CHAPTER 4

Harmonising Cultural Differences in International Arbitration: The Role of Parties' Reasonable Expectations and Counsel's Ethical Rules

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§4.01 INTRODUCTION

You can take your English car to France, but that doesn't mean that you can drive on the left-hand side.

The essence of this analogy guided a Stockholm Chamber of Commerce ('SCC') Tribunal's treatment of a binding party agreement to apply certain international rules of evidence in a Stockholm-seated arbitration. As a result, the Tribunal qualified those international rules and the parties' agreement by reference to Swedish domestic rules of procedure – much to the dissatisfaction of one of the parties. The Tribunal's approach in that case raises an interesting question of how to address and resolve cultural differences in arbitral proceedings, and the role of parties' expectations in guiding arbitral proceedings.

In this chapter, we discuss the role of culture in international arbitration, particularly in the context of issues of procedure and ethics. With respect to procedural issues, we conclude that recent attempts by the arbitration community to harness the benefit of cultural divergences are laudable, but they have not been without challenges, and we suggest that there is space for further consideration of how culture ought properly to influence procedural matters, and what role the parties' reasonable expectations should play in striking the right balance.

With respect to ethics, we observe that these are closely connected with arbitrators' and counsel's legal culture. Those actors import their ethical standards into the conduct of arbitration. However, ethics are not divorced from procedural consid

erations. To the contrary, national ethical rules have often evolved as a direct result of national procedural norms. When you import national procedures into international arbitration without also importing corresponding ethical standards, asymmetry can result between the parties because of their counsel's unequal ethical footing, which in turn can undermine procedural fairness and effectiveness. We therefore suggest that further harmonisation of ethical standards applicable in international arbitration would enhance the process of arbitration in the longer term even though it might limit the influence of cultural diversity on the arbitral process.

§4.02 ROLE OF CULTURE IN INTERNATIONAL ARBITRATION

When we refer to culture in international arbitration, we mean the set of values and instincts that individual parties, counsel, or arbitrators bring into the arbitration by virtue of their experience and background. As regards these participants, their culture flows from their nationalities, place of legal or commercial training, the nature of the professional practice that they have developed, and any judicial or other adjudicatory experience that they may have had. It has also been suggested that arbitral institutions are influenced by cultural factors such as the legal tradition of their local system.[1]

The expectations of parties, arbitrators and counsel in arbitration vary depending on their respective cultures. Participants often expect the arbitration process to be similar to the domestic processes familiar to them and the legal system or national litigation framework that they are accustomed to. While participants in arbitration do not usually expect a specific substantive outcome based on their familiarity with a particular legal tradition, they do expect the arbitration process to be predictable. That is not an unreasonable expectation given that party consent is the lifeblood of arbitration, and arbitration promises customisable procedures that reflect the parties' agreement.

Globalisation has ushered in an era of greater cultural diversity in transnational legal practices.[2] And nowhere has that been more evident than in international commercial arbitration. That is an overwhelmingly good thing too. Cultural diversity reflects arbitration's spirit of inclusivity. That spirit has allowed arbitration to expand and accommodate new perspectives from different legal traditions. Moreover, the flexibility of arbitration allows parties to influence the cultural make-up of a tribunal to allow for a variety of views among the people who will be deciding their dispute. This in turn guarantees that the further development of arbitration will be rooted in a multiplicity of cultural perspectives. As Professors Jan Paulsson and John Barkett have remarked, '[a]s the arbitral process has become global in its reach, new participants demand opportunities to participate in the process – indeed to shape it – rather than

1. W. Kidane, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration,* International Arbitration Law Library, vol. 23, 289-290 (Kluwer Law International 2011).
2. M. D'Silva, *A New Legal Ethics Education Paradigm: Culture and Values in International Arbitration,* 23 Legal Educ. Rev. 83, 98 (2013) https://www.researchgate.net/publication/256064138_A_New_Paradigm_for_Legal_Ethics_Education_Culture_and_Values_in_International_Commercial_Arbitration (accessed 30 April 2020).

accept its consequences in silence. No one can seriously imagine that the process could thrive, or even survive, as a closed shop'.[3]

Cultural diversity is therefore a desirable and inevitable consequence of arbitration's success as a global means of international dispute resolution. That presents both opportunities and challenges.

However, if the influence of cultural diversity is not anticipated by participants in the arbitral process, it can lead to difficulties. Participants could unintentionally misunderstand or misinterpret actions or omissions by parties, counsel or arbitrators on the basis of the practice in their own national jurisdiction. Parties might deploy strategies acceptable in their national legal traditions that in arbitration are considered 'guerilla tactics'.[4] Moreover, the infusion by a tribunal of its own cultural norms to supplant the expectations of the parties could leave some parties cold on their experience of the arbitral process. These negative aspects of cultural diversity can be damaging to the legitimacy of arbitration because while they are often imperceptible, they can undermine certainty and user confidence in the process.

To better understand the impact of culture on arbitration, in the next section, we explore the challenges that arise out of differences in procedure between common law and civil law jurisdictions. We then go on to consider the challenges that arise out of differences in ethical obligations for counsel in different jurisdictions.

§4.03 PROCEDURE: THE DIVERGENCE BETWEEN COMMON LAW AND CIVIL LAW APPROACHES

The primary driver of cultural difference in international arbitration, certainly in terms of procedural instincts, is whether a participant has a civil law or common law background, or experience of some other system, such as Islamic law. This particularly affects evidentiary issues and expectations regarding the role and responsibilities of the arbitrators.

In this section, we explore some of the differences between common law and civil law traditions. While we identify certain generic differences, national legal systems are not identical and the general observations in this chapter are not, therefore, necessarily true of all individual civil or common law systems.

The general approach of civil and common law traditions to dispute adjudication is different. In common law traditions, the system tends to be 'adversarial'. Parties' counsel advocate their clients' respective cases in opposition to each other, while serving an overriding duty to the court or tribunal not to mislead it and to ensure that the adjudicator has all of the facts and legal points necessary to her in order to apply the law correctly and make a determination. By contrast, the civil law tradition tends to follow an 'inquisitorial' system. In the civil law system, the adjudicator is presumed to know the law. She is tasked with investigating the case and establishing the relevant

3. J.M. Barkett & J. Paulsson, *The Myth of Culture Clash in International Commercial Arbitration*, 5 FIU L. Rev. 1, 11 (2009).
4. *See*, e.g., G.J. Horvath & S. Wilske (eds), *Guerrilla Tactics in International Arbitration* (Kluwer Law International 2013).

factual and legal matrix, with the assistance of the parties and the counsel as directed by the adjudicator.

That distinction between the systems informs respective attitudes to certain procedural issues. For example, in an adversarial system, parties are usually obliged to disclose all relevant evidence in their possession, including evidence adverse to them. The same may apply to legal precedents: in England, a party must bring all relevant legal precedents to the court's attention, including precedents adverse to its case. In addition, the common law adversarial system relies heavily on witness examinations and in-person hearings to present the parties' cases to the adjudicator, explain the evidence and the law, and test the truthfulness and credibility of witnesses. In a civil law inquisitorial system, on the other hand, parties are not required to disclose all relevant evidence: they can pick and choose which documents they present to the court, and it is for the adjudicator to determine whether she has everything that she wants to see. Moreover, there is a general view that a witness cannot be relied upon to give reliable evidence, and that contemporaneous documents therefore constitute weightier evidence.[5] The adjudicator in a civil law tradition is, therefore, likely to value the objective information provided by documentary evidence and expert opinions over the relatively more subjective information provided by the parties and their witnesses.

