerned about his and his client’s communications with foreign co-counsel and his contact with his opponents.

The answer to this question will vary from jurisdiction to jurisdiction, the status of the lawyer, his relationship with the client, the nature of the proceedings and whether proceedings have in fact commenced or are merely in contemplation. In some jurisdictions questions of

¹³² JA Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure, International and Comparative Law Quarterly*, Volume 52, Number 2, April 2003 , pp. 281-295(15).

privilege are matters of substantive law, in others matters of practice and in other still, are regulated as matters of professional conduct by the local bar authorities.

The differences between jurisdictions primarily arise from differing concepts of discovery and the role of the lawyer. In most common law jurisdictions privilege attaches to advice and documents brought into being for the purpose of legal advice or in contemplation of litigation. The privilege generally belongs to the client and it is for the client, not the lawyer, to waive it. In civil law jurisdictions, the question of privilege is often seen as one of professional secrecy or confidentiality which cannot be waived even by the client himself. Being a matter of professional obligation, rules of privilege are frequently administered by the local bar. In addition, in some common law and civil jurisdictions there are secrecy laws breach of which constitutes a criminal offence.

These rules, in the context of widely differing discovery obligations, can give rise to serious problems in multi-jurisdictional disputes. It is possible that material that a client is obliged to disclose in one jurisdiction might be protected by secrecy laws in another. In the first jurisdiction the lawyer might be vulnerable to personal sanctions for a failure to disclose the material, whereas in the second jurisdiction the lawyer may be guilty of a criminal offence for disclosing the material.

These problems are to an extent ameliorated by rules that prohibit the use of material disclosed in one set of proceedings for any other purpose (sometimes called the “implied undertaking” not to abuse discovery). Such rules do not however always provide a satisfactory answer: any form of disclosure in one jurisdictions may give rise to an obligation to disclose the material in another and even in jurisdictions where the “implied undertaking” applies, it may be

overridden by deployment of the disclosed material in a hearing, whereby it enters the public domain and all protection is lost.

The law relating to privilege is complex and there is no substitute for taking advice from those qualified to practice in the relevant jurisdiction as to the up-to-date rules, but some idea of the possible problems may emerge from the following analysis.¹³³

- **Belgium:** professional confidentiality is enforced by law,¹³⁴ the exceptions being where the law requires disclosure or where the lawyer is called upon to give evidence in legal proceedings. The rules of the Belgian bar forbid a member revealing facts that were disclosed to him in a professional context. The client may not disclose correspondence marked confidential by his lawyer unless the lawyer consents. Correspondence between lawyers is privileged from production in court unless classified as “official”. What is “official” is determined by the bar association.
- **Brazil:** all documents passing between lawyer and client are privileged under federal law.
- **Czech Republic:** there is no concept of privilege, but communications between a lawyer and his client are protected by the lawyer’s obligation to keep his client’s affairs confidential.¹³⁵ The protection may be lost however if the communications are in the possession of the client.
- **England:** in England there are two main types of legal privilege — legal advice privilege and litigation privilege. Legal advice privilege applies to confidential communications between a lawyer and his client for the purpose of giving or

¹³³ See “*Privilege: A World Tour*,” Good *et al*, *Global Counsel*, December 2004/January 2005.

¹³⁴ Article 458, Belgian Criminal Code, 1867.

¹³⁵ Section 21 of Act No 85/1996 Coll, on the Legal Profession (as amended).

receiving legal advice. There is a limited definition of the client for this purpose.

Litigation privilege applies from the time at which litigation is in reasonable prospect.

The privilege covers communications with third parties if for the purpose of obtaining legal advice in connection with the contemplated litigation.

- **France:** there are professional secrecy obligations between the lawyer and client¹³⁶ preventing the lawyer from disclosing information provided by the client.

Correspondence between the lawyer and client and between the lawyer and his opponent are protected by professional secrecy unless there is an express statement to the contrary.¹³⁷ The client cannot release the lawyer from his obligations, but is not bound himself.

- **Germany:** there are a number of professional confidentiality regulations. Unless the client consents, a lawyer cannot disclose any confidential information.¹³⁸ The lawyer may refuse to disclose the information.¹³⁹ Documents in the custody of the lawyer in his professional capacity may not be disclosed.¹⁴⁰

- **Hong Kong:** privilege attaches to communications between the lawyer and his client and to documents that have been brought into existence for the predominant purpose of legal advice. Litigation privilege attaches to documents and third party communications brought into existence in connection with legal proceedings. If a

¹³⁶ Articles 226-13, New Criminal Code.

¹³⁷ Articles 66-5, Law of 31 December 1971.

¹³⁸ Section 203(1), Criminal Code.

¹³⁹ Sections 383 and 142(2), Civil Procedure Code.

¹⁴⁰ Section 97, Criminal Procedure Code.

client's internal communications record privileged material, they will also be privileged.

- **Japan:** there is no general doctrine of legal professional privilege, but confidential communications between a registered lawyer and client are privileged from disclosure,¹⁴¹ however only the lawyer is protected from divulging the information, the client is not so protected.
- **People's Republic of China:** there is no concept of legal professional privilege in the PRC. While there is an obligation not to disclose state and commercial information he receives in his professional capacity,¹⁴² he cannot refuse to disclose information in legal proceedings or refuse a request for information from a government entity.
- **Russia:** communications between a lawyer representing a client in court (an advocate) are privileged. An advocate is not compellable as a witness and cannot be questioned about the information he has received from his client. A Russian lawyer who is not an advocate has no protection and must disclose any information requested by state entities.
- **Singapore:** legal professional privilege exists in both statute¹⁴³ and at common law. By statute, a lawyer may not disclose any communications, documents or advice produced for the purpose of his engagement as a party's lawyer. Business advice however is not covered. At common law all communications of the purpose of obtaining legal advice are privileged.

