Authority and Contemporary International Arbitration

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TABLE OF CONTENTS

I. Introduction ................................................................ 802

II. The Authority of Judicial Decisions ......... 807
   A. Types of Authority that Can Be Delivered to Judicial Decisions
      1. The “Efficiency” Rationale for Authority ...... 812
      2. The “Personal” Rationale for Authority .......... 813
         a. The “Insight” Rationale for Authority ....... 813
         b. The “Expertise” Rationale for Authority ...... 814
         c. The “Institutional” Rationale for Authority ...... 815
      B. A Preliminary Objection ........................................ 818

III. The Role of Authority in Traditional Arbitration .......... 821

IV. The Loss of Authority in Contemporary International Arbitration ........................................ 829
   A. Problems Derived from the Arbitrator Selection Processes ........................................ 829
   B. The Three-Arbitrator Panel as Displaced Party Negotiation ........................................ 836
   C. The Relevance of Authority to Corporate Actors .......... 841

V. The Unavailability of Institutional Authority to Replace the Authority of Arbitrators ........ 842

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VI. The Shift from Authority of Arbitrators to Authority of Procedure ................................................................. 846

VII. A Procedural Suggestion for Restoring Authority to Arbitral Awards ................................................................. 850

VIII. Conclusion .................................................................................................................................................. 855

I. INTRODUCTION

While arbitration has existed in one form or another for centuries, and has at times even had a central role in both domestic and international dispute resolution,1 its recent rise to prominence and acceptability on the contemporary international scene has been both abrupt and overwhelming.2 From a situation less than a century ago in which arbitration was rare and pre-dispute arbitration agreements were often legally invalid,3 one of the most oft-repeated statements in contemporary arbitral scholarship is the observation that arbitration has now become the “dispute resolution mechanism of choice” for the resolution of cross-border disputes.4 Indeed, empirical studies indicate a strong preference for

2. For example, the number of requests for arbitrations filed with the four most prestigious international commercial arbitration institutions more than doubled in the decade from 1993 to 2003. Towards A Science of International Arbitration 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter SCIENCE OF INTERNATIONAL ARBITRATION] (extracting from a table the data on the American Arbitration Association, the International Chamber of Commerce, the London Court of International Arbitration, and the Stockholm Chamber of Commerce). Similarly, although the International Center for Settlement of Investment Disputes (ICSID) was founded in 1966, the first ICSID arbitration did not occur until 1972. From that point one to two cases were usually filed per year, until the mid-1990s, when there was a “dramatic increase in activity.” There are now, on average, two new cases per month, with over 100 cases pending in early 2007. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 224 (2008).
3. Yves Derains & Eric A. Schwartz, A Guide to the ICC Rules of Arbitration (2d ed. 2005) (discussing the “jurisdictions, of which there were still many [in 1922] that did not recognize the validity of an agreement to arbitrate future disputes”).
4. See, e.g., Christopher R. Drahozal, Empirical Perspectives on International Commercial Arbitration, in SCIENCE OF INTERNATIONAL ARBITRATION, supra note 2, at 3 (“Arbitration is the dispute resolution mechanism of choice for parties to international contracts.”); Richard H.
international arbitration over domestic litigation, and States of all levels of wealth and power have felt the need to rewrite their laws to make them more "arbitration friendly." Similarly, courses in international arbitration are now routinely offered in law schools worldwide, academic scholarship on arbitration appears in even the most prestigious journals, and law firms of all sizes attempt to claim specialized expertise at representing clients in international arbitration.

Yet, this growth has not come without controversy. Procedures that were developed to resolve disputes between private commercial actors have been a source of concern when applied in disputes in which one party is a State, or when significant consequences will result for an individual or group not represented in the arbitration. In addition, the view is increasingly expressed that the apparent suitability of arbitration for the resolution of international disputes can at times be misleading, as difficulties can easily arise when norms developed for the resolution of Western disputes are applied in a different cultural context. Perhaps most

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5. SCH. OF INT’L ARBITRATION, QUEEN MARY, UNIV. OF LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2006, at 5 (2006) (“When the same respondents were asked which mechanism they preferred to use, 73% stated international arbitration; either alone (29%) or in combination with ADR mechanisms in a multi-tiered, or escalating, dispute resolution process (44%). ADR mechanisms as a standalone approach were favoured by 16% of the corporations; transnational litigation was preferred by only 11%.”).


7. See, e.g., Damon Vis-Dunbar, Meg Kinnear Elected as Secretary-General of ICSID, INVESTMENT TREATY NEWS, Mar. 3, 2009, http://www.investmenttreatynews.org/cms/news/archive/2009/03/03/meg-kinnear-elected-as-secretary-general-of-icsid.aspx ("[T]he Centre has come under criticism on a number of fronts from civil society groups.").


notably, however, given the traditional consensual basis of arbitration, arbitral awards are increasingly being challenged in court by the losing party,\textsuperscript{10} even in the face of consistent efforts on the part of States to make them almost unchallengeable.\textsuperscript{11}

In short, while arbitration has unquestionably been a success in the international dispute resolution "marketplace," effectively resolving problems still faced by international litigation,\textsuperscript{12} it is becoming increasingly doubtful that it still functions well as a means of genuine dispute resolution, rather than merely being desired as a means of avoiding the constraints of domestic litigation. As a result, the enormous potential of arbitration as a dispute resolution mechanism is being increasingly wasted.

This Article will attempt to demonstrate that this situation has arisen because a dispute resolution mechanism initially designed to be invoked post-dispute, between parties who both wished to arbitrate, is now being applied in a far broader range of situations,

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\textit{Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective}, 

10. See, e.g., HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 2 (2002) ("The 'gentleman era' has come to an end. It has been dethroned by interminable pleadings and lengthy hearings during which attorneys multiply diverse objections with a view to challenging the resulting award. . . . Though the vast majority of awards continue to be enforced voluntarily by parties, the tendency is progressively leaning towards challenging arbitral awards . . . .") (citations omitted)); Alan Rau, \textit{The Culture of American Arbitration and the Lessons of ADR}, 40 TEX. INT'L L.J. 449, 527 (2005) (noting the "sudden torrent" of litigation by "disappointed arbitrants" attempting to have an arbitration award overturned for "manifest disregard of the law"). Similarly, an analysis of investment arbitration awards reported on the website of the ICSID shows that in cases in which a final award was delivered prior to 2000, a request for annulment of the award was made twenty-five percent of the time. By contrast, of final awards delivered in the period 2004–2008, a request for annulment was made forty-one percent of the time. See unpublished analytical data (on file with author).

11. See, e.g., Albert Jan van den Berg, \textit{The New York Convention: Summary of Court Decisions, in THE NEW YORK CONVENTION OF 1958}, at 46, 89 (Marc Blessing ed., 1996) (reporting that awards were successfully vacated under the New York Convention in only 2 of 556 reported cases); see also Prostyakov v. Masco Corp., 513 F.3d 716, 723 (7th Cir. 2008) ("But in short, we will uphold an arbitral award unless there is no possible interpretive route to [it] . . . .") (alteration in original) (quotation marks omitted)).

12. See, e.g., NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD 229 (1997) ("[S]ince the courts generally insist that documents relevant to a dispute be submitted in Arabic, this can impose substantial translation costs in a complex dispute. . . . In Egypt and the Gulf, it is not unusual for a court to take several years before issuing a final decision—and the decision itself can generally be appealed. . . . International arbitration is often deemed to be more predictable than local litigation.").
usually involving a pre-dispute arbitration agreement, and often involving one party that does not wish to arbitrate at all. This change means that the characteristics that previously resulted in parties to an arbitration accepting and voluntarily abiding by the award delivered by the arbitrator rarely exist now. Moreover, the procedural innovations that have been adopted to adapt arbitration to the new contexts in which it now occurs have not been effectively designed to provide parties with any reason to accept the award delivered. Consequently, contemporary international arbitration simply no longer functions properly as a means of genuinely resolving disputes and is instead increasingly coming to represent merely a legal game, invoked by parties due to the enforceability of its awards rather than because the system produces desirable results.

Part II of the Article will discuss the nature of judicial authority as a means of examining what characteristics of a judicial decision will lead to it being accepted by the parties as inherently binding, rather than merely obeyed by them because effective review is unavailable. It will identify four different types of authority that a judicial decision can possess. It will then defend this analysis against the argument that only legally unsophisticated parties truly view legal decisions as authoritative and that therefore such an analysis is irrelevant to international arbitration, which is unlikely to involve legally unsophisticated parties.

Part III of the Article will then apply this analysis to traditional arbitration, establishing the particular types of authority that historically led parties to accept arbitral awards as binding. It will argue that the authority of a traditional arbitral award was inherently personal, relying upon the possession by the arbitrators of certain personal characteristics.

Part IV will then address the differences that exist between contemporary international arbitration and traditional arbitration, focusing specifically upon the means by which, and context in which, arbitrators are selected by the parties and the role arbitrators are expected to perform once they are appointed. It will illustrate that these differences mean that the forms of authority that were

13. The term "traditional arbitration" is used in this Article to refer generally to any form of arbitration prior to the recent rise of contemporary international commercial arbitration. In this sense it will generally refer to arbitrations taking place prior to the twentieth century. However, it ultimately refers to a style of arbitration rather than an arbitration occurring at a particular time. As a result, the term can also be applied to arbitrations occurring today, where they are conducted in a manner more consistent with that of pre-twentieth century arbitrations than of arbitration as it is currently practiced in international commercial arbitration.
possessed by awards delivered in traditional arbitration are rarely possessed by awards delivered in contemporary international arbitration. Moreover, nothing in contemporary international arbitration delivers additional authority to arbitral awards. As a result, while an arbitral award may indeed be authoritative for the parties to the arbitration in certain specific instances, this authority derives solely from facts unique to that arbitration. As a form of dispute resolution, on the other hand, contemporary international arbitration is simply structurally incapable of delivering authoritative awards.

Part V will then examine the possibility that the increasing procedural uniformity of contemporary international arbitration can provide a means of delivering authority to arbitral awards. Just as the formal court structure underlying a court judgment delivers authority to that judgment, it might be argued that as international arbitration formalizes procedurally an authoritative "institution"14 will develop capable of delivering authority to arbitral awards. It will, however, be argued that to the extent arbitration is indeed becoming procedurally formalized, the rationale underlying the selection of rules to be standardized precludes the formation of any authoritative institution.

Part VI will then examine the one remaining means by which authority can be conveyed to arbitral awards, namely through the procedures used in the arbitral proceedings. While the standardization of procedures throughout international arbitration will not result in the delivery of authoritative awards, it will be argued that parties will view awards as authoritative when the awards are delivered through procedures specifically designed for the identity of the parties and the nature of the dispute.

Part VII will then conclude by proposing specific means by which the problem of the loss of authority in contemporary international arbitration can be addressed. It will argue that rather than merely encouraging arbitrators to use the power they already possess to design procedures to match the specific dispute at hand,

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14. The term "institution" is here presented in "scare quotes" to emphasize that the institution in question would be a "social institution," existing solely through the conformity of diverse actors to certain social norms. It would not, that is, be an institution in the sense of the International Chamber of Commerce or the United Nations. In the (somewhat convoluted) words of sociologist Jonathan Turner, a "social institution" is "a complex of positions, roles, norms and values lodged in particular types of social structures and organizing relatively stable patterns of human activity with respect to fundamental problems in producing life-sustaining resources, in reproducing individuals, and in sustaining viable societal structures within a given environment." JONATHAN H. TURNER, THE INSTITUTIONAL ORDER 6 (1997) (italics omitted).
an additional role should be added to contemporary international arbitration in the form of a “procedural special master.” While such an individual should only be appointed with the consent of the parties, and would perform his role in consultation with the parties, his decisions would be binding unless opposed by both parties and would not be mere recommendations for the parties to accept or reject. In addition, it will be argued that the role of arbitrators in international arbitration must be reconceptualized, with party-appointed arbitrators required to abandon their traditional detachment from their nominating party, and instead, while remaining independent and objective decision-makers, serve as the explicators of their nominating party’s positions to the remainder of the tribunal.

II. THE AUTHORITY OF JUDICIAL DECISIONS

A. Types of Authority that Can Be Delivered to Judicial Decisions

Before arguing that arbitrator authority is central to contemporary international arbitration, it is necessary to have at least a general idea of what is meant by the term “authority” in this context and what roles it can have in the response of disputing parties to a legal decision. As the paradigm case of the authority of a legal judgment concerns judicial decisions rather than arbitral awards, this part of the Article will focus upon judicial, rather than arbitral, decisions. This analysis will then be built upon in subsequent parts of the Article, with full recognition of the differences between judges and contemporary international arbitrators, as a means of addressing the roles of arbitral authority in contemporary international arbitration.