It follows that whether an arbitrator is more familiar with an inquisitorial or adversarial process could influence how such an arbitrator would seek to shape the procedure of the arbitration that she presides over.

In a recent speech, Professor Bernard Hanotiau expressed the view that it may be common law arbitrators who tend to be more inquisitorial in their approach, as he observes them to be more interventionist during oral submissions.[6] However, whether or not an arbitrator asks questions and tests the submissions and evidence at an oral hearing is not a hallmark of the distinction between adversarial and inquisitorial processes. Indeed, in the English courts – a quintessentially adversarial forum – it is common for judges to intervene during the oral submissions in order to indicate the points that they may be sceptical of or otherwise struggling to rationalise with the facts and the law. That is an exercise in ensuring that the adjudicator understands the case presented by a party; it is not intended to usurp the role of the parties in presenting their own case. Perhaps most interesting in the context of this chapter is Professor Hanotiau's citation of a survey by the Swiss Arbitration Association in which Swiss in-house lawyers unanimously said that truth 'was not their primary concern'.[7] What they instead wanted was for arbitrators 'to impose a peace treaty on commercial warfare'.[8] Professor Hanotiau went on to identify the parties' control of the evidence

5. A.M. Kubalczyk, *Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation*, 3(1) Groningen J. Int'l L., 85, 90 (2015).
6. C. Sanderson, *Hanotiau on an Arbitrator's Duty*, GAR (2019), https://globalarbitrationreview.com/article/1211462/hanotiau-on-an-arbitrator%E2%80%99s-duty (accessed 30 April 2020).
7. C. Sanderson, *Hanotiau on an Arbitrator's Duty*, GAR (2019), https://globalarbitrationreview.com/article/1211462/hanotiau-on-an-arbitrator%E2%80%99s-duty (accessed 30 April 2020).
8. C. Sanderson, *Hanotiau on an Arbitrator's Duty*, GAR (2019), https://globalarbitrationreview.com/article/1211462/hanotiau-on-an-arbitrator%E2%80%99s-duty (accessed 30 April 2020), citing the 2009 annual meeting of the Swiss Arbitration Association held in Zürich, Switzerland.

produced in arbitral proceedings as an impediment to a search for the truth, contrasting arbitration and English court litigation in this respect.

Establishing truth may be too lofty an ambition for the typical arbitral process. However, what an arbitral process must do is to live up to the parties' expectations. After all, they are the ones paying for the process. That means giving each party an opportunity to present its case in the most efficient manner possible and to reach a correct and enforceable outcome based on a well-reasoned and internally-consistent award.

So how, principally, do the differences between inquisitorial and adversarial instincts impact arbitral processes?

First, pursuant to the emphasis on oral evidence and hearings, common law traditions have brief pleadings, often with no evidence or legal arguments. The details and evidence are provided subsequently and tied together with the submissions in skeleton arguments and orally during the hearing. These are often referred to in international arbitration as 'pleading-style' submissions. In contrast, civil law traditions have lengthy pleadings which include facts and legal arguments along with exhibits. These are referred to as 'memorial-style' submissions. Memorial-style submissions dominate the arbitral landscape.[9]

The overall process of an arbitration will vary widely depending on which submission model is followed, and imposing one against the expectations of one of the parties is likely to leave that party displeased. Establishing which of those expectations is reasonable is therefore important for promoting the popularity and legitimacy of arbitration as a means of dispute resolution.

Second, by extension of the emphasis on oral evidence, hearings and trials in common law traditions are much longer than in civil law traditions. Where crucial facts can be established on the basis of written documents, hearings are often not necessary in civil law jurisdictions. Moreover, scepticism as to the value of witness evidence deprioritises the examination of witnesses in the processes of civil courts, and the judges tend to lead any examination that may occur. By contrast, common law jurisdictions place great importance on witness testimony, and allow for extensive questioning by the parties of witnesses during the oral hearing to establish their credibility or lack thereof. It takes time in cross-examination to extract objective answers from a witness predisposed to give highly spun and subjective accounts of events or to expose falsehoods, fabrication or exaggeration presented by a witness. A civil law judge who is agnostic as to the outcome of a civil case (as long as it is an objectively correct outcome) is not motivated in the same way as a party to test the evidence of a witness, which may explain why in civil law systems the solution has been to marginalise witness evidence rather than to develop time-consuming processes to test such evidence.

International arbitration has settled on a half-way house when it comes to the examination of witnesses. Hearings are typically much shorter than English or US court hearings, and the examination of witnesses is targeted and more restrained in tone. The

9. Although parties to an all-English arbitration seated in London are still likely to deploy pleading-style submissions and a process more akin to the English court process.

questioning tends to be led by the parties rather than the tribunals, and cross-examination is generally accepted as a means of testing witness evidence. However, this compromise between civil and common law traditions does not meet with universal approval. In the authors' experience, many civil practitioners deem that established practice is too common-law-centric, while some common lawyers bristle at the instinct of civil law arbitrators to discount witness evidence. Again, managing the parties' expectations and determining which expectations are reasonable and legitimate help ensure that the parties come away satisfied with the fairness of the process even if they do not like the substantive outcome.

Third, in common law jurisdictions, experts are usually appointed by the parties. In civil law jurisdictions, they tend to be appointed by the adjudicator, either upon the request of the parties or ex officio. The prevailing view of counsel in arbitration (but certainly not the unanimous one) appears to be that parties and their counsel prefer to keep control over the appointment of experts. One of the criticisms of encouraging tribunals to appoint their own experts is that it usually leads to the proliferation of experts as parties cannot be prohibited in arbitration from appointing their own experts in addition to the tribunal's expert.[10] Tribunal-appointed experts therefore usually result in higher overall costs.[11]

Fourth, in terms of documentary evidence, because of the duty on parties under common law systems to produce any relevant document, including internal documents and documents contrary to the party's interests, discovery procedures in the adversarial system are key. Contrary to this, discovery procedures are limited in civil law proceedings, as the dispute is usually determined on the basis of evidence voluntarily produced by the parties. In addition, privilege is a common law concept which, by and large, has no direct equivalent in civil law traditions. Lawyer confidentiality is used in civil law jurisdictions instead.

On documentary evidence, arbitration has again broadly settled on a compromise between the prevailing common law and civil law traditions. Critics of disclosure complain that it is costly and wasteful, adding little to the process, while supporters of disclosure complain that the limited power of arbitrators to sanction parties and counsel enables unscrupulous parties to hide documents damaging to their cases, undermining the effectiveness and value of the disclosure process.