¹⁴¹ Lawyers Law and Professional Ethics Code.

¹⁴² Article 33, PRC Lawyers Law.

¹⁴³ Sections 128(1) and 131 of the Evidence Act (Cap.97).

- **Switzerland:** professional secrecy protects information received by an independent lawyer from his client or a third party and the lawyer is not obliged to divulge that information.
- **Thailand:** a lawyer may not disclose any confidential document or fact that was entrusted or imparted by a party or witness to the lawyer in his capacity as a lawyer.¹⁴⁴ The privilege attaches to communications which include or refer to documents or facts provided in confidence to the lawyer for this purpose. The privilege is that of the client or witness, who may give permission for the disclosure. Unauthorized disclosure of confidential information by a lawyer may be a criminal offence.

A particular problem arises in connection with confidentiality in the context of international arbitrations. Most major institutional rules provide that the hearing shall be in private. Article 21.3 of the ICC Arbitration Rules state:

The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.

Article 25.4 of the UNCITRAL Arbitration Rules provide:

Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

The rules of the ABA's International Centre for Dispute Resolution (ICDR), the International Centre for Settlement of Investment Disputes (ICSID) and the London Court of International Arbitration (LCIA) contain similar provisions as do those of the China International Economic

¹⁴⁴ Section 92, Civil Procedure Code and section 231, Criminal Procedure Code.

and Trade Arbitration Commission (CIETAC) and the Japanese Commercial Arbitration Association (JCAA).

It is suggested¹⁴⁵ that if the hearing is to be held in private, it would seem to follow that the documents disclosed and evidence given at the hearing should also be and remain private.

Under English law it has been recognized that there is an implied term of confidentiality in an arbitration agreement, “*but the boundaries of the obligations of confidence which thereby arise have yet to be delineated.*”¹⁴⁶ However other jurisdictions have held that public interest may outweigh the privacy of the arbitral process so as to allow disclosure of documents and information provided for the purpose of the arbitration while the actual hearings remain private.¹⁴⁷

In contrast, in the USA neither the Federal Arbitration Act nor the Uniform Arbitration Act provides that the parties or the arbitrators shall keep the arbitration proceedings secret. Thus, unless the arbitration agreement or any applicable rules provide that the arbitration proceeding are to be confidential, the parties are not obliged to treat the proceedings as such.

Compliance with arbitral confidentiality in certain jurisdictions can be enforced by injunction or restraining order, breach of which might lead to both civil and criminal sanctions.

But even in jurisdictions that do enforce strict confidentiality over the arbitral proceedings, often a distinction is made between the proceedings themselves and the resultant award. On the one hand, ICSID and UNCITRAL rules provide that an award may only be made

¹⁴⁵ ¶ 1-54, *Law and Practice of International Commercial Arbitration*, Redfern and Hunter (4th Ed., 2004).

¹⁴⁶ *Ali Shipping Corporation v Shipyard Trogir* [1998] 1 Lloyds Rep. 643, 651.

¹⁴⁷ *Esso Australia Resources Ltd v The Hon Sidney James Ploughman* (1995) 183 CLR 10 (Australia).

public with the parties' consent. The ICDR's rules provide that an award may be made public with the consent of all parties "or as required by law."¹⁴⁸

Practice differs widely, even amongst the jurisdictions that are popular choices for the seats of arbitrations. At one extreme, in Sweden, while it is recognized that arbitration is fundamentally a private process, there is no implied duty of confidentiality in relation either to the proceedings or the award.¹⁴⁹

English jurisprudence (inevitably) tries to steer a pragmatic middle line — in upholding the decision of a judge not to publish details of an arbitration appeal, the Court of Appeal held that while appeal proceedings were no longer consensual, the courts could still take into account the parties' expectations regarding privacy and confidentiality when they agreed to arbitrate, but any judgment should be given in public where it could be done without disclosing significant confidential information.¹⁵⁰

At the other extreme the *Cour d'appel* of Paris has ruled that the mere bringing of court proceedings to challenge an arbitration award violated the principle of confidentiality in that it gave rise to "a public debate of facts which should remain confidential" and that it is "the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed."¹⁵¹ As a result the *Cour d'appel* imposed substantial civil damages on the appellant.

The intention of the preceding whistle-stop world-tour is to give some sense of the differing interpretations of concepts as fundamental to a legal practice as confidentiality and

¹⁴⁸ Article 27.

¹⁴⁹ *A I Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd*, Supreme Court of Sweden, October 27, 2000.

¹⁵⁰ *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2005] Q.B. 207.

¹⁵¹ *Aita v Ojjeh*, (1986) *Revue de l'Arbitrage* 583.

privilege, which go to the heart of a lawyer's relationship with his client and with counter-parties. One person's accepted practice may be another's professional misconduct or even a crime. The remainder of this section and that which follows it will seek to exemplify these differences in relation to a number of specific situations.

2. Negotiation of Settlements

The negotiation of settlements in certain jurisdictions attracts a particular species of privilege. In many common law jurisdictions such as England, Canada, Australia, New Zealand and Singapore, the term "without prejudice" if used in the course of negotiations will indicate that a particular conversation or letter is not to be tendered as evidence in court (or before a tribunal).