It is first necessary to be clear on the kind of authority that this Article addresses. The “authority of law” is an oft-addressed question within contemporary jurisprudence, and it has been the subject of work by some of the most important contemporary legal theorists. Yet the overwhelming focus of this work has been the normative question of when individuals subject to the pronouncements of specific legal figures should see themselves as obligated to act in accordance with the pronouncements of those

figures, whether they agree with them or not. This is, however, a fundamentally different analysis of authority than the kind being undertaken here.

As this Article is concerned with the practical question of the degree to which parties freely adhere to the arbitral awards that they receive, the type of authority relevant to this discussion is what can be called the "social" analysis of authority. This type of analysis of authority focuses on the question of when parties do, as a matter of fact, view legal decisions as binding upon them—whether or not they are right to do so from a theoretical perspective.

To clarify, a normative account of authority attempts to describe the conditions under which a given individual does indeed legitimately have authority over certain other individuals, such that the latter should obey his directives simply because he has delivered them. A social account of authority, on the other hand, makes no claims whatsoever about whether the directives of the alleged authority should or should not be obeyed by any particular group of subjects. Rather, it focuses on the social reality that individuals do consistently acknowledge other individuals as having authority over them in certain situations and attempts to explain what specifies those situations. Whether the alleged authorities indeed have genuine authority or not is simply irrelevant to this latter investigation.

Of course, emphasizing the subjective reasons that individuals have for obeying the decisions of legal decision-makers unavoidably raises the risk of an excessively fragmented analysis. After all, even if individuals from a particular social group all share a specific reason for accepting the authority of the decisions of a given legal actor, this in no way indicates that individuals from other social groups will also accept that reason as motivating obedience. It needs to be emphasized, then, that while the results of the following analysis are indeed intended to be broadly applicable, it is not claimed that a series of more fine-grained analyses could not be performed for individual social groups. That is, this analysis is intended to provide a foundation for a generalized discussion of authority. It would, however, need to be

16. RICHARD E. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY 14 (1980) ("Authority yields (authorities issue) commands to be obeyed or rules to be subscribed to, not statements to be believed.").

supplemented with additional factual details whenever a particular social group, or even an individual, is being discussed.\textsuperscript{18}

Two additional points need to be made before entering into the substantive discussion to ensure that what this discussion attempts to address is clear. First, it must be emphasized that the present discussion does not concern the authority of "law" but rather the authority of individual decisions handed down at specific times by specific individuals. After all, individuals who appeal legal decisions, or take advantage of any other means provided by a legal system to resist a decision’s enforcement, are in no way challenging the binding nature of law. Indeed, they are acting in complete conformity with the law, as it is the law that provides the opportunities for appeal that are being used. Consequently, it is quite possible for the losing party in a dispute to view the law as binding but nonetheless seek to overturn the specific legal decision applicable to him.

Second, it is also essential to note the distinction between acceptance of a decision and mere acquiescence to it. In both cases the decision will remain unchallenged. However, acquiescence does not occur because of any authority attached to the award but because of some element external to the judgment. To give an example, a losing party may fiercely dispute the correctness of a judge’s decision but nonetheless not seek to have it overturned on the ground that, even though it is wrong, the proceeding was fair, and the judge’s decision was not irrational or prejudiced. In such a case the decision is not accepted as binding by the losing party but is merely allowed to stay in force. What is sought in the following analysis, then, is not those characteristics of a legal decision that will lead a losing party to simply abandon any attempt to resist that decision but those characteristics that will lead to the decision actually being endorsed by the losing party as an appropriate resolution of the dispute, even though they do not see the correctness of the conclusion.

These clarifications being made, it is necessary to dispense with one fairly basic justification for obeying a legal decision, namely its demonstrable correctness. While it is certainly true that most parties to a court case will see the demonstrable correctness of a judge’s decision as in itself providing a decisive reason for adhering to it, it is nonetheless clear that only a minority of legal

\textsuperscript{18} It is worth emphasizing here the difference between "social group" and "culture." Use of the term "social group" reflects the likelihood that even an apparently culturally homogeneous jurisdiction will in reality be divisible into many different "social groups." Tony Cole, Book Review, 27 PHIL. IN REV. 286 (2006).
decisions will ever be recognized by the losing party as demonstrably correct. After all, even the most correctly reasoned and thoroughly explained legal decision will unavoidably involve factual or legal points on which a view rejected by the judge was also defensible. Legal decisions are not deductively solid arguments based on indisputable facts but merely defensible interpretations of conflicting factual and legal claims.19

Indeed, it is precisely because of the underdetermined nature of legal decisions that there is any need for parties to a dispute to see a judicial decision as authoritative since a demonstrably correct decision can be obeyed simply because of its correctness, without invocation of any form of background “authority.”

For an account of the authority of a legal decision, then, it is necessary to concentrate on the context of the legal decision, not on its substantive correctness. Thus, the question is how a legal decision, independent of its content, can provide a losing party with a reason to accept it as binding. Only through such a content-independent analysis will it be possible to isolate the source of the authority of the decision, as opposed to the authority of reason or of truth.

This notion of the authority of a legal decision as necessarily independent of its content is a familiar one from academic discussions of the authority of law, as it plays a central role in the theory of authority advanced by Joseph Raz.21 Raz’s theory is

19. There are, of course, many writings on the nature of legal reasoning. Excellent general treatments of the topic can be found in MARTIN GOLDING, LEGAL REASONING (1984); EDWARD LEVY, AN INTRODUCTION TO LEGAL REASONING (1948); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).

20. “Underdetermination” is a term commonly used in philosophy of science to refer to situations in which two or more mutually inconsistent theories are equally justifiable under the available evidence. See generally THOMAS BONK, UNDERDETERMINATION: AN ESSAY ON EVIDENCE AND THE LIMITS OF NATURAL KNOWLEDGE (2008); Alexander Bird, Underdetermination and Evidence, in IMAGES OF EMPIRICISM 62 (Bradley Monton ed., 2007).

21. Raz’s account is well captured in this following example:

Consider the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute for they agreed to abide by his decision. Two features stand out. First, the arbitrator’s decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case. It is not just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. The arbitrator’s decision is meant to be based on the other reasons, to sum them up and to reflect their outcome.

JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 212 (1995) [hereinafter RAZ, ETHICS].
normative rather than social, so it may initially appear irrelevant here. However, while Raz’s conclusions are normative, his analysis draws directly from a common understanding of the nature of authority and hence serves as an insightful guide to what motivates obedience to a legal decision. Consequently, while Raz’s analysis will not be adopted here as providing the structure through which authority is to be analyzed, its insight and subtlety mean that it provides an excellent initial analytical step.

Raz breaks his theory of authority down into three theses: (1) the dependence thesis, (2) the normal justification thesis, and (3) the preemption thesis. In general terms, Raz’s argument is that an authority’s decision does not merely give those subject to it an extra reason to consider when deciding for themselves how to act but rather replaces any other reasons they may have for action (this is the preemption thesis). In addition, for the decision to be authoritative, the decision-maker must base her decision upon the same reasons to which those subject to the decision should themselves appeal in making their own decision—after all, the authority’s decision is intended to replace their decision, not to merely be an alternative (this is the dependence thesis). Finally, what normally justifies a conclusion that a given individual has authority over particular other individuals is that the individual subject to the decision is more likely to comply with those reasons to which he should appeal in making his decision by adhering to the authority’s decision than if he made a decision himself (this is the normal justification thesis).

22. That is, in the present discussion, the disputing parties in the arbitration.
23. JOSEPH RAZ, THE MORALITY OF FREEDOM 46 (1988) [hereinafter RAZ, MORALITY OF FREEDOM] (“[T]he fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”); JOSEPH RAZ, PRACTICAL REASON AND NORMS 193 (Oxford Univ. Press 1999) (1975) (“The authority’s directives become our reasons. While the acceptance of the authority is based on belief that its directives are well-founded in reason, they are understood to yield the benefits they are meant to bring only if we do rely on them rather than on our own independent judgment of the merits of each case to which they apply.”).
24. RAZ, MORALITY OF FREEDOM, supra note 23, at 47 (“[A]ll authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”).
25. Id. at 53 (“[T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.”).
Raz's vision of the authority of a legal decision, then, is one ultimately based on expertise: the authority's decision should be obeyed because it is more likely to be correct than a decision reached by the individual to whom the decision is delivered. More than this, though, the authority's decision is one that the recipients of the decision would ultimately reach were they able to abstract themselves from their personal involvement in the dispute and effectively reason their way through the facts and arguments. Raz, that is, is relying upon what he terms a "service conception of authority": authority serves the parties as a means of delivering to them a more correct decision than they would have reached, thereby eliminating the need for them to derive the conclusion.26

This notion of an authoritative decision as providing a "service" to the recipients of the decision underlines one central element of any social analysis of authority, namely that treating the decisions of another as authoritative constitutes a means of moving beyond one's immediate analytic abilities. Whether the rationale is that one does not have the time to perform the analysis satisfactorily oneself, or that one lacks the ability to perform the analysis at the required level, there would simply be no point in subjecting oneself to the decisions of another if those decisions were not viewed as giving one information that one could not currently get alone. While Raz adopts the service conception of authority as part of a normative analysis of authority, then, it nonetheless is also clearly applicable in the context of the social analysis being performed here.

I. The "Efficiency" Rationale for Authority

As just stated, however, there are two ways in which the service provided by an authoritative decision might be useful to parties to a dispute. First, in some cases authority will serve merely as a "time saver." In such a case, given adequate time and resources, the disputants could indeed have reasoned their own way to the judge's conclusion. By appealing to the superior abilities of a third party, they benefit from that third party's expertise, through which she is able to reach the conclusion in question more quickly than the disputants could reach it themselves.

This constitutes what will here be referred to as the "efficiency" rationale for authority. It cannot, however, by itself suffice as an analysis of authority, as it is clear that there will be a significant number of cases, if not an overwhelming majority of

26. RAZ, ETHICS, supra note 21, at 214.
cases, in which the disputants simply could not have reached the conclusion obtained by the judge. In such cases the disputants must simply accept the decision of the judge, unable to evaluate its substantive correctness, but relying upon indicators of trustworthiness not derived from the decision, such as the judge’s professional standing or other personal characteristics.

2. The “Personal” Rationale for Authority

This constitutes the second element of a broad analysis of authority, whereby the service provided by the authority is not merely to provide a more efficient means of reaching a conclusion that the disputants could theoretically have reached themselves. Instead, the authority delivers a decision that the disputants cannot rationally explicate and defend but that they nonetheless endorse as an appropriate settlement of their dispute due to certain personal characteristics of the individual providing the decision. This will be referred to as the “personal” rationale for authority.

a. The “Insight” Rationale for Authority

An important point for the present discussion is that the “personal” rationale can be broken down into three distinct aspects. First, the judge may have made a rationally unjustified step in her reasoning, relying upon a “hunch” regarding the correct way to resolve the dispute rather than a solidly constructed argument. Nonetheless, despite the judge’s inability to provide a rationally defensible basis for her conclusion, the parties accept the decision as satisfactory and binding. Unlike with respect to the “efficiency” rationale for authority, then, when the parties are at least theoretically able to evaluate the validity of the judge’s decision, under this “insight” rationale for authority the disputants must instead rely upon certain personal characteristics of the judge that adequately convince them that any rationally indefensible steps she

27. The classic statement of the “hunch” view of judicial decision-making is found in Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision, 14 CORNELL L.Q. 274 (1929). Notably, Raz himself acknowledges that reasons often underdetermine our choices, leaving more than one conclusion available as rationally defensible: “[W]hen no option is supported by conclusive reasons, when we face conflicting adequate reasons for action, the explanation of why we followed the reasons we did will involve more than the invocation of our rationality. It will allude to our tastes, predilections, and much else besides.” JOSEPH RAZ, ENGAGING REASON 117 (1999).

28. This is true even if they did not actually perform the analysis.
takes in her reasoning will ultimately be correct ones. The judge may, for example, have a reputation for insight born of long experience, or perhaps for fairness in deciding between disputing parties, or even just a reputation for delivering judgments that satisfy both parties. As a result, the disputants are willing to endorse the judge’s decision, as they accept that any leaps in reasoning will be performed in an acceptable manner.