As the paragraphs above illustrate, there are a number of fundamental differences in procedure between civil and common law traditions. It follows that legal proceedings between Swedish parties before a Swedish adjudicator in Stockholm look different from legal proceedings between English parties before an English adjudicator in London. These differences can come to a head when the traditions collide in

10. *See* CIArb, *Party-Appointed and Tribunal-Appointed Experts,* International Arbitration Practice Guidelines, 1–3 (2015), *see also* p. 3 ('It is widely accepted that a party's right to be given a fair opportunity to present their case includes a right to call independent experts'), (accessed 1 May 2020), https://www.ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf.
11. *See* N. Schmidt-Ahrendts, *Expert Teaming – Bridging the Divide Between Party-Appointed and Tribunal-Appointed Experts*, 43 Victoria U. Wellington L. Rev. 653, 655 (2012), http://www.nzlii.org/nz/journals/VUWLawRw/2012/34.pdf (accessed 1 May 2020).

arbitration, as they might if you had, say, an arbitration seated in London, between a US party represented by US counsel and a French party represented by French counsel, presided over by a Swedish arbitrator.

We believe that one of the key reasons giving rise to the dissatisfaction on both sides of the debate is the different ethical obligations placed on counsel in different jurisdictions as a result of the legal system within which they operate, which have a significant impact on procedural compliance and performance. That subject is addressed later in this piece.

At this stage, we observe simply that where the parties' expectations are not met in procedural matters, it can lead to feelings of injustice or complaints about costs that can undermine user satisfaction in the process. A tribunal must therefore be careful not to allow its own cultural views on document production – and other procedural aspects – to supplant the *reasonable* expectations of the parties. Of course, determining the reasonable expectations of the parties on questions of procedure can be challenging, but it is suggested that arbitrators should resist defaulting to their own national systems for guidance unless that outcome is understood to have been within the range of outcomes that the parties reasonably expected.

Before looking at factors that tribunals consider to ascertain the parties' reasonable expectation, we examine in the following section attempts by the arbitration community to harmonise differing procedural traditions.

§4.04 HARMONISATION IN INTERNATIONAL ARBITRATION

Due to the differences in procedural traditions across the world, harmonising the rules of international arbitration has been a challenge. Institutional rules usually address only the powers of tribunals to set procedure, without prescribing the procedures themselves. This leaves it up to the tribunal to set appropriate procedures guided by any agreements of the parties and subject to the norms of due process, fairness and any mandatory rules of *lex arbitri*. For example, the London Court of International Arbitration ('LCIA'),[12] International Centre for Settlement of Investment Disputes ('ICSID'),[13] International Chamber of Commerce ('ICC'),[14] United Nations Commission on International Trade Law ('UNCITRAL'),[15] SCC,[16] Singapore International Arbitration Centre ('SIAC')[17] and Hong Kong International Arbitration Centre ('HKIAC')

12. LCIA Arbitration Rules, Art. 14 (2014), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2014 (accessed 30 April 2020).
13. ICSID Arbitration Rules, rule 19 (2006), http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap03.htm (accessed 30 April 2020).
14. ICC Arbitration Rules, Art. 22 (2017), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (accessed 30 April 2020).
15. UNCITRAL Arbitration Rules, Art. 17 (as adopted in 2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf (accessed 30 April 2020).
16. SCC Arbitration Rules, Art. 23 (2017), https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf (accessed 30 April 2020).
17. SIAC Rules, Art. 19 (2016), https://www.siac.org.sg/our-rules/rules/siac-rules-2016 (accessed 30 April 2020).

Rules[18] all provide wide discretion for the tribunal to conduct the proceedings as they think best.

Due process in arbitration is embodied in the duties of tribunals, for example, to 'conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case' (SCC Rules, Article 23(2)),[19] or to 'act fairly and impartially and ensure that each party has a reasonable opportunity to present its case' (ICC Rules, Article 22.4),[20] or to 'act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s)' (LCIA Rules, Article 14.4(i)).[21] However, what constitutes a 'reasonable opportunity to present its case' is likely to be understood differently by parties and counsel based on cultural differences between them. What might be due process for the common lawyer in respect of document disclosure might be unduly burdensome and costly in the eyes of a civil lawyer.

In the past, some of these cultural differences have been resolved through the harmonisation of procedural and evidentiary processes. The process of harmonisation in the context of international arbitration started with the New York Convention and the UNCITRAL Model Law[22] and has continued with, for example, various guides issued by the International Bar Association ('IBA') Arbitration Committee, including most notably the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules'). Professor Gabrielle Kauffman-Kohler has noted that there has been convergence of practice in international arbitration on a number of procedural points outside the ambit of the IBA Rules too.[23] Having certainty about procedures helps to de-bias decision-making and eliminate what has been referred to as the 'dark side of arbitral discretion'.[24]

Much of the recent debate on soft law in international arbitration has, however, revolved around the December 2018 launch of the Rules on the Efficient Conduct of Proceedings in International Arbitration (the 'Prague Rules') that are seen as a civil law

18. HKIAC Arbitration Rules, Art. 13 (2018), https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (accessed 30 April 2020).
19. SCC Arbitration Rules, Art. 23(2).
20. ICC Arbitration Rules, Art. 22(4).
21. LCIA Arbitration Rules, Art. 14(4)(i).
22. G. Kaufmann-Kohler, *Globalization of Arbitral Procedure,* 36 Vand. J. Transnat'l L. 1312, 1321 (2003); *See, also,* T.T Landau & R. Weeramantry, *A Pause for Thought,* in *International Arbitration: The Coming of a New Age?,* ICCA Congress Series, vol. 17 (Albert Jan Van den Berg ed. Kluwer Law International 2013), 496 adding the UNCITRAL Rules of 1976 as another ground-breaking instrument in the harmonisation process.
23. G. Kaufmann-Kohler, *Globalization of Arbitral Procedure,* 36 Vand. J. Transnat'l L. 1312, 1325–1330 (2003).
24. K.P. Berger, *Common Law vs. Civil Law in International Arbitration: The Beginning or the End?* 36 J. Int'l Arb. 295, 304–305, citing W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion,* in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration, Sponsored by Freshfields Bruckhaus Deringer,* 331, paras 17–91 et seq. (Julian Lew & Loukas Mistelis eds Kluwer Law International 2006).

response to what is perceived by some as the common law approach enshrined in the IBA Rules.[25] This development therefore justifies a brief detour.

Intended to provide 'an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between [p]arties from different legal traditions',[26] the IBA Rules are supposed to bridge the gap between common and civil law approaches to document production. They do not provide for broad discovery but instead contemplate the disclosure of specific documents or narrow categories of documents that are relevant and material to the outcome of the case and that are in the possession, custody or control of the opposing party. Due to their transcultural nature and high levels of acceptance, tribunals often look to the IBA Rules for guidance even in the absence of a positive agreement between the parties to apply the rules.

However, some participants in international arbitration believe that there is a direct link between the adoption of the IBA Rules and the increasing cost and time inefficiencies of arbitration proceedings. They consider that the IBA Rules adhere too closely to the common law approach to evidence and have led to the importation of techniques associated with the adversarial system such as extensive discovery phases and lengthy cross-examination of witnesses.[27] As will be explored later in this chapter, these criticisms appear to emanate most prominently from civil lawyers whose national systems do not have specific or wide-ranging ethical rules designed to control and safeguard the disclosure and witness examination processes typical for a common law system. That is not surprising given that extensive discovery is not part of those legal traditions – if you do not have wide-ranging disclosure rules, you do not need wide-ranging ethical rules to govern such processes.