Such correspondence must be made in the course of negotiations and must be a genuine attempt to settle a dispute between the parties. It may not be used as a device to conceal facts or evidence. Further a document marked "without prejudice" that does not in fact contain any offer of settlement *can* be submitted in evidence should the matter proceed. On the other hand, courts or tribunals may decide to exclude from evidence communications not marked "without prejudice" but which do contain offers of settlement. Even if communications are they subject to "without prejudice" privilege, they may still be admissible in proceedings the object of which is to determine whether a settlement has been achieved.

Reference by an advocate to "without prejudice" material can derail a hearing. In court hearings it could lead to a judge recusing himself. It is likely that the party whose advocate made the reference would be ordered to pay the costs thrown away (and presumably the client would seek to recoup those costs from the hapless advocate) and if the judge were persuaded that it was an intentional reference, the advocate could be sanctioned.

In arbitration proceedings the position would be a little more complex. Arbitral tribunals tend to take a more relaxed view of the occasional reference to negotiations and indeed expect the parties to have exhausted the negotiation process before resorting to arbitration. There is also a greater reluctance on the part of arbitral tribunals to relinquish references since it will be more time-consuming and costly to reconstitute an arbitral panel than it would be for one judge to swap his docket with another. Nevertheless if the innocent party were to satisfy the tribunal that his interest were irrevocable prejudiced, the tribunal could be left with no alternative but to resign.

The same results will follow in those jurisdictions which have systems of formal offers (usually directed to putting the opposing party on risk for enhanced legal costs should he fail to better the offer). Such offers are often to said to be “without prejudice save as to costs.” In some jurisdictions the offer must be secured by what is called a “payment into court.” Tribunals in arbitrations with seats in jurisdictions where such procedures are available often adopt them and will have regard to without prejudice offers when deciding the incidence of costs. Reference to these types of offer almost inevitably leads to disruption of court proceedings, but as indicated, arbitral tribunals are usually more pragmatic in their approach.

The converse of the problem arises in jurisdictions where there is no concept of the confidentiality of settlement negotiations. The only way in which confidentiality can be protected is by express agreement, but the following issues must be borne in mind:

- How can the position be secured against a party who is willing cynically to disregard the confidentiality agreement and use any admissions in subsequent proceedings? In a jurisdiction where the courts are likely to uphold such agreements notwithstanding a general law of confidentiality, it may be possible to persuade courts to disregard such

evidence or restrain the use of the evidence in arbitral proceedings. Indeed it is likely that international arbitral tribunals will be amenable to persuasion to disregard such evidence.

- The problem arises where a court for whatever reason is not willing uphold the agreement. The reasons could range from the entirely admirable (for example, the court may be persuaded that the confidentiality agreement is intended to prevent the revelation of criminal conduct) to the not so admirable (the court may have been bribed or might favour a particular interest). If an arbitral tribunal were to exclude the evidence in those circumstances it could possibly be jeopardizing the enforceability of the arbitral award. There are cases in several jurisdictions where courts have refused to enforce awards under the New York Convention for alleged procedural irregularities.¹⁵²
- One possible expedient that may work where the parties are represented by lawyers from jurisdictions with strong ethical traditions enforced by their bar associations is to include a provision in the confidentiality agreement making breach a professional matter for the individual lawyers and the firm involved that may be reported to the relevant bar association and the local licensing authority. The writers have recently encountered a clause in the following terms in a Middle Eastern country:

Any breach of the terms and conditions set out in this letter will result in the Firm and the person in breach being reported to the Law Society of England and Wales or the General Council of the Bar and/or the [] Ruler's Office and/or the Ministry of Justice, as the case may be.

¹⁵² For example, in *Forever Maritime vs. Mashimport*, the Russian court denied enforcement of the award on the grounds that the defendant was not notified properly of the time and place of the hearing. The court rejected copies of correspondence between the parties proving the fact of proper notification because the translation of those letters into Russian was not notarized.

- Ultimately, however, if one is forced to proceed in a jurisdiction where the courts will favour the opposing party, its lawyers (absent external constraints) may act with impunity. This of course is one of the main reasons for the “delocalization” of international arbitration, *i.e.*, that hearings are held subject to a neutral and predictable system of law, in a venue whose courts are generally sympathetic to the arbitral process, before an independent tribunal who will render an award enforceable against assets pursuant to the New York Convention.

3. Illegal Contracts

Anyone who has practiced internationally will be familiar with the situation where, often after a considerable period of seemingly satisfactory trading, a dispute has arisen and the respondent party suddenly discovers that the contract was in fact illegal from its inception and therefore, notwithstanding the facts of the dispute, the respondent cannot be liable to the claimant party. Experienced international tribunals are rarely impressed by such arguments, but there are occasions when a party’s legal representatives do genuinely receive information that indicates that the underlying transaction is tainted with illegality. How will this impact on client confidentiality?

It has already been noted that China’s Law on Lawyers permits a lawyer to refuse or terminate the engagement if the matter “violates law” or the client seeks to use the lawyer’s services to “engage in illegal activities” that Islamic law, “[i]n contrast to the American system, the shari’a calls on individuals to promote what is just, good, and right for the community, not only for the client.” Those jurisdictions that derive their jurisprudence from that of England (*e.g.*, Singapore, Hong Kong and the “offshore” jurisdictions) may well be influenced by the position under English law which places an independent and overriding duty on counsel to raise

the question of illegality: it has been said that not only does counsel not act improperly in raising an unpleaded question of the possible illegality of the transaction, but on the contrary, it is counsel's duty, however embarrassing, to prevent the court from enforcing illegal transactions.¹⁵³

US lawyers will note that these obligations impose a potentially much wider duty of disclosure on the advocate than that found in the ABA Model Rules concerning confidentiality. This lack of congruence will have to be borne in mind when instructing local counsel.