Notably, this form of authority is the one most closely tied to the long tradition of informal dispute settlement, including non-binding arbitration, as it requires the parties to be willing simply to trust in the good judgment of the judge and, as a result, accept a decision that is not clearly rationally defensible. Obviously this form of authority requires either a strong familiarity of the parties with the judge or at least a belief by the parties that the judge has the personal characteristics necessary to make intuitive leaps correctly.29

b. The “Expertise” Rationale for Authority

A second variant of the “personal” rationale for authority arises when the parties do not have a generalized faith in the judge’s decision-making abilities but rather acknowledge the judge’s superior ability to reason to the proper conclusion. In basic cases of this “expertise” rationale for authority, such as in civil disputes involving legally unsophisticated parties, this can be as simple a matter as the higher level of training or even higher intelligence of the judge, which the parties accept as allowing the judge to reason to a conclusion that the parties could not justifiably reach by themselves.30

29. For example, certain individuals may simply presume that an individual holding high judicial office must have the characteristics justifying reliance on her judgment or else she would not have made it to that level. Consequently, any judgment delivered by that judge will be regarded by those individuals as authoritative. As the discussion in this Article concerns a social analysis of authority rather than a normative one, it is irrelevant whether the judge in question does indeed have the characteristics necessary for her to be an authority. All that matters is that the parties to the dispute believe that she does.

30. The term “justifiably” is important here, as the question is not whether the parties would indeed reach that conclusion or whether they would reach it by socially acceptable forms of argument. While “expertise” authority is an element of the social analysis of authority, it is inherently tied to a notion that the authority is reaching a correct answer rather than merely a socially acceptable one. Consequently, the authority’s conclusion must be justifiable, as in accordance with norms of correct reasoning. There are many theoretical works regarding what constitutes correct reasoning, as this is hardly a settled topic. However, an excellent survey of the field can be found in JOHN L. POLLOCK &
The "expertise" rationale, however, does not merely appear in cases involving legally unsophisticated parties but can also exist when the disputants are sophisticated legal actors with highly paid attorneys to consult and the judge is an individual with acknowledged specialized insight into the legal subject matter of the dispute.\(^{31}\) Thus, for example, an opinion in an antitrust case by a judge recognized as possessing significant expertise in this area may be authoritative for the disputants even though an opinion by the same judge on a different issue might not.

Unlike the "insight" rationale for authority, where the parties must trust in the judge to properly take a rationally indefensible step to an appropriate decision, the "expertise" rationale will be operative if the judge's decision is indeed rationally defensible but relies upon reasoning that can only be followed by individuals with a level of knowledge or ability not possessed by the parties to the dispute.

c. The "Institutional" Rationale for Authority

The final version of "personal" authority is distinguishable from both the "insight" and "expertise" variants, as it emphasizes not the judge's ability to reach a substantively appropriate conclusion but rather the judge's ability to reach a socially appropriate conclusion, whether substantively correct or not.\(^{32}\)

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\(^{31}\) JOSEPH CRUZ, CONTEMPORARY THEORIES OF KNOWLEDGE (2d ed. 1999).

Important individual accounts are in ALVIN GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD (1999); A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY (Louise M. Antony & Charlotte Witt eds., 1993); RICHARD SWINBURNE, EPISTEMIC JUSTIFICATION (2001); TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS (2000).

\(^{32}\) The question of when an individual is justified in relying upon the views of an expert is a specialized topic within epistemology, but a good general treatment is provided in DOUGLAS N. WALTON, APPEAL TO EXPERT OPINION (1997).

\(^{32}\) That is, what is sought by the parties to the dispute is not a judgment regarding which individual acted correctly as judged by a specific legal rule but rather which individual acted in accordance with broader social norms regarding the conduct of the activities in question within the community to which both parties belong. As a result, it matters less that the judge's application of the law is correct, in the sense of matching the interpretations made by higher courts within that legal system, than that the law is applied in a way consistent with the views of a particular social group. The importance of this distinction between the written law and the law as it actually exists in the community is best expressed in the enormously insightful work of Eugen Ehrlich. EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 356 (1913) ("[I]f English law should be introduced anywhere on the continent of Europe, the
This "institutional" rationale for authority exists when although the disputants may deny that the judge actually has any superior abilities in reasoning or judgment, they nonetheless recognize the judge's superior ability to reach a conclusion that properly reflects the standards applied within a particular social group. The judge's decision, then, is authoritative not because of the judge's abilities but because of his representativeness.\footnote{33}

In its most basic variant, this form of authority will arise when the parties to the dispute both belong to a single community and both desire a validation of their actions as being in accordance with the norms of the community.\footnote{34} If the judge also comes from that community and properly applies that community's standards in reaching a decision, both parties will have reason to accept her decision as an appropriate settlement of their dispute.

family, the corporations, ownership, the real rights, and the contracts would remain what they had been until then; and even though they should be adjudged according to English law, they would not become English legal relations. Legal relations are created by society, not by legal propositions."\footnote{33}; Eugen Ehrlich, \textit{The Sociology of Law}, 36 HARV. L. REV. 130, 137-38 (1922) ("An oriental despot can, if he pleases, level a city to the earth or condemn a few thousand human beings, but he cannot introduce civil marriage into his kingdom.... It is not enough that a statute is passed; it must be capable of being enforced.").

\footnote{33} A parallel can be drawn here with ethical arguments relating to moral relativism, which argue that the morally correct action in any given situation is not dictated by any absolute moral norm but rather depends upon the personal and social context in which the action takes place. See generally GILBERT HARMAN & JUDITH THOMSON, \textit{Moral Relativism and Moral Objectivity} (1996). While the current discussion need not take a stance on moral relativism, the parallel is useful in so far as in both situations the sole concern of the individual evaluating the act in question is its conformity with certain local standards, regardless of conformity with any broader or arguably more objective standards. This issue of the conformity of normative judgements with local rather than absolute standards is fundamentally distinguishable from the more contentious claims of relativism found in the works of philosophers such as Richard Rorty, who deny the sense of any form of reference to an independent, non-relative world. See, e.g., RICHARD RORTY, \textit{The World Well Lost, in Consequences of Pragmatism} 3 (1982). For a critique of such views, see ROBERT KIRK, \textit{Relativism and Reality} (1999).

\footnote{34} The term "community" as used here should not be misunderstood, as it refers solely to a form of social organization that is at some level normatively cohesive. Thus it includes a purely business "community," in which participants in a certain type of business interact repeatedly with one another and have, as a result, developed certain substantive norms with which each actor is expected to conform. See Nancy S. Kim, \textit{Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes}, 84 NEB. L. REV. 506 (2005) (arguing for the interpretation of contracts in accordance with local norms rather than in accordance with rules developed at the national or other large-scale level).
However, a second variant of "institutional" authority should also be acknowledged, as it can exist even when both of the parties do not come from a single community with identifiable norms but nonetheless recognize themselves as being subject to a particular legal system. In such a situation the disputants do not value the judge due to her representativeness of their own community but because she herself is a representative member of the community of judges in a particular legal system. That is, the judge's decision is valued because it reflects appropriately the norms of reasoning with which the legal rules in question are expected to be applied. Thus, for example, a decision by a highly regarded English judge on French law will be less authoritative on the meaning of French law regarding the issue in question than a decision by a merely average French judge, so long as the latter judge is characteristic of French judges.

This rationale for authority draws upon the notion that even though judges within a single court structure may come from a diversity of backgrounds, they are under professional pressure to conform their legal interpretations to those of other courts in their jurisdiction, particularly higher courts, whether they agree with the higher courts or not. Moreover, many judges will experience a form of socialization, as the constant interaction with the same colleagues over a period of years leads to an increasing level of

35. It should, after all, be emphasized that what counts as proper legal reasoning can vary from one jurisdiction to another. This can be due simply to differing evaluations of the importance of certain principles (e.g., consistency between decisions, objective fairness versus formal application of rules, etc.). However, it can even extend to the point of reflecting fundamental cultural differences in the way reasoning is approached. See, e.g., Jos Hornikx & Hans Hoeken, Cultural Differences in the Persuasiveness of Evidence Types and Evidence Quality, 4 COMM. MONOGRAPHS 443 (2007) (noting differences between Dutch and French students in the means of evaluation of anecdotal, statistical, causal, and expert evidence); Richard E. Nisbett et al., Culture and Systems of Thought: Holistic Versus Analytic Cognition, 108 PSYCHOL. REV. 291 (2001) (noting that East Asian individuals attend far more to context than Western individuals, who attend primarily to the specific object under discussion and the application to it of formal rules); Ara Norenzayan et. al., Cultural Preferences for Formal Versus Intuitive Reasoning, 26 COGNITIVE SCI. 653 (2002) (noting that East Asian university students display a preference for intuitive reasoning, while European and American students display a preference for formal reasoning).

36. A "rational actor" explanation for judicial adherence to precedent is offered in Eric Posner, The Decline of Formality in Contract Law, in THE FALL AND RISE OF FREEDOM OF CONTRACT 61, 74–75 (Francis H. Buckley ed., 1999). But see Gilat Levy, Careerist Judges and the Appeals Process, 36 RAND J. ECON. 275 (2005) (arguing that judges wishing to promote their careers can be expected to depart from precedent more often than their colleagues in order to publicize their abilities).
consensus on many, although not all, elements of the law. As a result, even though the judgment delivered in a particular case is simply a legal interpretation by a single judge, the disputants are able to view it as an interpretation offered by the legal institution as a whole rather than merely by the individual before whom the dispute happens to have been brought.

What is distinctive about the "institutional" rationale for authority, then, is that while the parties superficially recognize the authority of the judge that delivers the decision, in reality what is being respected is the authority of the court system as a whole, with the judge delivering the decision only receiving deference from the disputants because she is seen as an accurate guide to the views that would be expressed by the broader community to which she belongs. Consequently, while both the "insight" and "expertise" rationales for authority primarily rely upon some specific characteristics of the judge, the "institutional" rationale refers only secondarily to the judge and primarily to the respect accorded to the legal institution as a whole.

B. A Preliminary Objection

Prior to applying this analysis to the question of the role of authority in arbitration, one argument should be addressed that, if correct, would effectively preclude authority from almost all arbitral awards. Drawing as it does upon Raz's insightful work, the analysis above adheres tightly to the "service conception of authority." However, incorporating the "service conception" into a social analysis of authority means that a judicial decision will only be found authoritative when the parties receiving that decision view the judge as providing them with a service. That is, the parties must regard the judge as delivering a decision that is closer to the correct answer than any decision they would have reached themselves.

The complication this raises is that it would seem to follow that the parties to the dispute must indeed believe that there is a pre-existing correct answer to the question the judge is being asked to decide. Otherwise there would be no substantive sense in which the judge could be seen as providing the parties with a service.

37. Jordi Blanes i Vidal & Clare Leaver, Behaviour in Networks of Collaborators: Theory and Evidence from the English Judiciary (Univ. of Oxford Discussion Paper Series, Paper No. 354, 2007), available at http://www.economics.ox.ac.uk/Research/wp/pdf/paper354.pdf (finding empirical evidence, based on a citation study, that judges are more likely to cite positively the decisions of other judges with whom they have closely worked).
They need not believe that there is a single correct answer to the question being asked, but they must believe that there are at least right and wrong answers, and that the judge’s decision is defensible as right, if they are to see him as providing the desired service.

While this may initially seem to be a technical matter of legal theory, raising the traditional dispute as to whether judges “make” or “find” the law, it achieves a practical importance precisely because of the emphasis in the social analysis of authority on the beliefs of the parties receiving the decision. Whatever the correct answer to the theoretical question of whether judges “make” or “find” the law, this argument maintains that if the parties to a dispute believe that judges merely “make” the law, then they simply will not see the judge deciding their case as providing them with a service, as there is no “correct” answer that the judge is capable of delivering.

The problem this raises is that it is clear that legally sophisticated parties often simply do not view the judge’s decision in their case as representing anything more than a judgment by an individual with a particular place in a legal hierarchy. That is, they do not view the judge’s decision as more correct than their own views, or even those of a third party, but merely as determining the application of the law in their case as a factual matter. Such “sophisticated” parties, then, view the judge as merely an individual with the power to decide a case, who must be convinced to decide it in a certain way, and not as an individual with an ability to deliver an authoritative decision.

38. That is, the legal rule being applied may result in either a range of correct answers or even a “vague” answer. In the latter case, one or more answers is clearly right, and many answers are clearly wrong, but there also exists a range of answers for which there is simply no means of determining their correctness. As a result, a judge could legitimately select any of these answers, and it would be impossible to criticize that answer as incorrect. On the issue of “vagueness,” see generally VAGUENESS: A READER (Rosanna Keefe & Peter Smith eds., 1996).