The pockets of criticism of the IBA Rules led to the development of the Prague Rules, conceptualised predominantly by Russian and Eastern European lawyers. The Prague Rules provide a 'menu of options said to be more palatable to civil lawyers'.[28] The Prague Rules' civil law lilt is revealed by their original name: 'Inquisitorial Rules on the Taking of Evidence in International Arbitration'. Article 4.2 of the Prague Rules

25. A. Rombach & H. Shalbanava, *The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?* 17 SchiedsVZ, 53, 53–60 (2019); D.G. Henriques, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration,* in *ASA Bulletin,* vol. 36 Issue 2, (Matthias Scherer ed. Kluwer Law International 2018), 351–363; M. McIlwrath, *The Prague Rules: The Real Cultural War Isn't Over Civil vs Common Law,* Kluwer Arbitration Blog (2018), http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/?print = pdf (accessed 30 April 2020); P. Costa e Silva, *Arbitration, Jurisdiction and Culture: Apropos the Rules of Prague*, Kluwer Arbitration Blog (2018), http://arbitrationblog.kluwerarbitration.com/2018/07/16/arbitration-jurisdiction-culture-apropos-rules-prague-part/ (accessed 30 April 2020).
26. IBA Rules on the Taking of Evidence in International Arbitration, Preamble, p. 4 (29 May 2010) ('IBA Rules'), https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx (accessed 4 May 2020).
27. A. Rombach & H. Shalbanava, *The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?* 17 SchiedsVZ, 53, 54 (2019).
28. F. Singarajah, *Cultural Differences in International Arbitration*, PLC Arbitration Blog (2020), http://arbitrationblog.practicallaw.com/cultural-differences-in-international-arbitration/ (accessed 30 April 2020).

demonstrates the fundamental difference in approach promoted by these new rules, encouraging the tribunal and parties to 'avoid any form of document production, including e-discovery'.

Some practitioners argue that users of arbitration are not harmed by having the ability to choose between different sets of evidentiary guidelines leaning more or less towards civil or common law traditions, while others say that the Prague Rules create more problems than they solve.[29] A detailed assessment of the Prague Rules vis-à-vis the IBA Rules is beyond the scope of this chapter but their launch demonstrates that even with the IBA Rules, which have enjoyed near-universal acceptance, there are critics who consider that arbitration should look to different cultural influences for guidance.

The 2018 Queen Mary Survey on the Evolution of Arbitration indicates that stakeholders want clarity on provisions ranging from independence and impartiality of arbitrators to the conduct of parties and their advisors.[30] Most stakeholders consider arbitral institutions and arbitration interest groups (such as the Chartered Institute of Arbitrators ('CIArb'), International Council for Commercial Arbitration ('ICCA') and IBA to be best placed to influence future harmonisation in these areas.[31]

As a practical matter, certainty in arbitration can be achieved through harmonising standards, guidelines and approaches and through the consensual procedural agreements and the clarity of tribunal interventions in their procedural orders, especially the initial Procedural Order No. 1. It is also important not to lose sight of the fact that diversity and flexibility are among the strengths of arbitration. The legitimate and reasonable expectations of parties to arbitration should allow us to chart a course balancing the twin goals of harmonisation and diversity.

§4.05 THE CASE IN FAVOUR OF THE PARTIES' REASONABLE EXPECTATIONS

The exercise of a tribunal's discretion on questions of procedure undoubtedly has the potential to cause party dissatisfaction, especially where unexpected cultural influences drive an outcome that is unpopular with one or more of the parties. Procedural harmonisation helps to limit unexpected outcomes, but harmonisation can

29. M. McIlwrath, *The Prague Rules: The Real Cultural War Isn't Over Civil vs Common Law,* Kluwer Arbitration Blog (2018), http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/?print=pdf (accessed 30 April 2020).
30. *See* Queen Mary University of London, White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration' Chart 38, p. 34, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 30 April 2020).
31. *See* Queen Mary University of London, White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration' Chart 39, p. 36, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 30 April 2020).

only go so far if arbitration wishes to preserve the flexibility that is one of its hallmarks. The risk of unexpected procedural outcomes will therefore persist.

To limit that risk, arbitrators should be sensitive to differences in the parties' legal cultures. Tribunals should consider what may constitute due process and fairness in different jurisdictions, and whether it is reasonable for a party to expect such cultural influences to be taken into account in respect of any given procedural issue. The consensual nature of arbitration and the market-driven system in which it operates dictates that a tribunal's ultimate focus should be on user satisfaction: users must feel the benefits of pursuing arbitration over court litigation and of using an international procedure over a national one. In order to do so, tribunals must determine the parties' reasonable expectations in the conduct of the proceedings against the overarching principle of fairness. The parties' culture will inform those expectations.

Objective factors including, for instance, the seat of the arbitration, governing law of the relevant agreement, nationality of the parties, and place of performance of the contract could be considered in evaluating parties' reasonable procedural expectations. In all instances, this assessment will require consideration of all the circumstances of the case.

It is not possible to be prescriptive about all the relevant circumstances that could drive parties' reasonable procedural expectations, but experienced practitioners and arbitrators will have a strong sense of what is *not* a reasonable expectation. One such example that raised a few smiles was the claim by a party from a south Asian jurisdiction that the merits hearing in their arbitration should be delayed because that party had a reasonable expectation not to be subjected to the risk of catching a cold by having to travel to London for hearings in winter, even though it had agreed to London-seated arbitration.

But sometimes the question of what is or is not a reasonable expectation is not so easy to determine. For example, is it reasonable for an arbitrator to consider that the reason she was appointed for a matter was to bring to the table her own specific cultural and legal perspectives, even if those diverge from the governing law and the *lex arbitri*, and if so, should that be treated as part of a party's reasonable expectations?

At a recent closed-door conference, a number of eminent arbitrators debated that question. Specifically, they considered whether, when appointed to adjudicate an English law governed dispute, non-English arbitrators should consider themselves bound by precedent in the same manner as an English judge would be. It was surprising that there was substantial support for both 'yes' and 'no' answers to that question. Some clearly considered that the binding nature of precedent was part of English law and must therefore be adhered to, while others considered that as a foreign lawyer it was proper for them to bring their foreign perspective into the adjudication process and to apply their experience to interpret what they considered English law to be, even if that view might differ from the leading court decision on that question. The reason given for this was that it is in the nature of law to evolve, and an arbitrator ought to be free to propose that evolution in the same manner as the Supreme Court can do in England.

While the position of arbitrators on this topic is not uniform, the English courts have held that arbitrators in English-law governed disputes are bound by the doctrine

of precedent, and that failure to abide by it may give grounds to the setting aside of an award.[32] But what if one is sitting in a foreign-seated arbitration where the governing law of the contract is English law? Thus, while arbitrators in English-law governed proceedings seated in England may find themselves bound by precedent or risk their award being set aside, their counterparts in a foreign-seated arbitration may not feel compelled to operate under such constraints. Given the divergence of views among arbitrators as to how much of their own legal tradition they should import into cases they adjudicate, this is an important factor for parties and appointing authorities to bear in mind when selecting arbitrators for specific disputes. It is a dynamic that complicates efforts to identify what the parties' reasonable expectations of their tribunal might be in any given case, and it is a dynamic that therefore risks provoking dissatisfaction among one or more of the parties in the face of any unexpected procedural or, indeed, merits decision. What this serves to highlight is that having regard to the parties' expectations will not guarantee user satisfaction. Where parties' expectations conflict, there will always be a risk of discord. But the parties' reasonable expectations should play some role in guiding the tribunal's perspective.