4. Money Laundering

After September 11, 2001, money laundering became a major concern of the US administration's war on terror. The international response has been coordinated by the Financial Action Task Force on Money Laundering¹⁵⁴ ("FATF," also known by its French acronym of "GAFI").

In response to mounting concern over money laundering, FATF was established by the G-7 Summit that was held in Paris in 1989. In order to identify steps that national governments should take to implement effective anti-money laundering programs, FATF devised and promulgated its 40 Recommendations, which set out a basic, universally applicable framework for legal and regulatory systems, law-enforcement activities, and the work of supervisory and regulatory agencies. Over time, this international standard has been revised to reflect new trends and techniques in money laundering and experience, including a comprehensive overhaul of the 40 Recommendations in 2003 and the associated assessment methodology in 2003-04.

¹⁵³ *Mercantile Credit Co Ltd v Hamblin* [1964] 1 WLR 423.

¹⁵⁴ The members of FATF are: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-operation Council, Hong Kong, Iceland, Ireland, Italy, Japan, Kingdom of the Netherlands, Luxembourg, Mexico, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

After September 11, 2001, the FATF expanded its mission beyond money laundering and agreed to use its expertise in the worldwide effort to combat terrorist financing. An extraordinary FATF Plenary on the Financing of Terrorism, held in Washington, D.C. in October 2001, issued 8 Special Recommendations on Terrorist Financing as a new international standard to supplement the 40 Recommendations. This standard has also been subsequently expanded and elaborated and now includes nine recommendations.

In 2000 FATF expanded to 31 members, in 2003 to 33 members, and in 2007 it expanded to its current 34 members. Several FATF-style regional bodies also exist.¹⁵⁵

As a result of these initiatives and others there is now a mass of anti-money laundering legislation worldwide that may impact substantially on the way in which a lawyer is obliged to communicate with his client, adverse parties and their counsel. A useful resource (although not a substitute for taking advice from local counsel) is to be found on the website of the UN organization, The International Money Laundering Information Network, namely a country by country analysis of anti-money-laundering legislation.¹⁵⁶

5. Conflicts of Interest

The general rules relating to conflicts of interests have been adverted to above. In the context of communicating with adverse parties and their counsel, issues may arise where a lawyer's personal interest may conflict with that of his client because of his relationship with an opposing party, his lawyer or the tribunal.

Relations between a party's lawyer and the opposing party, either as an existing or potential client will be familiar to the US lawyer, but in certain jurisdictions a lawyer's

¹⁵⁵ For example, Caribbean Financial Action Task Force (CFATF), Eurasian Group (EAG), Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and Intergovernmental Action Group against Money-Laundering in Africa (GIABA).

¹⁵⁶ https://www.imolin.org/amlid2/browse_countries.jsp

professional advancement (or indeed his physical well-being) may be dependent on his relationship with the opposing party, his lawyer or the tribunal. These are issues that must be borne in mind when instructing foreign co-counsel. At their most extreme they are facts of life in doing business in the relevant jurisdiction, but it is perhaps in what might be regarded as more benign jurisdictions that more subtle and therefore, in a sense, more problematical, questions arise.

It is no longer that case in England that elevation from the bar to the bench is in the gift of the judges. The former position may however still obtain in other jurisdictions. Even in England it is not unusual for barristers to appear against members of the same chambers, or before deputy judges and arbitrators who are members of the same chambers. The same situations may arise in jurisdictions where barristers practice in chambers (for example, Hong Kong) or where English barristers sit as deputy judges (*i.e.*, many “offshore jurisdictions”).

This is often perplexing for lawyers unfamiliar with the “chambers system.” A barristers’ chambers is not a law firm, it is not even a corporate entity. Each barrister is theoretically a sole and independent practitioner who merely shares office space and resources and is prohibited from sharing fees. In reality many chambers in fact operate indistinguishably from boutique law firms specializing in advocacy on the basis that the members “eat what they kill.”

The practice of members of the same chambers appearing against each other has come in for little comment and in practice does not seem to have thrown up any problems. Indeed experience seems to indicate that competitive instincts tend to be sharpened rather than dulled by close association.

More problematical has been the relationship between counsel and members of arbitral tribunals. The *Tribunal de grande instance* of Paris has held that the particular way in which

barristers practice meant that it was not a ground for challenge that a barrister acting as an arbitrator shared chambers with a barrister acting as counsel to one of the parties.¹⁵⁷ That decision influenced a subsequent English case in the rather unsatisfactory circumstances where the complaining party did not appear.¹⁵⁸ That decision has been heavily criticized¹⁵⁹ as it is difficult to say that it is *not* a point that “*might call into question the arbitrator’s independence*” at least in the eyes of a non-English part.

The IBA *Guidelines on Conflicts of Interest in International Arbitration* now include “*The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers’ chambers*”¹⁶⁰ on the “Orange List” (*i.e.*, a non-exhaustive enumeration of specific situations which in the eyes of the parties may give rise to justifiable doubts as to the arbitrator’s impartiality or independence which the arbitrator has a duty to disclose). The Working Group that drafted the Guidelines explained that there is an understandable perception that barristers’ chambers should be treated in the same way as law firms.¹⁶¹

It is also suggested that in England, the courts are now more likely to set aside a judgment or award where counsel and the tribunal are members of the same chambers as demonstrated by a case where counsel and a deputy judge were members of the same chambers and this was known to the party, but it was held that while it was proper for counsel to inform the

¹⁵⁷ *Ste Icori v Kuwait Foreign Trading Contracting & Investment Co*, 24 February 1992, 1994 Rev. Arb. 557.

¹⁵⁸ *Laker Airway Inc v FLS Aerospace* [1999] 2 Lloyds Rep 45.