39. See, e.g., JOHN AUSTIN, LECTURES ON JURISPRUDENCE 655 (4th ed. 1873) (declaring the view that judges merely find, rather than make, the law to be a “childish fiction”).

40. See, e.g., E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES 3 (2005) (“None, other than the uninitiated who seemingly lack an understanding of the dynamic of the common law, seriously question the fact that judges make law.”).

41. In the classic quotation from Holmes, “The prophecies of what courts will do, and nothing more pretentious, are what I mean by the law.” Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 461 (1897).

42. By contrast, the conception of legal decision-making as effectively involving the appointment of a legal specialist to determine how the law applies
This argument is particularly important in the context of international arbitration, as it is beyond question that parties involved in international arbitrations will invariably qualify as sophisticated legal actors. Consequently, were this view to be accurate, and legally sophisticated parties simply did not view legal decisions as authoritative, it would necessarily follow that international arbitral awards could not be authoritative, and the entire argument of this Article would be undermined.

However, the analysis performed above of the differing rationales of the social analysis of authority makes it possible to demonstrate that even if it is accepted that parties in international arbitration do not believe that judges “find” rather than “make” the law, arbitral awards can nonetheless be authoritative.

There is little question that the first rationale for authority, that of “efficiency,” does indeed fall prey to this argument. After all, if there is no pre-existing correct answer to be reached, then it simply cannot be the case that the judge is reaching a particular conclusion faster than the parties themselves could have done. While the decision of the judge may indeed coincide with what the parties would theoretically have agreed upon, there is no necessary reason why this should be so, and the judge’s decision would have been every bit as valid had it been radically different.

To the extent legal decisions are to have any authority for sophisticated parties, then, this authority must derive from one of...
the "personal" rationales for authority: "insight," "expertise," or "institutional." Indeed, as will be argued, all of these variants are ultimately capable of providing the desired authority, as none require that the parties possess any particular view regarding the pre-existing correctness of a legal decision.

With respect to both the "insight" and "expertise" rationales for authority, the parties are placing their reliance upon the ability of the decision-maker to achieve enhanced insight into the dispute, whether due to the judge's superior understanding of a technical, non-legal issue, or merely because of the judge's ability to see a fair conclusion that would have eluded the parties. Consequently, the authority of the decision-maker does not derive from any alleged enhanced insight into the law that is being applied to the dispute, and as a result the parties' views on the pre-existence of that law simply play no role in their evaluation of the authoritativeness of the decision.

Similarly, the "institutional" rationale for authority is not precluded by the objection. The first variant, according to which the judge's decision will conform with the norms of a non-legal social group, is unaffected by the parties' views on the conformity of judicial decisions with pre-existing legal rules. Moreover, the second variant only requires that the judge will reliably decide in a manner consistent with other official actors within the legal system. With respect to this second variant of the "institutional" rationale, then, the question of whether the judge has "made" or "found" the law becomes irrelevant so long as the parties can observe that the norms within the broader legal system would lead judges more generally to reach the same conclusion.

Consequently, the analysis of authority provided in this Article offers a clear explanation of how even "legally sophisticated" parties can view legal decisions as authoritative so long as they view the judge in their case as having the necessary personal abilities to deliver "insight," "expertise," or "institutional" authority to her decisions. Similarly, then, arbitral awards can possess at least some forms of authority, no matter how sophisticated the parties in international arbitration may be.

Part III of this Article will now apply this analysis of authority to traditional arbitration. It will clarify which versions of authority lay behind the success of arbitration prior to its recent arrival as the preferred form of international dispute resolution.

III. THE ROLE OF AUTHORITY IN TRADITIONAL ARBITRATION

Arguably the single most defining feature of arbitration as a confrontational dispute resolution procedure is the centrality of the
arbitrators to the dispute resolution process. While there are no strict procedural rules in accordance with which arbitrations must be conducted, and the degree to which arbitrations are subjected to State control can also vary greatly, the necessity of an independent, third-party decision in arbitration unavoidably places great emphasis upon the individuals selected to serve on an arbitral panel. Indeed, while the degree of independence of arbitration from State law enforcement has always been questionable, the importance of the identity of the arbitrators and their power to control the proceedings over which they preside have remained consistent.

With respect to the authority of arbitral awards, the primary virtue of traditional arbitration was the authority of the arbitrators as seen by the parties. Whatever procedural rules were adopted

44. Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kröll, Comparative International Commercial Arbitration 522 (2003) ("Parties are free to agree generally the procedure and, in any event, the arbitration tribunal has the power to fix the procedure and determine procedural issues.").

45. Gary B. Born, International Commercial Arbitration 30 (2d ed. 2001) ("Despite the hostility to international arbitration in some parts of the world, most States in Europe, North America, and parts of Asia have adopted legislation that provides effective and stable support for the arbitral process.").

46. For example, definitions of arbitration consistently include reference to the participation of a third-party decision-maker. See, e.g., id. at 1 ("International arbitration is a means by which international disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers."); Richard Garnett et al., A Practical Guide to International Commercial Arbitration 1 (2000) ("Arbitration is a dispute resolution mechanism whereby private parties, by way of agreement, submit their existing or future disputes for binding resolution by an appointed arbitrator or arbitrators.").

47. See, e.g., James Alan Jaffe, Striking a Bargain: Work and Industrial Relations in England, 1815–1865, at 210 (2000) ("Western Circuit assize records reveal that sometimes the parties themselves were allowed to select their own arbitrators, while at other times arbitrators were appointed by the court, but only after securing the consent of the parties."); Stephen E. Sachs, From St. Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant," 21 Am. U. Int'l L. Rev. 685 (2006) (arguing that contrary to the views expressed by many commentators, courts were intimately involved in medieval English arbitration).


49. Richard Garnett, International Arbitration Law: Progress Towards Harmonisation, 3 Melb. J. Int'l L. 400, 401 (2002) ("Rather than making use of the court systems in their own countries—which were undeveloped, procedurally backward and cumbersome—traders preferred to set up their own tribunals, consisting of their own representatives who were familiar with the
for the arbitration, the fully consensual and party-controlled nature of arbitration meant that the award was delivered by a tribunal that the parties saw as having genuine insight into their relationship and the context in which they were operating.50

Indeed, precisely because of this insight of the arbitrators into the relationship between the parties, particular emphasis was placed on the arbitrators’ role as settlers of the dispute rather than as judicial arbiters.51 The disputants were usually in some form of ongoing relationship and had selected as arbitrators individuals with a connection to either the parties or the social context in which they operated.52 As a result, the decision of the tribunal was viewed by the parties as not merely a rule-based legal judgment but a proposed “resolution” of their dispute, intended either to allow the relationship to continue or at least to allow both parties to feel that justice had been served.53 Moreover, as the agreement to arbitrate was reached post-dispute,54 and the procedural elements types of disputes that arose. In this way, areas of recognised expertise could be developed without excessive legal formality.”).

50. JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION 55 (2008) (“The arbitrators themselves were often friends or relatives of the parties.”).

51. Id. at 55 (“Arbitrators were not bound by formal rules. Their aim was to devise a compromise that would leave each party at least partially satisfied.”); Edward Powell, Settlement of Disputes by Arbitration in Fifteenth-Century England, 2 LAW & HIST. REV. 21, 24 (1984) (“[A]rbitration procedures, while clearly influenced by legal forms in the fifteenth century, nevertheless remained independent of court supervision in most cases, and continued to perform functions to which the courts could not aspire: they could settle feuds, make peace and restore harmonious social relations between disputing neighbors.”).

52. MARYANNE KOWALESKI, LOCAL MARKETS AND REGIONAL TRADE IN MEDIEVAL EXETER 219 (1995) (“[T]he litigants themselves usually chose one or more arbitrators each, with an additional man jointly selected by both to serve as referee. The arbitrators were usually merchants or artisans with some knowledge of the business at hand. . . . In some arbitrations, the parties chose a cleric or even a member of the local nobility as the referee to help settle the dispute, hoping perhaps that the prestige of the arbitrator would ensure the success of the process.”); ANTHONY MUSSON, MEDIEVAL LAW IN CONTEXT 92 (2001) (“In the trade and business context . . . p[ar]ties were able to appoint their own arbitrators (usually one or more for each side), which extended to drawing them from a party’s own nationality, and an additional unanimous choice to act as referee.”).

53. Powell, supra note 51, at 35 (“The arbitrators’ role as peace-makers led them inescapably towards framing a settlement that would be acceptable to both sides in a dispute.”).

54. JAFFE, supra note 47, at 213 (“While the scope of arbitration was therefore quite broad by the end of the eighteenth century, the legal obligation to pursue arbitration was construed relatively narrowly by the courts during this
of the arbitration were determined with the mutual consent of the parties, even the losing party had reason to view the result as binding.\(^5\)

Historically, then, the distinctiveness of arbitration from litigation, and the reason it was selected by parties, involved not the procedural flexibility so regularly touted today as a primary virtue of contemporary international arbitration,\(^6\) but rather the esteem of the parties for the particular individuals serving as arbitrators. As either prominent and experienced figures in the same industry as the parties, or perhaps merely individuals both parties respected,\(^7\) the arbitrators were able to deliver a decision that, although not always legally binding on the parties,\(^8\) was nonetheless usually sufficient to preclude any further disputes.\(^9\)

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55. Michael Mustill, *Comments on Fast-Track Arbitration*, 10 J. INT’L ARB. 121, 124 (1993) (“In the past, commercial people chose arbitration because they wished their dispute to be resolved with the minimum of antagonism by someone whom they trusted and respected, and whose award they would honour as a matter of course because that was what they had agreed to do.”).

56. Thomas Allen, *Institutional Rules: Straitjacket or Scaffold?*, in *INTERNATIONAL COMMERCIAL ARBITRATION* 79 (Martin Odams De Zylva & Reziya Harrison eds., 2000) (“The procedural flexibility offered by arbitration and arbitral institutions is a defining characteristic of this form of dispute resolution and a quality which makes it an attractive alternative, especially in an international commercial context, to traditional litigation.”); Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT’L 59, 65 (2002) (“One of the great strengths of arbitration is its procedural flexibility, which permits the process to be tailored to the particular needs of each case.”).

57. MUSSON, *supra* note 52, at 92 (“In Exeter, merchants or artisans with knowledge of the matter normally served as arbitrators, but it was quite usual to have as an impartial umpire a respected local figure or a man of the cloth.”); Powell, *supra* note 51, at 27 (“Most arbitration awards were made locally, where the disputes had arisen, and were negotiated by arbitrators from the same classes as the disputants themselves—the magnates and gentry who dominated local society.”).

58. JAFFE, *supra* note 47, at 213 (“A particular weakness of arbitration, outside those agreements registered with the courts under the terms of the 1698 Act, was the inability to compel the performance of awards.”); Zeyad Alqurashi, *Arbitration Under the Islamic Sharia*, TRANSNAT’L DISP. MGMT. 2–3 (2004) (discussing that both binding and non-binding awards existed under traditional Islamic law).

59. This is not, though, to say that enforcement was never an issue in traditional arbitration. *See, e.g.*, Stephen Weinberger, *Arbitration of Disputes*, in *MEDIEVAL FRANCE: AN ENCYCLOPEDIA* 61 (William W. Kibler ed., 1995) (“[I]n order to ensure the stability of the settlement, great care was taken to have it witnessed by as many people as possible. In some cases, a settlement might be
In terms of the analysis of authority developed in this Article, then, it will be argued here that traditional arbitration relied upon either the “insight” of the arbitrators, their “expertise” in a certain area, or their possession of a specific variety of “institutional” authority tied to the social context in which the parties operated.

To address first the question of the “efficiency” rationale for authority, it is clear that the arbitrators were not selected because they were viewed as having an ability to reach the correct result more efficiently than the parties. After all, while the arbitrators may indeed have possessed the ability to reason quickly to reliable conclusions, the emphasis in traditional arbitration placed on achieving a resolution acceptable to both parties, rather than delivering a formally correct and logically deduced conclusion, meant that the arbitrators did not deliver awards based on strict application of norms to facts but rather decisions judged to be both appropriate and acceptable to the parties. Consequently, as there was no pre-existing correct answer to which the arbitrators could lead the parties, these parties could not view the award as authoritative for reasons of “efficiency.”

By contrast, the arbitrators could have been viewed by the parties as authoritative due either to the belief that they possessed the “insight” required to settle the parties’ dispute in a mutually satisfactory way or because of their perceived “expertise” in a subject central to the dispute.