§4.06 DIFFERENCES IN ETHICAL RULES

If procedural decisions should be informed by the parties' reasonable expectations as to the conduct of proceedings, what role do professional ethical rules play in shaping the conduct of arbitral proceedings?

Professional ethical rules guide counsel's approach to the procedure of international arbitration. Where procedures are the same or similar to those that counsel are accustomed to in their home jurisdiction, it is likely that they will import the same ethical standards to their performance of such procedures in arbitration, unless their national systems exempt them from doing so. English lawyers, for example, have prominent professional obligations preventing them from suppressing disclosure of damaging documents, and rules preventing them from accusing opposing parties, counsel or witnesses of dishonesty in the absence of clear evidence.[33] Such ethical traditions safeguard the proper performance of evidentiary processes in England.

32. *John Sisk & Son Ltd v. Carmel Building Services Ltd* [2016] EWHC 806 (TCC) (15 April 2016) (refusal to set aside on the basis that the arbitrator correctly followed precedent in relation to a costs claim); *Carboex SA v. Louis Dreyfus Commodities Suisse SA* [2011] EWHC 1165 (Comm) (setting aside on basis that, among other errors of law, the tribunal disregarded English Court of Appeal precedent); *Ocean Marine Navigation Ltd v. Koch Carbon Inc.* [2003] All ER 564 (remarking that the principles set forth by precedent were 'binding on the arbitrator'). *See generally*, G. Rizzo Amaral, *Judicial Precedent and Arbitration – Are Arbitrators Bound by Judicial Precedent? A Comparative Study among England, Scotland, the United States and Brazil* in *Rev. Brasileira de Arbitragem* vol. 14 (J.B. Lee & D. de Andrade Levy eds Kluwer Law International 2017), 49, 63–68.

33. *Medcalf v. Mardell* [2002] UKHL 27 ('This particular professional duty sometimes poses difficult problems for practitioners. Making allegations of dishonesty without adequate grounds for doing so may be improper conduct. Not making allegation of dishonesty where it is proper to make such allegations may amount to dereliction of duty.'); *see also* the Bar Standards Board ('BSB') Misconduct, Rule C7 (read in conjunction with gC96), https://www.barstandardsboard

But where counsel's home court system does not contain procedural concepts that the arbitral process has introduced, such counsel will find no guidance in their national ethical rules to guide their conduct in arbitration. This can give rise to difficulties.

For one thing, it can create situations where parties find themselves fighting on unequal terms, with their respective counsel bound by different ethical restrictions. This can happen in two ways: either opposing counsel's ethical rules differ in a way that allows for a different interpretation of procedural rules – with one interpretation inevitably being more advantageous than the other, such as the US approach to witness preparation; or the opposing counsel is subject to no national ethical rules at all that would restrict certain activities that could favour her client, such as where there is no assumed restriction on unilateral communications with an opponent's witnesses.

Ethical culture is an important element of a party's expectations of the arbitral process. A perception of inequality because the opponent's conduct would be unethical in the party's home jurisdiction, can undermine confidence in the arbitral process and cause dissatisfaction among its users. Putting the parties on an equal ethical footing in arbitration would therefore reduce the scope for conflict and increase fairness and predictability in the process.

In this section, we examine four areas of procedure impacted by ethical obligations on counsel, and we consider whether arbitraging ethical culture in arbitration is fair game or whether it undermines the legitimacy of arbitration as a means of resolving disputes fairly and should therefore be tackled by the arbitral community. The four areas of procedure considered in this section are: (i) witness preparation, (ii) constitution of the tribunal and the appointment of counsel, (iii) disclosure, and (iv) alleging counsel misconduct.

[A] Witness Preparation

Perhaps the most well-known procedural issue giving rise to ethical conflict in the context of international arbitration is the preparation of witnesses for oral examination. Much has been written about this topic.[34] There is general agreement in international arbitration that *some* pre-testimonial interaction with a witness is permissible. But within the parameters set by the applicable arbitral rules, parties and their counsel can position themselves on various points of the spectrum depending on the ethical rules of their place of legal qualification.

In the United States, failure to prepare a witness to the fullest allowable degree may constitute ethical misconduct or malpractice.[35] But while US attorneys can

.org.uk/uploads/assets/de77ead9-9400-4c9d-bef91353ca9e5345/da444eba-fa2e-40c2-b9ff7f705f462807/second-edition-test31072019104713.pdf (accessed 29 September 2020),

34. *See, e.g.*, C.A. Rogers, *Ethics in International Arbitration,* 100 (OUP 2014).

35. C.A. Rogers, *Ethics in International Arbitration*, 108 (OUP 2014) (citing, among other, discussion in District of Columbia Bar, *Opinion No. 79: Limitations on a Lawyer's Participation in the Preparation of Witness Testimony*, Code Prof. Resp. & Opinion D.C. Bar Legal Ethics Comm. (1991) 138, 139). *See* J. Gaal & L.P DiLorenzo, *Ten Degrees of Separation, How to Avoid Crossing the Line on Witness Preparation*, 2018 NYSBA Journal 26, 26 (2018) ('the failure to [prepare a

conduct a mock cross-examination on the evidence as a means of preparing a witness, solicitors and barristers preparing a witness to give evidence in the English court may not do so.[36] The court in *R v. Momodou*[37] aptly summarised the position under English law 'There is no place for witness training in this country, we do not do it. It is unlawful.' By contrast, some European lawyers are prohibited altogether from pre-testimonial communications with witnesses[38] and could even be subject to criminal sanctions for non-compliance,[39] while other European systems allow a certain degree of pre-testimonial interaction with a witness, subject to restrictions.[40] Some national systems have identified the risk of an uneven playing field in arbitration, and while restricting witness interaction in court proceedings they contain lighter restrictions for witness preparation in arbitration proceedings.[41]

The international arbitration community recognised the risk of unfair advantages being secured by one party over another by virtue of its counsel being permitted to

witness] can constitute a breach of an attorney's professional responsibility, as attorneys are required to 'competently' represent their clients'), https://www.bsk.com/uploads/Ten-Degrees-Feb-2018.pdf (accessed 1 May 2020). *See also*, S.V. Vasilev, *From Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States*, 9 Int'l Commentary on Evidence, 1, 7–8 (2011) ('the failure to adequately prepare a witness might qualify as malpractice'), https://pure.uva.nl/ws/files/1198357/104946_Comparative_Controversies_of_Witness_Preparation_in_the_United_States.pdf (accessed 1 May 2020).