¹⁵⁹ Joanne Riches, Comment, [1999] Sweet & Maxwell, *International Arbitration Law Review*, 175 cited with approval in *International Chamber of Commerce Arbitration*, Craig, Park & Paulsson (3rd Ed.).

¹⁶⁰ ¶ 3.3.2.

¹⁶¹ *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, *BUSINESS LAW INTERNATIONAL* Vol 5 No 3 September 2004, 433 at pages 455 to 456.

client of the implications of the choice, it was not appropriate for counsel to urge the client to waive his right to object to the tribunal.¹⁶²

B. *Ethical Concerns in International Arbitration Proceedings*

In this subsection it is intended to address some of the issues that can arise where US lawyers are involved in international arbitration proceedings (and any associated proceedings in court) as counsel or co-counsel with foreign counsel. Associated court proceedings may be necessary before arbitral proceedings are commenced in order to secure matters in dispute, during the proceedings to secure evidence or the attendance of witnesses and after the closure of proceedings to challenge or enforce the award.

1. Counsel Considerations

Competence

“Competence”, meaning skill and ability has been addressed above; here “competence” meaning being legally qualified to prosecute proceedings is addressed. There are two aspects to this issue:

- Capacity to bring the arbitration proceedings; and
- Authority to present the case before the tribunal.

In practice these aspect are often linked. In many jurisdictions it is mandatory for advocates appearing in court proceedings to produce a power of attorney to the court in order to be recognized as a party representative. It has been said that it is likely that international arbitrators will interpret questions of authority of representatives liberally on the grounds that international trade usages demand that one overlook formal flaws in corporate action if as a

¹⁶² *Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 W.L.R. 370.

matter of fact corporate consent is evident.¹⁶³ However, like all matters of fact, the contrary may be proved.

Even in the US and UK where it is customary for tribunals to accept oral assurances from the parties' representatives that they have authority to act, if the other party has reasonable grounds to question the authority, the arbitral tribunal might require evidence of the authority. In Japan, it is general practice to submit formal powers of attorney and in most Arab countries a power of attorney is required by law. In civil law jurisdictions, powers of attorney are not required in most cases but it is advisable to be prepared to produce one on the request of the arbitral tribunal.¹⁶⁴

In the circumstances, the most prudent course is that, save in cases where there can be no reasonable doubt, a power of attorney should be prepared and, conversely, to require that one be produced by opposing counsel.

Even if a foreign lawyer can prove that he has the client's authority to act, he may still be precluded from acting, or acting without local co-counsel.

Article 21(4) of the ICC Rules of Arbitration provides that:

The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.

Article 4 of the UNCITRAL Arbitration Rules provides that:

The parties may be represented or assisted by persons of their choice.

Generally there are no restrictions on who may act as representatives. Craig, Park & Paulsson suggest that, "*It nevertheless cannot be assumed that counsel wishing to advise and/or appear in a foreign jurisdiction unused to hosting international arbitrations will be immune from*

¹⁶³ *International Chamber of Commerce Arbitration*, §5.03.

¹⁶⁴ See generally, *Comparative Arbitration Practice and Public Policies in Arbitration* (Sanders ed.) ICCA Congress Series No.3 (Kluwer, 1987) pp. 41 *et seq.*

*procedural challenges from local authorities or local counsel on the basis of local monopolies of rights of audience.”*¹⁶⁵

For example:

- In Japan the formal issue of the right of representation has been mostly settled, however, through Law No. 65, which came into force on September 1, 1996.

According to the Japan Commercial Arbitration Association:

By this amendment, a foreign lawyer practicing outside of Japan may represent a party to the proceedings of an arbitration case in regard to civil affairs where the place of arbitration is located in Japan and all or some of the parties have domicile or principal place of business in a foreign country. A foreign law solicitor registered in Japan may also represent a party in the above-mentioned case. The long pending issue of whether foreign lawyers may represent a party in international arbitral proceedings conducted in Japan in relation to conflicts with Japan's Lawyers' Law is considered to have been eventually settled.

- In Thailand it is still unclear whether national legislation prohibiting foreign nationals from providing legal services or services in connection with legal disputes in Thailand applies to arbitration. The prevailing view among legal scholars is that the Act should not apply to arbitration but legislative amendment is recommended to settle the issue. The Ministry of Justice has in fact recommended legislation which would carve out an exception from any prohibition by the existing legislation and authorize foreign counsel to represent parties in arbitration in Thailand provided that local counsel has also been engaged.
- In Singapore in order to reverse a court ruling that extended local qualification requirements to international arbitration, those requirements were amended to provide that parties may be represented by any person of their choice and that representatives

¹⁶⁵ *International Chamber of Commerce Arbitration*, §16.05.

need not be lawyers. However if the issues in dispute involve Singaporean law, foreign lawyers must appear with Singaporean co-counsel.

Payment and Fee Funding Arrangements

In many jurisdictions US-style contingency fee arrangements are contrary to bar regulations and in certain jurisdictions based upon the English model they are also illegal.

For many centuries prior to 1968 maintenance and champerty were crimes both at common law and by statute. However the Criminal Law Act 1967 abolished the criminal offences tortious liability for maintenance and champerty, but s.14(2) of the Act provided that “*the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.*” It is thought that the provisions of s.14(2) of the Criminal Law Act 1967 must mean that at least *prima facie* contracts which under the law before 1968 would have been unenforceable for maintenance or champerty are still to be unenforceable therefor, even though the criminality attaching to such contracts has been removed.¹⁶⁶

A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. Champerty has been defined as “*an aggravated form of maintenance*”¹⁶⁷ and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute. For champerty there must not only be interference in the suit but there must be the added factor of a division of the spoils. In *Giles v Thompson*, Lord Mustill was of the opinion that champerty as it

¹⁶⁶ *Chitty on Contracts* (29th Ed.) ¶ 16-049.