The situation with respect to the “institutional” rationale for authority is somewhat more complex, although it is certainly true that the arbitrators were usually not selected because their view

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60. Michael D. Myers, The Failure of Conflict Resolution and the Limits of Arbitration in King’s Lynn, 1405–1416, in Traditions and Transformations in Late Medieval England 81, 83 (Douglas Biggs, Sharon D. Michalove & A. Compton Reeves eds., 2001) (“[T]he arbitratus itself resulted from a process of proposal and counter-proposal until a compromise solution acceptable to all parties emerged.”); Powell, supra note 51, at 35–36 (“Their function was not that of a law court, to decide in favor of one party or another on the basis of a body of legal rules and principles. Legal thinking might influence their deliberations, but in fifteenth-century England, as in twelfth-century France, arbitrators were concerned less to apply objective rules of decision than to ensure that both parties were satisfied and that no one left empty-handed.”); Weinberger, supra note 59, at 61 (“[D]espite the weight of the evidence, arbitrators most often recommended a compromise. With each side receiving some satisfaction, there was less likelihood that the dispute would be renewed.”).
was seen as an accurate indicator of the views of a larger and ultimately more important legal institution. After all, even if arbitrators have long experience with the law to be applied and genuinely desire to apply it in the same way as a domestic court, what is delivered in an arbitration is external to the law in question and constitutes simply an interpretation of the law by individuals whose opinion holds no specific relevance for the subsequent development of that law.

By way of illustration, due to a mixture of the doctrine of precedent and professional deference, any decision by a judge within the English court system automatically becomes interwoven into English law, even if it is not a decision that other judges within that court system would have made. That is, when an English court delivers an interpretation of a point of English law, English law itself is changed. There is either support for a new interpretation of that particular point of law, or there is further confirmation that the dominant interpretation is correct. Decisions by judges interpreting their domestic law, then, have "institutional" authority not merely because they are reliable predictions of the behavior of other courts within the same legal system but also because they help determine the behavior they are predicting by creating the law that other courts will then interpret.

By contrast, the same decision delivered by an arbitrator has a fundamentally different relationship with the law that is being interpreted. The courts of the jurisdiction whose law the arbitrator applies may regard the decision as insightful, and thus persuasive, but it has no precedential value and also receives no particular professional deference by courts addressing other disputes. In

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61. NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 151 (2008) ("[I]n certain contexts, such as the judicial context, precedent-following might be accepted by decision-makers and others as a common standard of correct adjudicative practice, deviation from which is likely to meet with criticism or censure.")

62. "Changed" should here be understood as including situations in which the decision in question merely affirms previous case law. Such a decision still "changes" the law in so far as it adds to the support for the dominant rule.

63. Deference will certainly be given to the arbitrator's evaluation of domestic law if an attempt is made to vacate the final award. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 424 (4th ed. 2004) ("The Model Law . . . sets the internationally accepted standard for judicial control of international arbitration . . . . [T]here is no provision in the Model Law for challenging an award on the basis of mistake of fact or law."). However, this deference merely reflects the parties' choice of that arbitrator as the individual to determine their dispute and does not reflect any judgement at all of the correctness of that final award as an interpretation of the applicable law.
short, its impact upon the deliberations of a court is equivalent to that of an academic article, not of a court decision. Its conclusion will be adopted and endorsed if the decision is persuasive, but it will be rejected if it is not.\textsuperscript{64}

Moreover, prior to the mid-twentieth century, courts often had highly negative attitudes toward arbitration.\textsuperscript{65} As an example, under English law, even when both parties had indisputably agreed to participate in arbitration, they both retained the right to revoke their consent at any time prior to the delivery of the award.\textsuperscript{66} As a result, there was simply no incentive for parties to select an arbitrator who could reliably produce reasoned awards that accurately predicted the reasoning of a particular court system, as once a party realized that the law was not in its favor, it could simply terminate the arbitration, thereby requiring the other party to incur further time and expense by taking the dispute to court.

Instead, as discussed above, arbitrators concentrated upon delivering an award that would be acceptable to both parties rather than an award that was technically legally correct. In so far as an arbitral award in traditional arbitration possessed authority derived from the “institutional” rationale, then, it did not come from the arbitrators’ representativeness of the judges of a particular legal system.

\textsuperscript{64} Indeed, citation of arbitral awards by courts is virtually unknown, even in contemporary times.

\textsuperscript{65} \textsc{Born}, supra note 45, at 29 (“Many nations historically regarded international commercial arbitration with a mixture of suspicion and hostility.”); \textsc{Lew et al.}, supra note 44, at 18 (“Even in England . . . arbitration was closely controlled by the English courts. During this period there was significant national court intervention in the arbitration process, including reviewing the substantive decisions of the arbitrators.”); Sarah Rudolph Cole & Kristen M. Blankley, \textit{Arbitration, in The Handbook of Dispute Resolution} 320 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (“Until Congress passed the Federal Arbitration Act (FAA) in 1925 . . . American courts refused to assist the merchants in strengthening arbitration, holding instead that arbitration agreements impermissibly divested the courts of jurisdiction.”).

\textsuperscript{66} \textsc{James Jaffe}, \textit{The Limits of Justice and Fairness: Expanding the Scope of Arbitration in Britain and India during the Late Eighteenth and Early Nineteenth Centuries} 5 (July 2007) (unpublished draft paper), \textit{available at} \url{http://www.law.harvard.edu/programs/ames_foundation/BLHC07/Jaffe The Limits of Justice and Fairness.pdf} (“While a submission to arbitration was considered by the courts to be an unenforceable contract, it was at the same time also considered to be a mandate, which indicated that it could be revoked at any time before the award was made. A standard nineteenth-century treatise noted, for example, that oral agreements to arbitrate could be aborted simply by announcing to the arbitrator: ‘I discharge you from proceeding any further.’ In the end, therefore, arbitration awards could only be secured if both parties fully agreed to proceed to arbitration and accepted the legitimacy of the entire arbitration procedure.” (citation omitted)).
However, this does not mean that all institution-based authority was lacking in traditional arbitral awards. Rather, it merely indicates that the institution serving as the basis for the authority in question could not be a legal one. For example, the arbitrators may have been selected due to their membership in, and representativeness of, a particular social group as a means of the winning party gaining validation of its behavior from that social group. If, for example, highly regarded members of a local trading community sat as arbitrators in a dispute between two other members of that community, any decision they delivered based on the norms of that community would provide more validation within that community of the correctness of the victorious party's conduct than would any decision by an external body, including the national courts.

Consequently, traditional arbitrators were able to deliver authority through the "institutional" rationale, but only when there was a common social group shared by the parties and the arbitrator's decision reflected the norms of that group.

Drawing these conclusions together, then, it is clear that the authority of a traditional arbitral award was inherently personal, relying upon the possession by the arbitrators of certain personal characteristics. They may have been viewed as insightful or as possessing a certain expertise, but even when it was the "institutional" rationale for authority that was operative, this authority was only possible because the arbitrators were personally representative of a particular social group rather than because they possessed a certain place in an institutional hierarchy, such as a court system.

Part IV of this Article will build upon this analysis of the place of authority in traditional arbitration by addressing recent changes in both the role of arbitrators and the procedures used to select them. It will argue that these changes have ultimately deprived contemporary arbitral awards of the authority possessed by awards delivered in traditional arbitration.

67. As noted previously, it should be remembered that "social group" here refers not just to ethnic or political groupings but to any social grouping with a coherent normative set of rules governing conduct, including groups of consistently interacting businesses. See supra note 34.

68. This does not mean that hierarchy was entirely irrelevant, of course, because an individual highly placed in the relevant social structure was more likely to be viewed as authoritative than was an individual lower down in that hierarchy. However, the validation sought ultimately depended on the individual being viewed as representative, and a highly placed individual who was not regarded by the parties as representative of the norms of the group would nonetheless be incapable of delivering the requisite authority to the award.
IV. THE LOSS OF AUTHORITY IN CONTEMPORARY INTERNATIONAL ARBITRATION

This part of the Article will argue that the loss of authority in contemporary international arbitration, as illustrated by the increasing willingness of parties to challenge awards, derives from the adoption of procedures that usually operate to preclude precisely the types of authority that underlay the success of traditional arbitration. Moreover, while contemporary international arbitration has been deprived of the sources of authority that traditional arbitration possessed, no alternative means of delivering authority to arbitral awards have been adopted. As a result, contemporary international arbitration is simply structurally incapable of delivering authoritative awards. It will be argued here that this situation is largely attributable to the effect of certain procedures currently adopted in international arbitration on the role and standing of arbitrators and the interaction of those procedures with the increased “judicialization” of contemporary international arbitration.

A. Problems Derived from the Arbitrator Selection Processes

In traditional arbitration, parties agreed to arbitrate after their dispute had arisen and proceeded to a hearing only when they were both able to agree on an arbitrator or arbitrators to hear their dispute. The contemporary spread of arbitration as a dispute resolution mechanism, however, has made this fully consensual approach comparatively rare. Instead, contemporary arbitration agreements are predominantly signed at the time of the initial contract, before any dispute has arisen, and are designed to be

69. This does not mean, of course, that an authoritative award can never be delivered in international arbitration but merely that the existence of that authority will depend on facts specific to that case (e.g., both parties agree on a single arbitrator whom they both respect), so that it cannot be attributed to anything inherent in international arbitration itself.

70. 2 KLAUS PETER BERGER, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS 303 (2006) (“It is particularly in major, multi-million dollar arbitrations that the informal atmosphere, which has long been the main feature of international commercial arbitration and has made arbitration an important factor in ADR, has given way to confrontation and litigation tactics, hitherto known only from proceedings before national courts. Over the past decades, the arbitral process has undergone a fundamental transformation which is often characterized as the ‘judicialization’ of arbitration . . . .” (internal cross-reference omitted)).

71. JAFFE, supra note 47, at 213.
broad enough to catch a wide range of potential future disputes.\textsuperscript{72} As a result, arbitration agreements usually include few details beyond the mere consent to arbitration, leaving details such as the identity of the arbitrators to be determined once a request for arbitration has been lodged.\textsuperscript{73}

Unsurprisingly, this has made the traditional fully consensual approach to arbitrator selection entirely unworkable for most contemporary arbitrations. After all, once the request for arbitration has been made a significant dispute has arisen between the parties, and attempts to negotiate an amicable dispute will have failed. Consequently, just as parties to a litigation will maneuver to ensure that their case is heard in what they view to be the most favorable jurisdiction for their own arguments, many parties will regard the appointment of an arbitral panel not as a means of securing a fair and independent tribunal to impartially decide a dispute between the parties but rather as a means of ensuring that the tribunal is composed of individuals more likely to decide in their favor.\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{72} Christopher R. Drahozal & Richard W. Naimark, Commentary, in SCIENCE OF INTERNATIONAL ARBITRATION, supra note 2, at 19.
\item \textsuperscript{73} INT'L CHAMBER OF COMMERCE, TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION: REPORT FROM THE ICC COMMISSION ON ARBITRATION 1 (2007), http://www.iccwbo.org/uploadedFiles/ TimeCost_E.pdf ("Simple, clearly drafted arbitration clauses will avoid uncertainty and disputes as to their meaning and effect. They will minimize the risk of time and costs being spent on disputes regarding, for example, the jurisdiction of the arbitral tribunal or the process of appointing arbitrators.").
\item \textsuperscript{74} Yves DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 120 (2d ed. 2005) ("Parties therefore often expend considerable effort in seeking to identify an arbitrator whom they hope may be 'sympathetic' to their position in an arbitration."); Keith E. W. Mitchell, Arbitrator Selection and Appointment Under the North American Free Trade Agreement, \textit{in NAFTA INVESTMENT LAW AND ARBITRATION} 314 (Todd Weiler ed., 2004) ("As 'you will want someone who will be philosophically receptive to the theory of your case and to your arguments' . . . 'you will need to analyse your case to determine the crucial issues to be decided, with a particular emphasis on the strategies and arguments you will use to get past the sticky issues.'" (quoting Elizabeth T. Baer, Selecting and Challenging Arbitrators in International Commercial Arbitration (Oct. 17, 2000) (unpublished manuscript))); \textit{id} at 313 ("Generally, a party attempts to select an arbitrator predisposed to a favorable consideration of their case, but not legally biased such as to result in disqualification."). On a more specific level, one practitioner has listed the following "attributes for party-appointed arbitral candidates: . . . Philosophical predisposition to your case: [(1)] previous arbitral decisions for or against claimant and for what sums; [(2)] previous procedural or jurisdictional decisions similar to those likely to arise in this case; [(3)] written favorably on issues likely to arise." Earl McLaren, \textit{Effective Use of International Commercial Arbitration: A Primer for In-House Counsel}, 19 J. INT'L ARB. 473 (2002).
\end{itemize}
Acknowledging this reality, contemporary international arbitral institutions have adopted a mechanism for selecting arbitrators that is intended to avoid the most likely problems. While arbitration can proceed with only a single arbitrator who is mutually agreed upon by both parties, the contentious nature of much contemporary international arbitration means that agreement between the parties on a single arbitrator will often be unlikely. As a result, if such agreements were necessary, many arbitrations would simply fail to take place, and parties either would be forced into court litigation or an "appointing authority" would simply impose an arbitrator of its own choosing upon the parties.