36. In concrete terms, it is believed that familiarising a witness with the process and conducting a mock cross-examination in respect of a hypothetical set of facts is generally permitted but training witnesses with mock cross-examination on the specific subject of their evidence is not. There are serious personal consequences for those who breach the rules. Due to the fine line between witness familiarisation (allowed) and witness training (not allowed), English lawyers sometimes abstain from preparing witnesses altogether lest they be seen to cross that line. *See* Code of Conduct for Solicitors, Arts 2.1–2.3; *see also* SRA website, stating that a 'serious failure to meet our standards or a serious breach of our regulatory requirements may result in our taking regulatory action against you', SRA Code of Conduct for Solicitors, https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ (accessed 4 May 2020). *See also* the Bar Standards Board, Written Standards for the Conduct of Professional Work, s. 3, [6.1.2.]–[6.1.3.]; Bar Standards Board, Code of Conduct of the Bar of England and Wales and Written Standards for the Conduct of Professional Work (8th edition, adopted by the Bar Council on 18 September 2004, effective from 31 October 2004), [705], [705(b)].
37. [2005] 2 All ER 571, at [584].
38. C.A. Rogers, *Ethics in International Arbitration,* 112 (OUP 2014) (compare, for example, Netherlands that allows a degree of witness preparation and Belgium that prohibits it completely).
39. C.A. Rogers, *Ethics in International Arbitration,* 108 n. 40 (OUP 2014), citing *See* Mirjan Damaska, *Presentation of Evidence and Fact Finding Precision*, 123 U. Pa. L. Rev. 1083, 1088–1089 (1975).
40. In Germany, for example, witness preparation is in theory allowed, but a lawyer must not act in a way that leads to a deliberate dissemination of untruthful statements. *See* s. 43a(3) *Bundesrechtsanwaltsordnung* (BRAO) (The German Federal Lawyers' Act). Further, intentionally encouraging a witness to give untruthful testimony in court or produce a knowingly false statement intended to mislead the tribunal may give rise to a host of criminal offences. For example, a lawyer may be charged with fraud (*Prozessbetrug*, § 263 Criminal Code), participation in providing false unsworn testimony (*Teilnahme an einer uneidlichen Falschaussage*, § 153 Criminal Code), perjury (*Meineid*, § 154 Criminal Code), or obstruction of justice (*Teilnahme an einer Strafvereitelung,* § 258 Criminal Code). *See also* R. Harbst, *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, 175–212 (Kluwer Law International 2015).
41. These countries include France, Belgium and Switzerland. C.A. Rogers, *Ethics in International Arbitration,* 115–116 (OUP 2014).

operate under less stringent ethical restrictions, and it has moved to address the problem. Thus the IBA Rules[42] and the IBA Guidelines on Party Representation[43] both suggest that parties may discuss the prospective evidence of witnesses in preparation for cross-examination, as long as they do not seek to influence the witnesses' own account of relevant facts. There does remain, however, a significant lack of guidance on what is or is not permitted in practice, not least because of an absence of clarity as to what practitioners who are bound to adhere to their national rules on witness preparation should do when acting in an international arbitration that may well be seated outside of their national jurisdiction.

The interpretation of these rules is inevitably informed by the particular counsel's own ethical rules. For example, the IBA Rules state that '*it* [is] *not improper*' for counsel to '*discuss* [the witness's] *prospective testimony with them*'.[44] It is not inconceivable that an American lawyer may read this with the background of their own ethical rules in mind to interpret 'discuss' as allowing mock cross-examination of the witness on the evidence, whereas an English lawyer may read 'discuss' to mean something considerably less than that. On the other hand, for a lawyer whose national ethical rules prohibit all pre-testimony contact and make no exemption for arbitral proceedings, this rule may not make any sense.

Divergence in this area therefore continues to pose a problem for practitioners. In addition to generating the possibility of an inequality of arms, the lack of clarity over which rules apply (national professional ethics rules, ethical rules of the seat, or both?) creates another problem. Professor Rogers calls it a 'double deontology' problem – a situation where an attorney is subject to two sets of ethical rules that are in conflict, so that she will inevitably find herself in violation of one set of rules whichever set she follows. A notorious example from 2007 is a fine of EUR 10,000 that an American-qualified attorney and French national, who was employed with a major U.S. law firm, had to pay after being criminally convicted in France for interviewing a witness in France for the purpose of obtaining information for a court proceeding in the US.[45] He was stuck between a rock and a hard place – had he followed French rules and abstained from interviewing the witness, he would have fallen foul of US rules requiring active preparation of witnesses.

It remains an open question to what extent national bar associations will consider themselves to have the power to police ethical duties extraterritorially in foreign-seated

42. IBA Rules, Art. 4(3) ('It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.').
43. IBA Guidelines on Party Representation in International Arbitration (25 May 2013) ('IBA Guidelines on Party Representation'), Guideline 24 (Witnesses and Experts): ('A Party Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.'), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed 30 April 2020).
44. IBA Rules, Art. 4(3).
45. C.A. Rogers, *Ethics in International Arbitration,* 107 (OUP 2014) (*citing* Paris Court of Appeals, File n. 06/06272, Judgment of 28 March 2007).

arbitration. As discussed above, some national ethics rules expressly exempt foreign attorneys appearing in local arbitral proceedings from the application of local ethical rules, but not all do. In those cases, where for example the ethical rules of the arbitral seat, or the arbitral tribunal's rules, require a lawyer to prepare a witness – even if this is inimical to the rules of the national bar association in which the attorney is qualified – counsel will find herself in violation of one set of rules regardless of which set of rules she decides to follow. Finally, counsel are also exposed to the possibility of an 'ethical vacuum' in a situation where domestic rules under which counsel are regulated mandate that the rules of the seat of the arbitration apply to issues of ethics and professional conduct but the local ethical regulations of the seat exempt foreign attorneys appearing in arbitral proceedings from the application of the local rules.[46]

[B] Appointment of Counsel and Arbitrators

The appointment of counsel and arbitrators is another procedural step where ethical rules can create inequalities.

In civil law systems, a personal conflict of interest is considered to be a personal matter rather than a matter subject to regulatory oversight. Individual counsel therefore has wide discretion to ascertain whether or not such conflicts exist and to reach their own conclusion unconcerned by the risk of regulatory sanction for reaching the wrong conclusion. By contrast, in most common law systems, rules pertaining to conflicts of interests are regulated and subject of strict professional conduct rules.

In view of the divergence in national professional rules on the conceptualisation of a conflict of interest, various institutional rules and societies have sought to develop guidance on issues such as the appointment of arbitrators,[47] including, for example, the IBA,[48] and LCIA[49] and ICC Rules,[50] and most recently at the time of writing the draft Code of Conduct for investor-state dispute settlement ('ISDS') adjudicators released by ICSID and UNCITRAL.[51]

46. C.A. Rogers, *Ethics in International Arbitration*, 109 (OUP 2014).
47. P. Halprin & S. Wah, *Ethics in International Arbitration,* 2018 J. Disp Resol. 1 (2018), https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article = 1789&context = jdr (accessed 30 April 2020).
48. IBA Guidelines on Conflicts of Interest in International Arbitration (23 October 2014) ('IBA Guidelines on Conflicts of Interest), Guidelines 2-3, and *see* Appendices that include the Green, Orange and Red Lists; and *see* IBA Guidelines on Party Representation, Guideline 5: 'Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.'
49. LCIA Arbitration Rules, Art. 5(4); and *see* Annex on General Guidelines for the Parties' Legal Representatives.
50. ICC Arbitration Rules, Art. 11(2).
51. Article 12 of the Draft Code that deals with enforcement envisages primarily voluntary compliance, and preserves any applicable institutional rules on sanctions that may apply. Interestingly, Commentary to Article 12 suggests we may see potential additional sanctions (relating to remuneration, disciplinary measures, reputational sanctions and notifications to professional associations) and the creation of an advisory centre or a standing body to enforce the Code, depending on the means of the implementation of the Code. *See* ICSID and UNCITRAL,