¹⁶⁷ *Giles v Thompson* [1993] 3 All ER 321, 328 CA.

related to an agreement by a lawyer to accept payment of his fees measured as a proportion of the damages recovered by his client survived largely as a rule of professional conduct.¹⁶⁸ It is suggested that it would be going too far to treat the rule as being merely one of professional conduct.¹⁶⁹

The rule has, to an extent, been abrogated in England by the introduction of “conditional fee” agreements in 1999. Under a conditional fee agreement an English lawyer may agree that his client will pay no fee unless there was “success” as defined in agreement. In the event that success is achieved the lawyer will be entitled to his normal fee plus an “uplift” of up to 100%. The fee and the uplift will be recoverable from the opposing party.

English lawyers are not bound by these rules in relation to international work, but they must comply with any applicable rule of conduct prescribed by the law or by any national or local bar.

The rule remains in full force in many “off-shore” jurisdictions.

It is notable that the IBA Rules provide that:

Lawyers should not acquire a financial interest in the subject matter of a case which they are conducting.

The CCEL prohibit a lawyer from entering into a *Pactum de Quota Litis* which is defined as “*an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.*” There is an exception for fees charged in proportion to the value of a matter handled by the lawyer in accordance with an

¹⁶⁸ [1994] 1 AC 142, 153-4.

¹⁶⁹ *Chitty on Contracts* (29th Ed.) ¶ 16-055.

officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.¹⁷⁰

Appearing With Local Co-Counsel

As noted above, it may be mandatory in some jurisdictions to appear with local counsel. It may be advisable even if not mandatory, especially if foreign law issues arise or because of language difficulties.

Regard should also be had to the norms of the tribunal; it may be that if counsel shares a background with the tribunal he may be more effective in presenting the client's case, but a large number of factors will dictate the decision whether or not to retain local counsel, including use of the lawyer's status in order to confer confidentiality on communications or it may be necessary to institute parallel proceedings in local courts.

Sometimes appearing with local counsel will have unanticipated benefits. Lord Steyn (one of England's leading arbitration lawyers) tells the story of an arbitration in the Middle East concerning "articles not generally used for peaceful purposes." Counsel was cross-examining a witness through an interpreter when one of the local lawyers, ran forward and whispered in the witness' ear and then returned to his seat. The chairman of the tribunal asked the lawyer what did he think he was doing. The lawyer replied. "I told him that no-one believed what he was saying and that he would have to do better."

Alleging Fraud

In certain jurisdictions there are ethical constraints on counsel alleging fraudulent conduct. An English barrister must not devise facts which will assist in advancing the client's case and must not draft any statement of case, witness statement, affidavit, notice of appeal or

¹⁷⁰ § 3.3.

other document containing any allegation of fraud unless he has clear instructions to make such allegation *and* has before him reasonably credible material which as it stands establishes a *prima facie* case of fraud.¹⁷¹ Failure to exercise this independent professional judgment could lead to the advocate being personally sanctioned.

It must therefore be recognized that counsel may not be willing to advance the case he is instructed to plead if he is not personally satisfied with the credibility of the evidence.

Culturally-Defined Differences as to Advocates Duties to the Tribunal

It is sometimes said that there is a cultural difference between common lawyers and civilian lawyers that arises from the different nature of adversarial and inquisitorial proceedings. It is said that whereas in the adversarial system the court relies solely upon the evidence presented by the parties and adjudicates on competing cases whereas in the inquisitorial system the court itself investigates the case in order to ascertain the facts, this gives rise to differing conceptions of duties to the court.

It is to be doubted that there is anything in this. There will be lawyers in any system whose respect for professional standards of conduct will be less than complete, but there is a huge degree of commonality in the standards applicable in jurisdictions across the globe as will be demonstrated by a comparison of the rules relating to misleading the tribunal.

Misleading the Tribunal

The ABA Model Rules provide:

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law...

¹⁷¹ ¶ 704(c) Code of Conduct of the Bar of England & Wales.

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Unsurprisingly, very similar provisions exist in the Code of Conduct of the Bar of England & Wales, although there is an apparently greater emphasis on a positive duty to assist the court and the administration of justice:

302. A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

708. A barrister when conducting proceedings in Court:

(c) must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues;

(d) must bring any procedural irregularity to the attention of the Court during the hearing and not reserve such matter to be raised on appeal;

(e) must not adduce evidence obtained otherwise than from or through the client or devise facts which will assist in advancing the lay client's case;

(f) must not make a submission which he does not consider to be properly arguable.

The IBA Rules are intended to be of international application, applying to any lawyer of one jurisdiction in relation to his contacts with a lawyer of another jurisdiction or to his activities in another jurisdiction. IBA Rule 6 provides:

Lawyers shall always maintain due respect towards the Court. Lawyers shall without fear defend the interests of their clients and without regard to any unpleasant consequences to themselves or to any other person. Lawyers shall never knowingly give to the Court incorrect information or advice which is to their knowledge contrary to the law.

The CCEL apply mainly in civil law jurisdictions, but the fundamental principles are identical to those applicable in common law jurisdictions. Section 4 deals with relations with the Courts:

4.1. Rules of Conduct in Court

A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.

4.2. Fair Conduct of Proceedings

A lawyer must always have due regard for the fair conduct of proceedings.

4.3. Demeanour in Court

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly without

regard to the lawyer's own interests or to any consequences to him- or herself or to any other person.