To avoid these difficulties, the dominant approach to arbitrator selection taken in contemporary international arbitration requires a panel of three arbitrators, rather than a sole arbitrator. Under this system, each party gets broad freedom, restricted solely by constraints on the ultimate fairness of the proceeding, to select and nominate an arbitrator. Those two arbitrators will then usually agree upon the selection of a third arbitrator to chair the panel.

The rationale behind this approach from the perspective of the authority of the resulting award is that this selection mechanism will serve to generate an authoritative panel by ensuring that each party has one arbitrator who it can view as possessing the ability to deliver authority to the award. Consequently, when the three arbitrators confer and agree upon a decision, each party has a reason to accept the result because the arbitrator each recognizes as having the requisite authority has concurred in the decision.

75. An appointing authority is an individual or institution empowered to select arbitrators for an arbitration when selection by the parties has failed to occur. REDFERN & HUNTER, supra note 63, at 192–94.

76. While the selection of an arbitrator by an appointing authority at least ensures that an arbitration occurs, the lack of direct participation by the parties and the lack of detailed research by the appointing authority into the ideal arbitrator for the arbitration means such a process will rarely result in an arbitrator being selected who is viewed by the parties as capable of delivering an authoritative award.

77. MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 117 (2008) ("In international arbitrations, however, there is frequently a preference for three arbitrators . . . .").

78. The specific constraints adopted vary between jurisdictions, but in broad terms arbitrators are expected to be both "independent" of the parties and "impartial" between them. See generally Christopher Koch, Standards and Procedures for Disqualifying Arbitrators, 20 J. INT'L ARB. 325 (2003); Leon Trakman, The Impartiality and Independence of Arbitrators Reconsidered, 10 INT'L ARB. L. REV. 124 (2007).

79. BORN, supra note 45, at 616 ("Typically, each party (in a two-party dispute) nominates an arbitrator and the two party-nominated arbitrators (or 'co-arbitrators') endeavor to agree upon a presiding arbitrator (or 'chairman').").
Moreover, even if all three arbitrators do not agree, absent a particularly vociferous dissent from its nominated arbitrator, the losing party still has reason to accept the panel’s decision because, though its arbitrator may disagree with the resolution, the disagreement likely turns on a point of interpretation rather than a fundamental disagreement.

On its face this is an eminently well-designed procedure, ensuring that both parties have some reason to view the arbitral panel as authoritative and avoiding the difficulties of requiring genuine agreement on the identity of each arbitrator. However, it becomes highly problematic when it is placed in the context of an increasingly litigious approach to arbitration at the international level.

Contemporary international arbitrators are overwhelmingly highly regarded individuals, particularly at the higher levels of international arbitration. But, from the perspective of an arbitrator’s ability to deliver authority to an award, the important question is not whether the arbitrator concerned has some form of general social or professional prestige but whether the specific parties involved in the arbitration view that particular arbitrator as capable of delivering a decision to which they will be content to bind themselves. Historically, as discussed above, this authority was assured by the fully consensual, post-dispute nature of arbitration, as the arbitrators were selected by agreement of the parties specifically to resolve the particular dispute in which the parties were involved. However, the procedure operating in contemporary international arbitration, as just described, is poorly designed for the purpose of delivering an arbitral tribunal with genuine authority for the parties.

An important obstacle to the selection of an authoritative arbitral panel arises under the system currently adopted because if each party nominates one arbitrator, it will almost always be the

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80. Dissents are rare in international arbitration. Derains & Schwartz, supra note 74, at 308 ("Indeed, the use of dissenting opinions has not generally been encouraged in international arbitration."); Drahozal & Naimark, supra note 72, at 260 ("[T]he vast majority of ICC awards are unanimous (at least on their face."). On the legal status of dissenting opinions in international arbitration, see Jean-Francois Poudret & Sebastien Besson, Comparative Law of International Arbitration 673–79 (2007).

81. For example, admission to the International Centre for Dispute Resolution (ICDR) International Roster of Neutrals, from which the ICDR suggests arbitrators to parties, requires, inter alia, a “[m]inimum of 15 years of senior-level business or professional experience.” American Arbitration Association, Qualification Criteria for Admittance to the ICDR International Roster of Neutrals, http://www.adr.org/si.asp?id=4495 (last visited Oct. 6, 2008).
case that the non-nominating party will regard the other party’s nominee with some level of skepticism, or even suspicion. It is, after all, not necessary to question the impartiality of an arbitrator to acknowledge that when the other party has done its job properly, its nominated arbitrator will have been selected precisely because of some substantive leaning that the nominating party believes will be favorable to its position. Even in such a case, then, when there is no actual bias involved, the arbitrator is simply not substantively impartial but is known by the party that did not nominate her to be antagonistic toward some central element of its case. Consequently, in contrast with traditional arbitration, the arbitrator is simply not an individual to whom both parties would have agreed to submit their dispute.

To return to the analysis of authority derived above, the arbitrator in question may be an expert in the subject matter of the dispute and hence potentially capable of delivering an authoritative award under the “expertise” rationale. However, if she holds substantive views starkly incompatible with those held by the party that did not nominate her, that party will not regard her as a genuine expert with respect to the issues in the case at hand but merely as a specialist who is, at best, simply mistaken. Similarly, authority will be unavailable under the “insight” rationale because if the arbitrator works from presumptions rejected by the non-nominating party, that party will be unwilling to accept her conclusions as displaying genuine insight rather than mere bias. Finally, while the arbitrator may well come from a community of importance to both parties in the dispute, and potentially therefore be able to deliver an award under the “institutional” rationale, if her views represent a subsection of that community to which the non-nominating party does not belong, then she is not genuinely representative of a community shared by the two parties and hence cannot deliver an award under the “institutional” rationale.

It might be argued that while each party will have a single arbitrator who cannot convey authority to the award, two arbitrators will always remain, one of whom was directly selected by the party in question, with the other having been selected by that party’s chosen arbitrator. Consequently, because at least one of those individuals must support an award for it to receive the

82. See supra note 74.
83. Even in traditional arbitration, of course, a party might nominate an arbitrator to the tribunal that held views that were very unfavorable to the other party. However, the ability of parties in traditional arbitration to refuse to participate in the proceedings, despite having entered into an arbitration agreement, meant that nomination of such an arbitrator would be counterproductive and so was unlikely to happen.
required majority approval, an authoritative award should still be deliverable.

There are, however, two difficulties with this argument. First, the losing party may itself have approached arbitrator selection from a litigious perspective, nominating an arbitrator it believed would be friendly to its case rather than one it saw as genuinely authoritative. Indeed, in most contemporary international arbitrations the party-nominated arbitrator will actually have been selected by the party's lawyers, not by the party itself. But, whether the party or its attorneys was responsible for the selection of the party-nominated arbitrator, if he was selected from a litigious perspective rather than with a view to his genuine authoritativeness, the participation by either the party-nominated arbitrator or the Chair of the three-arbitrator panel in an unfavorable award will merely indicate to the party that it made a poor strategic choice of arbitrator. It will give that party no reason to believe that the award delivered was indeed appropriate.

Moreover, even when the party has indeed nominated an arbitrator that it views as authoritative, all the possible authority of the resulting award will of necessity be derived from the participation in the award of that individual arbitrator, not from the Chair of the panel. The party, after all, has not selected the Chair but has at best consented to a negotiated agreement on an individual arbitrator that is acceptable to both parties. That is, though the Chair will certainly be inoffensive to both parties, she is unlikely to hold real authority for either of them. While the requirement for agreement on the identity of the Chair may appear to resemble agreement upon a single arbitrator in traditional arbitration, it is important to note the starkly different context in contemporary arbitration. In traditional arbitration neither party was obligated to arbitrate, but both agreed to do so because each viewed arbitration as advantageous to its position and thought that the specific arbitrator agreed upon was acceptable. Consequently, both parties had an incentive to cooperate in selecting an arbitrator genuinely acceptable to both parties because unless both parties agreed to the appointment, there would be no arbitration. In contemporary international arbitration, on the other hand, arbitration has usually become mandatory before the identity of arbitrators has been discussed, and if either party refuses to agree

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84. This is because the agreement to arbitrate will have been included in the contract underlying the dispute. Consequently, arbitration will have become mandatory as soon as validly invoked by one of the parties, and only subsequently will the parties address the question of the identities of the arbitrators.
upon the Chair of the arbitration panel, an individual will simply be selected by the relevant appointing authority, and the arbitration will progress as normal. Consequently, parties have no incentive to take the time to agree upon an individual genuinely authoritative for both sides, as each party has veto power over any choice genuinely desired by the other party, as well as an incentive to use it. Ultimately, then, the two parties will simply settle upon an individual who is inoffensive to both but authoritative for neither.

The Chair of the panel, then, will very rarely be able to deliver any authority to the award herself, leaving all authority to be delivered by the party's own nominated arbitrator. One important consequence of this situation is that if a party has nominated an arbitrator it sees as genuinely authoritative and that arbitrator dissents, the party in question has no reason to view the resulting award as authoritative. Moreover, as dissenting opinions are extremely rare in arbitration, even an award in which the party's nominated arbitrator concurs has limited ability to produce authority, as it is unclear whether the arbitrator indeed endorsed the decision or merely failed to author a dissent.

Thus, only if a party has approached the arbitral selection process with no particular eye for strategic advantage, and the arbitrator the party has selected explicitly acquiesces in the award, will that party have any reason to regard the award as authoritative. Obviously this does not describe the conventional situation in contemporary international arbitration.

One other variation on arbitrator selection found in international arbitration is also worth addressing, if only to emphasize that it does not provide a solution to the problem just discussed. While the standard process in arbitrations in which significant sums are in dispute involves each party freely selecting its own arbitrator, smaller arbitrations will often be undertaken by a single arbitrator who has been selected by the parties from a list prepared by an arbitral institution. This may initially seem to

85. BORN, supra note 45, at 616 ("Where the co-arbitrators are unable to reach agreement, an 'appointing authority' is delegated authority to select the presiding arbitrator.").
86. The objecting party will, after all, have a justifiable concern that an arbitrator viewed by the other party as authoritative will likely have a strong enough understanding of that party's views that she will be unfavorable to the objecting party.
87. Those rare situations occur when both parties do indeed agree upon an arbitrator that they both view as authoritative.
88. See supra note 80.
89. REDFERN & HUNTER, supra note 63, at 188–89 ("A variation on this system, sometimes used by arbitral institutions, particularly the ICDR and the Netherlands Arbitration Institute, and by appointing authorities under the
resemble traditional arbitration, as the individual selected to serve as arbitrator has received the explicit consent of both parties. However, in such a situation the parties have selected the arbitrator not through any particular personal familiarity with him, or even after detailed research on his suitability, but merely because he appears prima facie suitable and has received the endorsement of an arbitral institution. Thus, such an individual simply cannot have the kind of standing for the parties necessary to deliver an authoritative award.\footnote{There might be instances in which the parties develop sufficient respect for the arbitrator during the course of the arbitration that the resulting award is indeed authoritative. However, such instances would obviously be extremely rare due to the limited and substantively restricted degree of contact between the parties and the arbitrator during the course of the arbitration. Arbitrators will, in the course of a proceeding, have sufficient opportunity to dispel concerns regarding their competence, but it will be a rare proceeding in which enough substantive and varied interaction between the parties and arbitrator will occur to enable the arbitrator actually to become authoritative.}

**B. The Three-Arbitrator Panel as Displaced Party Negotiation**

Although the problems just described with the dominant selection method for a three-arbitrator panel are serious, it is worth noting that the three-arbitrator panel is quite capable of delivering an authoritative award. The problem, that is, does not derive from the use of three arbitrators to resolve the dispute but from the combination of the current means of selecting the participating arbitrators and the highly litigious context in which that procedure currently operates. The three-arbitrator panel is in fact a highly desirable feature of contemporary arbitration, and this part of the Article is devoted to explaining a means by which a three-arbitrator panel can deliver awards possessing authority under the “insight” rationale, as well as discussing why this is not currently being done.