Harmonisation in this area has undoubtedly assisted in safeguarding the legitimacy of arbitration as a fair means of dispute resolution, but there is still a lot of uncertainty when it comes to ascertaining how a tribunal will deal with a challenge to an arbitrator or counsel on the basis of an alleged conflict of interest. The proliferation of such challenges has led to complaints about 'guerilla tactics' and the high costs of arbitration. On the other hand, very restrictive interpretations of situations of conflict damage arbitration's image. For that reason, all eyes will be on *Halliburton* that is pending before the UK Supreme Court at the time of writing.[52] The Court heard oral argument in November 2019 on the issue of whether or not an arbitrator's failure to disclose circumstances that should have been disclosed would, by itself, give rise to justifiable doubts as to their impartiality. The decision of the Court of Appeal was criticised for setting the bar to the exclusion of an arbitrator too high. Given the importance of the case, the LCIA, ICC, Chartered Institute of Arbitrators and the Grain and Free Trade Association ('GAFTA') all intervened in the Supreme Court proceedings to make submissions on behalf of the arbitration community.

[C] Disclosure

There is general agreement that some ability to request document disclosure in international arbitration is valuable.[53] But within the allowable parameters, the question of where parties and their counsel stand on the spectrum varies widely and may again be informed by their domestic ethical traditions.

In both the US and the UK, failure to produce documents that undermine the producing party's case or that are in some way contrary to the producing party's interests constitutes severe misconduct.[54] This approach contrasts sharply with the general approach to discovery in civil law jurisdictions where the judge is responsible for gathering evidence that she deems is necessary to reach a just decision. The parties can propose evidence to be considered by the court, but counsel need not voluntarily disclose documents adverse to its client – in fact, proactive disclosure of such documents may put such counsel in breach of professional rules in their jurisdiction.

A strong consensus emerged on a common standard for document production under the IBA Rules. However, as discussed above, criticism of the IBA Rules by a group of practitioners gave rise to the development of the Prague Rules. The question foreshadowed earlier is whether any shortcomings in the disclosure process in arbitration under the IBA Rules arises from the rules themselves or the different ethical standards binding counsel and parties applying those rules. The relatively more common law-focused IBA Rules work because of the strict duty on counsel to turn over

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Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, World Bank (2020),https://icsid.worldbank.org/en/Documents/Draft_Code_Conduct_Adjudicators_ISDS.pdf (accessed 4 May 2020).

52. *Halliburton Company v. Chubb Bermuda Insurance Ltd & Ors* [2018] EWCA Civ 817.
53. C.A. Rogers, *Ethics in International Arbitration*, 100 (OUP 2014).
54. Civil Procedure Rules, Part 31 (Disclosure and Inspection of Documents) (U.K.); Federal Rules of Civil Procedure (U.S.), rule 26 (Duty to disclose: General Provisions Governing Discovery); Rules of Professional Conduct (N.Y), rules 3.3 and 3.4.

all responsive documents, whether helpful or damaging to the case. The U.S. and English parties know this to be a feature of domestic litigation, which may often drive parties towards settlement. The consequence of being found to have suppressed damaging documents is invariably far more severe than the consequence of disclosing harmful documents, and any counsel complicit in document suppression could have their practising certificates permanently revoked. However, if parties and counsel from different legal traditions do not approach document production process applying the same ethical standards, trust in the process is put at risk, undermining the utility of the process to the fair and just resolution of the dispute, while still costing the parties significant time and money. This divergence is likely a driver of a dissatisfaction among counsel with document disclosure processes in arbitration.

One sometimes hears concerns expressed by lawyers that opposing counsel not bound by the same ethical obligations in respect of document disclosure are less likely to comply with the letter and spirit of disclosure rules. Further, the concern becomes that such counsel may turn a blind eye to certain documents that are damaging for their clients' cases. In fact, it is not inconceivable that a prospective party – should it turn its mind to the issue – may be discouraged from engaging counsel who are bound by strict disclosure obligations, if such party knows that it has certain damaging materials in its possession.

The penalty in arbitration for the failure to produce all documents ordered to be produced is often the drawing of adverse inferences. This is arguably insufficient, either because the sanction itself does not provide sufficient redress or its enforcement is lacking. Counsel frequently raise complaints that tribunals are not quick enough to apply the adverse inferences sanction decisively, and in any event that this is not a tangible sanction to apply. The deterrent effect of adverse inferences is certainly less than the deterrent effect of serious ethical sanctions against lawyers in their personal capacity for complicity in the suppression of documents.

The divergence in ethical cultures therefore may drive inequality of arms in respect of document production. Efforts to address this issue to date are laudable, but there may be scope for further improvement in this area that would help give parties more confidence that document production processes are a worthwhile part of the arbitral process.

Harmonisation would also help to solve the 'double deontology' problem, which can arise during the process of disclosure as it does in respect of witness preparation. For example, the seat of the arbitration may require the attorney to disclose documents that are adverse to their client, even if doing so will place them in violation of national law. Professor Rogers gives an example of a German attorney practising in England who ended up in jail for refusing to disclose client information as required under the UK Proceeds of Crime Act, knowing that making such disclosure would have put him in violation of the German law on confidentiality and subject to disciplinary proceedings in Germany.[55]

55. C.A. Rogers, *Ethics in International Arbitration*, 107 (OUP 2014) (*citing* H. Hellwig, *At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulation*, 27 Penn St. Int'l L. Rev. 395, 398–399 (2008)).

[D] Alleging Misconduct

When in 2014 the Swiss Arbitration Association ('ASA') concluded that 'extremely few complaints' are lodged in international arbitration, it found that the majority of those few that were lodged related not to misconduct as such but rather to 'ethics' in a broad sense: orderly conduct and integrity of arbitral proceedings, admissibility and weighing of evidence, and independence and impartiality of arbitrators.[56] The ASA considered these three strands as all of lesser concern given that arbitral tribunals have wide powers to regulate them

This position, however, does not account for the use of accusations of fraud and dishonesty against opposing counsel as a form of 'guerrilla tactics'. Of course, a serious allegation of fraud is grounds for reporting to the national bar association in which the counsel is regulated.[57] But the threshold is often high. For example, in England, the Solicitors Regulatory Authority ('SRA') will sanction counsel for dishonesty only if the SRA is 'absolutely sure that he or she has been dishonest' on account of 'serious consequences' that flow from such a finding.[58] The other side of the coin is that dishonesty should only be alleged with scarcity, and making such an allegation without good grounds may itself be grounds for sanctions. It is a breach of counsel's ethical obligations in England to allege dishonesty in the absence of cogent evidence of dishonesty, and unless the person against whom it is alleged is given an opportunity to consider and address that evidence.