4.4. False or Misleading Information

A lawyer shall never knowingly give false or misleading information to the court.

4.5. Extension to Arbitrators etc.

The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.

Malpractice/Misconduct Liability

Anyone contemplating instructing foreign counsel should be aware that not all bar associations or other regulatory authorities require that lawyers carry professional indemnity insurance cover. In addition, some jurisdictions permit lawyers to limit their professional liabilities.

There are also problems as to the enforcement of ethical and other duties of lawyers conducting international arbitrations. The leading English text-book¹⁷² identifies the problem in the following terms:

Difficult and perhaps unanswerable problems arise in determining who (if anyone) has the right or duty to discipline lawyers for breach of professional ethics in international arbitrations. Is it the local bar association at the place of arbitration or the home bar association of the lawyers involved? May a court in the place of arbitration restrain foreign lawyers from improper conduct before an arbitral tribunal? And, on the substantive aspect, do lawyers representing parties in arbitrations outside their own countries have a duty to act in good faith?

Professional bodies impose obligations and ethical duties on advocates, and these may follow them wherever they choose to practise; but that may not be sufficient to assist an arbitral tribunal in controlling the conduct of a party's lawyers in a country that is "foreign" to the professional body concerned. Instead, the tribunal must probably rely on

¹⁷² *Law & Practice of International Commercial Arbitration*, Redfern & Hunter (4th Ed.) § 6-19.

any unofficial sanctions that are available. For example, a party whose advocate acts improperly may be penalised by having to pay the costs incurred in remedying the improper act.

Relations with the Media

Although the question might rarely arise in relation to international arbitrations which are usually confidential, there are significant differences between US practice and that in other jurisdictions with regard to relations with the media.

The ABA Model Rules provide

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

In other jurisdictions, counsel may be prohibited from making any comment on pending cases.

2. Evidentiary Issues

There are several issues that can arise during the course of international arbitral proceedings which may give rise to divergences of practice.

Evidence and Submission (Advocate as Witness)

The ABA Rules prohibit a lawyer from acting as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

1. the testimony relates to an uncontested issue;
2. the testimony relates to the nature and value of legal services rendered in the case;
or
3. disqualification of the lawyer would work substantial hardship on the client.¹⁷³

It is however customary in some jurisdictions for lawyers conducting procedural hearings to swear affidavits or produce witness statements setting out the procedural history, but contentious matters should be avoided. The Cayman Islands Grand Court Rules provide that an affidavit sworn by an attorney shall not be admissible in any cause or matter unless the attorney has direct personal knowledge of the facts and matters to which he deposes and does not appear as advocate in the cause or matter.¹⁷⁴

Arbitral proceedings are likely to be less formal, but that informality can give rise to confusion between evidence and submission. Such confusion may also arise from the practice of some jurisdictions where briefs submitted by the parties' advocates include assertions of fact. Those practices may be appropriate in civil law jurisdictions where the tribunal will critically examine those assertions and make its own investigations. However if the arbitration follows the

¹⁷³ Rule 3.7 Lawyer As Witness.

¹⁷⁴ GCR O.41, r.5.

common law model, care must be taken to ensure that untested evidence disguised as submission does not find its way into the record.

Preparing Witnesses and Witness Statements

In most international arbitrations witness evidence is adduced by witness statements which normally stand as the witness' direct evidence or evidence-in-chief. This is reflected in the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Article 4.

Article 4.3 provides that, "*It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.*" There are however ethical constraints on advocates in certain jurisdictions having contact with witnesses before they give testimony. The weight of informed opinion is that these constraints will not apply in international arbitration.¹⁷⁵

It should also be noted that in some jurisdictions a party cannot be a witness in the sense that only witnesses may give evidence under oath whereas party representatives make declarations. Again, the consensus is that these rules do not apply in international arbitration.¹⁷⁶ Indeed, the IBA Rules of Evidence provide that any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.¹⁷⁷

US-style preparation of witnesses will be alien to foreign lawyers, the Code of Conduct of the Bar of England & Wales expressly prohibits a barrister from rehearsing, practicing or coaching a witness in relation to his evidence.¹⁷⁸ A tribunal of European lawyers will be highly

¹⁷⁵ *Law & Practice of International Commercial Arbitration*, § 6-86; *International Chamber of Commerce Arbitration*, §25.02.

¹⁷⁶ *Law & Practice of International Commercial Arbitration*, § 6-87; *International Chamber of Commerce Arbitration*, §25.02.

¹⁷⁷ Art. 4.2.

¹⁷⁸ §705(a).

suspicious of a witness who appears to have been highly prepared and indeed may expect US witness to have been prepared. Care must therefore be taken.¹⁷⁹

Experts

Undoubtedly unfairly in the experience of the writers, US experts tend to have the reputation internationally of being “hired guns”. It must be recognized that civil lawyers come from a tradition where the tribunal may appoint experts who will have no relationship with the parties. Even lawyers from jurisdictions that follow English procedure will be influenced by developments in English civil procedure over the last 10 years whereby even party-appointed experts owe their primary responsibility to the tribunal.

The IBA Rules of Evidence deal with both party-appointed and tribunal appointed experts.¹⁸⁰ With regard to party-appointed experts the Rules provide that:

- the report must contain,
 - the full name and address of the Party- Appointed Expert, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience;
 - a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - his or her expert opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions;
 - an affirmation of the truth of the Expert Report; and

¹⁷⁹ *Effective Witness Preparation for International Commercial Arbitration: A Practical Guide for Counsel*, D Roney, *Journal of International Arbitration*, Vol.20 No.5 (2003) pp.429-435.