As noted earlier, although a three-arbitrator panel theoretically allows arbitrators to be picked to represent both parties’ views, if one or both parties approaches the selection process with a goal of maximizing tactical advantage, neither party ultimately has any reason to view the panel as genuinely addressing the perspectives of both sides in an attempt to resolve the dispute. Consequently,

UNCITRAL Rules, is that the institution sends out the same list of names to each party. . . . Each party returns the list, deleting any name to which it objects and grading the remainder in order of preference. The appointing authority then chooses an arbitrator from the list, in accordance with the order of preference indicated by the parties.”).
the losing party has no reason to see the award it has received as possessing any kind of authority.

What needs to be emphasized, however, is not the current reality of the operation of three-arbitrator panels but the underlying goal of such panels, even if this goal is not currently being brought into reality. The rationale for the three-arbitrator panel, after all, does not depend solely on the reduction of uncertainty that comes from requiring at least two arbitrators to agree on the final award rather than the parties subjecting themselves to the potential quirks of a single arbitrator. Instead, the desirability of a three-arbitrator panel primarily arises from the way it allows each party to select an arbitrator and thereby have its substantive views and perspective represented on the panel.

A minimalist interpretation of this structure might argue that it is simply a means of ensuring that each party has one representative on the panel whose decision it can accept, thereby ensuring that the award has some level of authoritativeness for both parties. However, as just argued, such an interpretation is ultimately untenable, as the simple use of a three-arbitrator panel will not result in an authoritative award.

A stronger rationale for the use of a three-arbitrator panel can, however, be seen through an emphasis on the notion that parties will select which arbitrator to nominate not based on some generalized respect that they have for the individual in question but because that arbitrator holds certain substantive views that they wish to have represented on the panel. As already discussed, within the context of parties selecting arbitrators for tactical gain, attempts to pick an arbitrator for his substantive views can actually undermine the authoritativeness of the resulting award. But, when the selection is made in a good faith attempt to ensure that the party's viewpoint is fairly represented in the panel's deliberations, an entirely different situation results.

In this scenario, the panel moves beyond being just a result of tactical choices by parties attempting to ensure a favorable result and becomes a deliberative body that includes two individuals who can be expected to advance the views substantively held by each of the parties, with a third individual who holds substantive views at least acceptable to both parties.

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91. Moses, supra note 77, at 117 ("[I]t is generally believed that the award is more likely to be within the parties' expectations when considered by three arbitrators, and that unusual or inexplicable awards are less likely to occur.").

92. Redfern & Hunter, supra note 63, at 185 ("The advantage to a party of being able to nominate an arbitrator is that it gives the party concerned a feeling of confidence in the arbitral tribunal. Each party will have at least one 'judge of his choice' to listen to its case.").
In an ideal situation, then, a three-arbitrator panel can be seen not as a judicial body appointed to rationally determine which party should win the dispute but as a form of displacement of the negotiation of the parties. Once the arbitration has commenced, the parties of necessity will have adopted oppositional and even antagonistic stances, and there will therefore be significant obstacles to the parties discussing their dispute seriously with a view to achieving a settlement. Moreover, it is likely that some form of settlement negotiation has previously taken place, but a resolution acceptable to both parties was not reached.

Under the view of a three-arbitrator panel proposed here, however, the panel will not only deliberate about the case as presented by the parties, but it will do so from perspectives representing the substantive views of the parties. Importantly, this discussion will take place without the personal entrenchment in one’s own perspective that characterizes parties to a dispute. Consequently, when the award is delivered, it will represent not just a determination by an objective judicial body but rather a form of negotiated settlement between the parties, arrived at with the panel operating as proxies for the parties at a time when the parties are likely unable to undertake substantive negotiations due to the antagonism between them.

This is not to say that the “negotiations” undertaken by the arbitrators will be the same as those that might have been undertaken by the parties. While the arbitrators will represent the substantive views of the parties, they are ultimately selected to play a role in a legal dispute resolution system. Consequently, their ability to represent the views of the parties will relate to legal positions rather than the more personal arguments that might be made in direct party-to-party negotiations. The displacement of negotiations from the parties to the arbitrators, then, involves not just a change in the individuals involved in the discussions but also a change in the discussions themselves. Personal, non-legal concerns are replaced by law-based formulations of the same considerations, and the “settlement” that is ultimately reached is a compromise between legal stances rather than between personal considerations.

93. After all, even well-selected arbitrators will not have the depth of understanding of a party’s specific views and position to enable him to fully represent that party in discussions. My thanks to Alan Rao for highlighting the need to make this point.

94. The type of change involved in moving from a non-legal to a legal discussion is well captured in Niklas Luhmann, Law as a Social System, 83 NW. U. L. REV. 136 (1988).
In terms of the analysis of authority performed in this Article, a three-arbitrator panel functioning in this manner will deliver authority to its award under the "insight" rationale because the decision will have been reached by a panel that understood and seriously considered the views of both sides to the dispute. Just as a directly negotiated settlement is authoritative for the parties because it encapsulates to an acceptable level both of their points of view on the subject matter in dispute, this settlement-by-arbitral-proxy is also authoritative for ultimately the same reasons.

However, as desirable a situation as this may be, a major obstacle exists to the functioning of any arbitral panel in this manner, arising from the contemporary judicialization of the role of the arbitrator. Under the dominant view in contemporary international arbitration, all arbitrators, including those nominated by the parties, are obligated to achieve a detachment from the parties in order to act as "objective" judges of the dispute rather than as objective proxies for the parties in a settlement negotiation.

In the litigious context of contemporary arbitration this judicialization is indeed a desirable characteristic in arbitrators because it is an effective means of minimizing bias on their part. But, the justification for the judicialization of arbitrators ultimately rests upon a fundamental confusion between neutrality and detachment, in which the former is sought, but by insisting upon the latter. That is, it is an unquestionable tenet of contemporary international arbitration that all arbitrators on a panel, including the two party-nominated arbitrators, must be neutral between the parties and cannot favor the party that nominated them simply because of that nomination. This stance is clearly correct, as any other system would merely result in a transportation of the antagonism between the parties into the panel's deliberations and ensure that the award, when delivered, was not based on reasons that would be acceptable to both parties.

Yet, while the neutrality of arbitrators is essential, detachment of the arbitrators from the parties is not. One can certainly be neutral between two people because one knows or cares nothing about them, thereby leaving one free to decide their dispute on purely logical or otherwise rational grounds. However, one can

95. GARNETT ET AL., supra note 46, at 82 ("An arbitrator has a duty of impartiality in all dealings regarding the arbitration.").
96. See, e.g., the impartiality that was memorably described by one French judge concerning a case involving a famous English cricketer: "It is true that I have never heard of your Mr. Boycott or even seen a game of cricket. It is like American baseball, isn't it? But for me it is better that way as it meant I was completely impartial." ROBERT STEVENS, THE ENGLISH JUDGES: THEIR ROLE IN
also be neutral because she knows or cares deeply but equally about both sides to the dispute, or because she knows or cares deeply about one side but also cares deeply that a just and fair decision be made rather than simply one favorable to the party she knows.

This is an important distinction to make because very rarely will any legal dispute be resolvable on purely logical grounds. Legal disputes by their nature involve large amounts of vagueness, conflicting perspectives, and sincerely argued disputes over the comparative worth of differing elements of the underlying relationship. The best decision in such a context does not come from an individual detached from the parties attempting to logically and fairly apply abstract legal rules, as though there was a means of fairly and rationally deducing the correct answer to the dispute. Rather, the best decision comes from an individual or group that understands the perspectives involved in the dispute and therefore uses the applicable abstract legal rules in a flexible manner befitting the context of the dispute and the parties involved. It was, after all, precisely the arbitrator's familiarity with the parties and commitment to a mutually satisfactory solution that was one of the great attractions of traditional arbitration and a primary reason why traditional arbitral awards were regarded as authoritative by the parties.

The contemporary judicialization of the role of the arbitrator, however, as manifested in the implausibility of seeing any contemporary three-arbitrator panel as constituting a form of displaced negotiation between the parties, has resulted in the loss of this virtue. Instead, the insistence on the detachment of the arbitrators from the parties not only fails to deliver authority to the resulting award but indeed eliminates the possibility of that award receiving the "insight"-based authority available from an award delivered by a panel of neutral-but-involved arbitrators.

Part VII of this Article will address, among other things, a means by which the traditional connection between arbitrators and parties can be restored, enabling the delivery of awards with "insight"-based authority but without also creating an unacceptable risk of bias on the part of arbitrators. The next part of the Article, however, will address the possibility that even though arbitrators are now rarely able to deliver authority to an arbitral award, the development of contemporary international arbitration has resulted

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97. See supra note 19.
in the creation of an institution that can deliver the desired authority, much like a structured court system can provide the authority of a court judgment even if the parties do not regard the judge himself as authoritative in any particular manner.

C. The Relevance of Authority to Corporate Actors

Although the argument presented here is based upon the ability of arbitrators to deliver awards that will be authoritative for the parties receiving them, it might be argued that this issue has little relevance in the contemporary corporate world.

While in traditional arbitration disputes centered on differences between individuals—even though framed in a business context—contemporary international arbitration is dominated by disputes between large corporate actors, in which it is rare for a single individual to be both the decision-maker in the corporation and the chief recipient of the corporation's profits.\footnote{Margaret M. Blair, \textit{The Neglected Benefits of the Corporate Form: Entity Status and the Separation of Asset Ownership from Control}, in \textit{CORPORATE GOVERNANCE AND FIRM ORGANIZATION} 46 (Anna Grandori ed., 2004) ("[S]hareholders in widely traded corporations should not be regarded as the 'owners' of corporations since they yield nearly all of the important control rights and other indicia of ownership to boards of directors.").} Instead, any decision regarding whether an award should be complied with or resisted will be made by an individual whose job is not to make decisions in accordance with his personal beliefs but to maximize the corporation's profits.\footnote{Such is the case whether the decision is made by corporate counsel, the CEO, or an individual in some other position of power.} Consequently, it matters little if such an individual personally finds the arbitral award in question authoritative if he also recognizes that his corporation will be better served by challenging the award than by merely accepting it.

However, although this is an important complication to recognize, it does not ultimately undermine the argument presented here, as even corporations pursuing their own self-interest will benefit from abiding by demonstrably authoritative awards. While there are certainly individual corporations large enough that they need to pay little attention to the views of the companies with which they transact,\footnote{This is because these corporations are so central to the relevant market that the companies in question will be forced to do business with them no matter how they behave, or else be sidelined in the market.} the overwhelming majority of corporations have a vested interest in maintaining a reputation as a desirable contracting partner. This means, though, that such corporations
have good reason to avoid gaining a reputation as willing to go to any extent to win a dispute.

What is at issue in this context is the nature of the role of contract enforcement in commercial contracting. Even in the more "litigious" of Western business communities, contracts are not entered into with comfort in the knowledge that if any disputes arise the contract can simply be enforced through litigation or arbitration. Any form of enforcement, after all, involves both litigation-related expenses and lost business opportunities. Consequently, while the enforceability of a contract is an important consideration, ultimately contracts are entered into in the hope that they will not need to be enforced.

Once this is recognized, though, the importance even for corporate actors of abiding by demonstrably authoritative arbitral awards becomes clear.101 A party that cannot be trusted to abide by any arbitral award, but that will instead always take the opportunity to resist enforcement of an award it has not won, is simply unreliable as a contractual partner. Any party considering contracting with such a partner will be aware that it cannot merely rely upon its own efforts to abide by its obligations under the contract but must instead expect that if a dispute arises it will have to expend significantly more money enforcing a contract with this party than with a corporation that is willing to abide by demonstrably authoritative awards.

Accordingly, while the analysis of the relevance of authority to corporate actors is different than that of the relevance of authority to individuals, even corporate actors have reason to abide by demonstrably authoritative awards. Thus, the question of what makes awards authoritative remains just as relevant for corporate actors as for individuals.