But not all national rules contain equally stringent tests for alleging and proving dishonesty. This perhaps is the reason why we observe counsel in arbitrations increasingly alleging dishonesty against opposing counsel. Perhaps this is because national rules do not contain any sanctions for frivolous allegations, or perhaps the rules do deal with this, but the improbability of enforcement does not deter such conduct. Using such baseless allegations as a demagogic weapon – because 'all is fair in love and war' – does nothing for the reputation of arbitration. This practice increases the cost of the proceedings and damages the legitimacy of the process. Every time a groundless allegation of misconduct is made, it costs time and money to provide a response and correct the record.[59]

Using such allegations as a means of sowing prejudice should not be permitted, but in the absence of a global standardised code of ethics, should arbitral tribunals take

56. ASA, Statement on the Global Arbitration Ethics Council Discussions (2015), https://www.arbitration-ch.org/en/asa/asa-news/details/983.statement-on-the-global-arbitration-ethics-council-discussions.html?querystart=6l (accessed 1 May 2020); *see also* C. Caher & J. Lim, *Regulation of Counsel and Professional Conduct in International Arbitration*, in International Comparative Legal Guide to: International Arbitration (16th ed. Global Legal Group Ltd 2019), 1–8.
57. A. J van den Berg, *PCA & ICCA, International Commercial Arbitration: Important Contemporary Questions,* 287 (ICCA congress series, no. 11, Kluwer Law International 2003).
58. Solicitors Regulation Authority website, *Suspected Dishonesty,* https://www.sra.org.uk/consumers/problems/fraud-dishonesty/dishonesty-suspected/ (accessed 1 May 2020). *See also Medcalf v. Mardell* [2002] UKHL 27 (*supra* n. 33).
59. D.W. Rivkin, *Ethics in International Arbitration* (9 December 2014), Seoul Arb. Lecture, 22, 23 (2014).

a more active role? Tribunals have an inherent power to police the integrity of proceedings, strengthened by the powers given to them by institutional rules. Tribunals can take an active role in the management of such disputes. Even merely critiquing or admonishing counsel on the record can have a deterrent effect both for the purpose of the present and subsequent proceedings. But tribunals' concerns about taking on the role of police and regulator are understandable.

§4.07 TOWARDS A COMMON ETHICAL CODE?

The absence of any mandatory international code of conduct that governs arbitral proceedings, its counsel and arbitrators, across the world and that is enforceable against the participants in arbitration allows ethical divergence to sow discontent. Development of a transnational ethics code applicable in arbitration proceedings, along with an enforcement board, would help level the playing field and prevent 'double deontology' as well as problems arising from the existence of the 'ethical vacuum'.

This idea has been proposed on a number of occasions in recent years.[60] But when the Swiss Arbitration Association proposed in 2014 the creation of a Global Arbitration Ethics Counsel to act as the transnational ethics board for arbitration counsel, this proposal was received with mixed reaction and the ASA dropped the proposal in October 2016 on the grounds that the 'time [for a global ethics code] ha[s] not yet come'.[61] Such a global ethics code could arguably give effect to the reasonable expectations of the parties that arbitration will provide a fair and efficient process for the resolution of disputes.

In view of these issues, commentators have offered at least nine possible means of regulating counsel and arbitrator conduct in international arbitration proceedings, and many more have forcefully argued in favour and against each of these options:[62] (i) policing by national bar association(s) under whose jurisdictions advocates are licensed to practice law; (ii) policing by national courts of the seat of arbitration; (iii) policing by national courts where the arbitral award is to be enforced; (iv) policing by

60. *See, e.g.*, R.D. Bishop, *Ethics in International Arbitration,* https://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf (accessed 4 May 2020); and ASA *President's Message, Counsel Ethics in International Arbitration – Could One Take Things a Step Further*, September 2014.

61. ASA, Statement on the Global Arbitration Ethics Council Discussions (2015), https://www.arbitration-ch.org/en/asa/asa-news/details/983.statement-on-the-global-arbitration-ethics-council-discussions.html?querystart = 6l (accessed 1 May 2020); *see also* Caher & Lim, *supra* n. 56.

62. *See, e.g.*, C.A. Rogers, *Ethics in International Arbitration* (OUP 2014); Peter Goldsmith QC, Keynote Speech, ICC UK Annual Arbitrators Forum: Ethics in International Arbitration, Conference Materials, 2013; D.W. Rivkin, *Ethics in International Arbitration* (9 December 2014), Seoul Arb. Lecture (2014); S. Schill & C.N. Brower, *Regulating Counsel Conduct Before International Arbitral Tribunals,* in *Making Transnational Law Work in the Global Economy: Essays in Honor of Detlev Vagts* (Cambridge University Press 2010), 488–509; I. Ng, *Rethinking Counsel Ethics in International Arbitration*, Kluwer Arbitration Blog (2019), http://arbitrationblog.kluwerarbitration.com/2019/12/12/rethinking-counsel-ethics-in-international-arbitration/ (accessed 1 May 2020); http://arbitrationblog.kluwerarbitration.com/2016/04/18/who-should-regulate-counsel-conduct-in-international-arbitration/; https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/1-regulation-of-counsel-and-professional-conduct-in-international-arbitration.

arbitral tribunals adjudicating the underlying dispute; (v) policing by arbitral institutions whose rules govern the arbitration; (vi) express standards of conduct incorporated into the parties' agreement; (vii) express standards of conduct set out in the law of the seat of arbitration; (viii) a common standard of conduct agreed upon by counsel; and (ix) an overarching code of conduct for international arbitration common across the sector. It is beyond the scope of this chapter to address the relative merits of each of these options. Until an international consensus emerges, what is most important is the awareness of counsel and arbitrators – who can address these issues head on at the start of the proceedings, and remain attentive to them throughout the proceedings, and attempt to find a common ground to manage such issues and consider sanctions regimes as needed. A proactive approach by counsel and tribunal would help promote fair and even-handed arbitral proceedings.

§4.08 CONCLUSION

In this chapter, the authors have outlined some of the challenges that arise in the context of arbitration proceedings because of cultural differences. However, despite the differing backgrounds to which users, counsel and arbitrators belong, these participants share objectives which transcend cultural differences – that is of arbitration being 'fair, frugal, fast and foreseeable'.[63]

Given that this is the case, the authors believe there is a common foundation upon which to harness the benefits of cultural diversity in international arbitration. One of the proposed means of doing so is for arbitrators to keep parties' reasonable expectations at the forefront of their considerations while making procedural decisions.

In addition, the authors consider that further discussion about the benefits of a harmonised and enforceable code of conduct in arbitration would be worthwhile.

It has been commented elsewhere that 'we are only now seeing a generation of arbitration practitioners who have grown up on international arbitration'.[64] Perhaps this generation will adopt transnational arbitration culture as its cultural foundation. Until then, it will fall on individual counsel and tribunals to chart the right course through these choppy waters to ensure that the reputation of arbitration is enhanced rather than damaged by cultural differences.

63. Barkett & Paulsson, *supra* n. 3, at 11.
64. F. Singarajah, *Cultural Differences in International Arbitration*, PLC Arbitration Blog, (2020), http://arbitrationblog.practicallaw.com/cultural-differences-in-international-arbitration/ (accessed 30 April 2020).