¹⁸⁰ Articles 5 and 6.

- The arbitral 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. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement.

The tribunal may also appoint its own expert who:

- may request a party to provide any relevant and material information or to provide access to any relevant documents, goods, samples, property or site for inspection;
- will report in writing to the arbitral tribunal describing in the report the method, evidence and information used in arriving at the conclusions. The parties may respond to the report;
- may be questioned by the tribunal or the parties.

The IBA Rules of Evidence do not describe the professional standards to be adopted by the experts, but in many international arbitrations regard is now had to the English standards as a great deal of work has been undertaken in that jurisdiction to define the duties of experts culminating in a *Protocol for the Instruction of Experts to give Evidence in Civil Claims* published by the Civil Justice Council in June 2005. The Protocol describes the duties of experts as follows:

Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code of ethics. However ... they have an overriding duty to help the [tribunal] on matters within their expertise. This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.

...

Experts should provide opinions which are independent, regardless of the pressures of litigation. In this context, a useful test of ‘independence’ is that the expert would express the same opinion if given the same instructions by an opposing party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates.

Experts should confine their opinions to matters which are material to the disputes between the parties and provide opinions only in relation to matters which lie within their expertise. Experts should indicate without delay where particular questions or issues fall outside their expertise.

Experts should take into account all material facts before them at the time that they give their opinion. Their reports should set out those facts and any literature or any other material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification.

Experts should inform those instructing them without delay of any change in their opinions on any material matter and the reason for it.

Illegally Obtained Evidence

It may come as a surprise to US lawyers that in those jurisdictions based on English law there is no discretion in civil cases to exclude evidence that has been illegally obtained that is not subject to privilege.¹⁸¹ Nor may evidence be excluded on the grounds that its prejudicial effect outweighs its probative value.¹⁸²

In *Schmeiser v Monsanto Canada Inc.*¹⁸³ the Canadian Federal Court of Appeal held that illegally obtained evidence was generally admissible at common law in a civil dispute, and that s.24 of the Canadian Charter of Rights and Freedoms had no application.

¹⁸¹ *Phipson on Evidence* (16th Ed.) ¶ 38-43.

¹⁸² *ibid.*

¹⁸³ (2002) 318 DLR (4th) 31.

Improperly Obtained Privileged Documents

It will have been observed that certain jurisdictions do not recognize certain categories of privilege. However in those jurisdictions where privilege is accepted (and this is likely to be in most international arbitrations) even where the US exclusionary rule is not recognized material obtained in breach of privilege is likely to be regarded as inadmissible unless the material itself was part of a criminal or fraudulent proceeding or was a part of an attempt to obtain advice for the purpose of carrying out a fraud.

The obligation of an English barrister who comes into possession of a privileged document is to return it unread. If he has read the document he must withdraw from the case if he can do so without prejudice to his client. If his withdrawal would prejudice his client he may make use of the documents but he must inform his opponent of his knowledge of the document and of the circumstances, so far as known to him, in which the document was obtained and of his intention to use it. In the event of objection to the use of such a document it is for the Court to determine what use, if any, may be made of it. It is also possible that the owner of document may take steps to restrain counsel from acting.¹⁸⁴

V. CONCLUSION

Whether engaged in a multi-jurisdictional, international transactional or dispute resolution construction practice, a lawyer must be aware of the same ethical issues as when practicing domestically—and then some. This is because, first, the ethical requirements of the lawyer’s “home” jurisdiction invariably continue to apply when practicing across borders; second, there is a high degree of consensus across various ethical regimes regarding general categories of ethical obligations. To the extent that a lawyer’s activities may trigger application

¹⁸⁴ *Ablitt v Mills & Reeve, Times*, October 25, 1995.

of ethical obligations in another country, therefore, similar issues may arise as in the lawyer's domestic practice, such as issues of client confidentiality and conflicts of interest. What makes international practice different from purely domestic practice are added layers of complexity that are attributable to (1) compliance with additional ethical norms that may be similar to, yet not necessarily identical with, those of the lawyer's "home" jurisdiction; (2) different customs and norms that, while not strictly "ethical" in nature, are clearly relevant to the lawyer's ethical obligations, including the obligation to provide competent representation; and (3) laws that, by design, apply specifically to international matters, such as the Foreign Corrupt Practices Act.

What distinguishes ethical issues in an international construction practice from ethical issues in international commercial practice generally are the same factors that distinguish domestic construction work from domestic commercial work, particularly the number of parties potentially involved in a given project. As in domestic practice, the multiplicity of actors, for example, presents ample opportunity for cooperation among parties with similar interests. Ethical issues for a lawyer may arise when the client's cooperation with other participants in the process becomes too close, as where it leads to improper influence of public officials involved in the project. At the other end of the spectrum, there is the potential for conflicting ethical obligations, for example when the same lawyer represents parties with similar—yet not identical—interests.

The additional layers of ethical rules encountered in an international practice, combined with the inherent complexity of relationships in a construction project, present challenges to a lawyer practicing across borders. To meet these challenges, lawyers should bear certain considerations in mind. First, a lawyer should consider what ethical rules might apply to whatever representation is being undertaken. In both transactional and dispute resolution matters

there are often multiple jurisdictions where the effect of the lawyer's activity, at one point or another during the representation, will be felt. Second, as with any foray into a new jurisdiction or practice area, it is important—and may be legally required—to retain local counsel to advise on peculiarities of local law, including local ethics rules. Third, practicing construction law abroad requires the ability to remain alert and sensitive to an even greater range of personal and cultural styles and customs than that found in domestic work. Because ethical issues do not typically announce themselves, lawyers practicing abroad must actively look for and address them.