V. THE UNAVAILABILITY OF INSTITUTIONAL AUTHORITY TO REPLACE THE AUTHORITY OF ARBITRATORS

Acknowledging the loss of arbitrator authority in contemporary arbitration, it might nonetheless be argued that the observable increased drive toward procedural uniformity within international arbitration is itself a means of securing authority for the results of an arbitration by effectively creating an "institution" that is

101. The term "demonstrably authoritative" is used here because the concern in this context will ultimately not be with whether a given individual within the corporate actor finds the award authoritative, but with whether individuals in other corporations will see it as authoritative for an individual in that corporate actor's position.
international arbitration. Just as the authority of a court decision can be derived from the authority of the court structure, rather than from the specific judge who delivered the decision, so it might be argued that arbitration awards can achieve authoritativeness through the creation of a procedure-based “institutional” authority. As a result, authority could be conveyed to an award by the “institution” of arbitration, thereby compensating for the lack of conveyable authority from the arbitrators. To examine this argument it is necessary first to explore the rationales for procedural uniformity in arbitration, as this will determine the plausibility of claiming that any form of institution of arbitration has indeed resulted.

The drive to procedural uniformity in international arbitration has been motivated primarily by two distinct goals. First, there is the very thing that has been behind the increase in popularity of arbitration, namely the desire to avoid local idiosyncrasies in dispute resolution. Businesses commencing operations in an unfamiliar country face the risk that if any dispute arises they will be forced into a court system that may be substantively biased against foreign parties, and, at the very least, will use unfamiliar procedural rules, thereby placing the foreign business at a disadvantage in litigation. Yet arbitration can hardly serve as a successful means of resolving this problem if arbitration is itself a fundamentally different procedure in different parts of the world. Global businesses incorporating arbitration clauses into their contracts want to be assured that they are indeed selecting a specific dispute resolution procedure, not merely selecting a procedure that is “not litigation” but in all other respects will vary widely from jurisdiction to jurisdiction.

This might be termed the “defensive” rationale for uniformity, according to which businesses support the move toward uniformity in international arbitration as a means of ensuring some form of substantive predictability in their choice of arbitration over litigation. It should be noted, however, that because the dominant rationale for selecting arbitration is precisely that it allows parties in international transactions to remain outside local peculiarities of dispute resolution, what this “defensive” rationale justifies is in fact not uniformity of arbitration but merely predictability. That is,

102. Claus Bühring-Uhle, A Survey on Arbitration and Settlement in International Business Disputes, in SCIENCE OF INTERNATIONAL ARBITRATION, supra note 2, at 25 (reporting a survey of arbitrators, attorneys, and in-house counsel, in which neutrality of the forum and the enforceability of arbitral awards were selected as the two most important reasons for choosing international arbitration).
businesses benefit little from an arbitral system that is the same everywhere because the reality is that the disputes they encounter in international business, along with the parties involved in those disputes, will themselves vary. As a result, the best way to resolve those disputes will vary as well. Consequently, while a uniform approach to arbitration around the world will indeed provide businesses with predictability, it will often produce unsatisfactory results. The defensive rationale for uniformity does not, as such, justify uniformity but only openness as to the procedures to be adopted in any given forum so that businesses can select arbitration with full knowledge of the procedures that will result.

The second rationale for procedural uniformity in arbitration, and the more problematic one in the present context, is the pressure for uniformity resulting from the fact that because arbitration does not require court appearances it presents an opportunity for businesses to retain lawyers with whom they are already familiar rather than having to find reliable new lawyers in each jurisdiction in which a dispute arises. Yet these lawyers will, of course, wish to use procedures with which they are familiar. Consequently, no matter where in the world the arbitration is held, and no matter from where either party originates, attorneys attempting to maximize the prospect of their own client winning will press for the procedures with which they are already familiar. As a result, the dominance within international arbitration of attorneys and law firms from only a very small number of countries results in a significant pressure for procedural uniformity in arbitration across the world.

This second driving force for uniformity in international arbitration has behind it what might be called the "offensive" rationale for uniformity. The motivation for attorneys to produce a uniform system of international arbitration is not to produce a "level playing field" but rather to ensure that the procedures adopted are at least those with which they are familiar. An attorney cannot, after all, serve his clients well if the opposing party's attorneys are significantly more familiar with the procedures under

103. REDFERN & HUNTER, supra note 63, at 22 ("A party to an international contract which does not contain an agreement to arbitrate is likely to find, if a dispute arises, that it is obliged . . . to employ lawyers other than those who are accustomed to its business . . . ").

which the arbitration will operate and thereby know how best to use those rules to their own client’s advantage.

While both rationales for procedural uniformity within international arbitration, “offensive” and “defensive,” attempt to justify the same goal, it is far too easily ignored that they are nonetheless fundamentally separable, as they serve very different purposes. The “defensive” rationale merely aims to protect the party to the arbitration against unfair procedures, while the “offensive” rationale attempts to enforce certain procedures that will most likely result in a particular party’s victory. The problem that contemporary international arbitration faces, then, is not an increase in procedural uniformity per se but that the increased uniformity that can be observed arises from the “offensive” rationale, not the “defensive.” By the time the procedures for the arbitration are to be selected, the parties have already retreated into the background of the dispute resolution process, leaving matters to be predominantly guided by their attorneys. As a result, the “offensive” rationale for uniformity dominates procedural decisions even if the “defensive” rationale underlay the decision to choose arbitration in the first place.

This dominance of the “offensive” over the “defensive” rationale for uniformity has important consequences with respect to the authority of the resulting award because it undermines the ability of international arbitration to develop the kind of institutional authority that might replace the lost authority of arbitrators. While a significant degree of procedural uniformity has developed within international arbitration, 105 because of the dominance of the “offensive” rationale for uniformity, these increasingly standardized procedures have not been consciously selected because of their perceived enhanced usefulness for suitably settling disputes between parties. Instead, they have resulted from decisions made by lawyers who view these procedures not as inherently desirable but rather as allowing them the maximum ability to effectively represent their own clients.

However, it is precisely this unity—between the individuals who attempt to use arbitral procedures for their own ends and the individuals who design and control those procedures—that prevents the development of any form of “institution” of international arbitration capable of delivering authority to arbitral awards. While the rules of a court system are also routinely manipulated by attorneys attempting to effectively represent their clients, authority for a court judgment can often still be derived

105. Poudret & Besson, supra note 80, at 485 (“[I]nternational arbitration proceedings tend towards uniformity.”).
from the structure of the court system because the rules structuring those courts, and the rules employed in their proceedings, are consciously designed by independent third parties with an interest often at odds to both parties in any specific dispute. Consequently, the rules in question are abstracted from the disputes that they govern.

Arbitration, on the other hand, is unable to attain the level of abstraction necessary for it to be viewed by parties as a genuinely separate institution. This might be possible if the "defensive" rationale were behind arbitration's increased procedural uniformity, as the motivation behind this rationale is precisely a desire to abstract arbitral disputes from any particular context and provide rules that are uniformly fair, no matter who the participants are in an arbitration. The "offensive" rationale for uniformity, however, is singularly unable to deliver this necessary abstraction. Because the uniformity it generates results solely from the desires of attorneys zealously representing their clients, the independence from the dispute that is necessary for the creation of an authoritative institution is simply unavailable. As a result, procedural uniformity in contemporary international arbitration, motivated as it is by the offensive rationale for uniformity, is simply unable to lead to the creation of any "institution" of arbitration, and thus the procedural uniformity within international arbitration cannot deliver any authority to an arbitral award.

Part VI of this Article will address the final way in which authority can be delivered to an arbitral award, namely through the specific procedures used to conduct the arbitration. It will argue that authority derived from procedure is the only remaining means by which authority can be delivered to arbitral awards but that, under current approaches to the design of arbitral procedures, such authority is simply unlikely to result.

VI. THE SHIFT FROM AUTHORITY OF ARBITRATORS TO AUTHORITY OF PROCEDURE

This Article argued that the contemporary structure of international arbitration serves to impair and largely preclude the deliverance of authority to international arbitral awards. However, it should be acknowledged that even if arbitration itself does not possess the structural ability to deliver authoritative awards, it nonetheless remains possible for parties to select an arbitrator who

106. That is, the rules of procedure are ultimately controlled by a legislature, which introduces concerns of justice, efficiency, and consideration of third-party interests that may not be important to the parties.
is authoritative for both parties and can thereby deliver an award authoritative for them.

Unfortunately, such situations are highly unlikely in the context of contemporary international arbitration. Selecting an arbitrator authoritative for both parties was plausible in traditional arbitration, as the restricted level of transnational or other long-distance business meant that most disputes arose between parties who operated within a single business community. As a result, it was possible to select an individual from the community in which both parties operated who would be authoritative for both parties, both because of his standing within that community and because the parties and the arbitrator all had a shared conception of the norms that governed the business conducted by the parties.

In the context of contemporary international arbitration, however, such a situation rarely exists. Through the very nature of international business, parties will usually come from distinct business communities. As a result, it will not only be difficult to find a single individual who will be authoritative for both parties, but parties will indeed often lack the shared substantive norms that facilitated dispute resolution in traditional arbitration.

This part of the Article will argue, though, that these difficulties should not be viewed as precluding contemporary arbitral awards from being authoritative. Instead, arbitral awards can still be authoritative when they are delivered through a procedure specifically tailored for the parties, as a properly designed procedure will assure both parties that its views have been understood and considered, thereby enabling the award to possess "insight"-based authority. Since, as argued above, no other rationale for authority is usually available for an international arbitral award, actively tailoring arbitral procedures to the identities of the parties to the dispute is the only means by which an authoritative award can be delivered in contemporary international arbitration.

Of course, the connection between authority and procedure in a dispute resolution mechanism is clear in a negative sense because no matter how much authority a judge or judicial authority might have, if a party feels they were not treated fairly procedurally, they will not respect any judgment delivered. However, while procedure's ability to remove authority from a judgment is clear, its ability to deliver it, with no support from other sources, is less clear.

One problem in this respect is that the procedure and the arbitrator are ultimately difficult to separate entirely. An incompetent arbitrator, for example, can drain authority from even the most well-designed procedure, as the procedure merely ensures
that the necessary information has been properly provided to the arbitrator but does not ensure that his own judgment will be properly exercised. In order for procedure to deliver authority to an award, then, there must be at least an acceptable level of competence of the arbitrator such that the poor quality of the arbitrator's work will not eliminate whatever authority the procedure may have been able to deliver. Once the appropriate level of arbitrator competence is attained, however, it will ultimately be the nature of the procedure, and not the identity of the arbitrator, that delivers authority to the resulting award.

Of course, because arbitration already provides parties with the ability to design their own dispute resolution procedure, it may be argued that the procedures actually used in contemporary arbitration must clearly be the preferred procedures of the parties who use arbitration. Consequently, so it would be argued, if procedure is capable of delivering authority to an award, then authority can already be delivered to an award through the procedures of contemporary international arbitration. However, such an argument ignores the context in which contemporary arbitrations occur. As previously discussed, contemporary international arbitrations generally arise as a result of pre-dispute agreements to arbitrate any and all disputes within a particular substantive area. These agreements very rarely include any kind of detail regarding the procedures to be adopted in the arbitration and at best merely refer to the rules of a particular arbitral institution or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Such rules, by design, provide only the bare bones of an arbitral procedure, as they are intended to apply only when parties cannot agree on necessary procedural rules. That is, they are designed to ensure only that the arbitration will function, not that it will function well. Thus, the selection of such rules can hardly be taken as a substantive endorsement by the parties of a particular way of conducting an

107. See, for example, the arbitration clause recommended by the International Chamber of Commerce, the most prominent international arbitration institution: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." International Chamber of Commerce, Model Clause, http://www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt (last visited Mar. 24, 2009).

108. BORN, supra note 45, at 450 ("[A]ll leading institutional rules provide only a general framework for arbitral proceedings. Within the broad framework provided by the institutional rules, the parties and tribunal are left free to work out the details of particular arbitral procedures as they see fit.").
arbitration any more than an agreement to any form of "backup plan" constitutes an endorsement of that plan as the best course of action.

Moreover, as previously noted, once an arbitration arises, and it is unavoidably necessary to decide the procedures to be adopted, all efforts at amicable negotiation between the parties will have failed, and the parties will have hired attorneys to handle their arbitration. These attorneys, of course, will approach design of the arbitral procedure with a clear eye on tactical advantage, including the adoption of procedures familiar to them. They will, that is, not attempt to design a procedure that will deliver an award authoritative for the parties but will instead attempt to install tactically favorable procedural rules, while relying on the high enforceability of arbitral awards, to make authority unnecessary for the winning party to be paid. As a result, agreement between the two sides on all but the broadest points of procedure will be rare, and even such agreements will overwhelmingly reflect the procedural judgments of the attorneys rather than the identities of the parties.

Consequently, while much effort is put into researching and selecting an arbitrator that, it is hoped, will hold views favorable to the position of the nominating party, very little effort is put into the design of the arbitral procedures. Instead, choice of procedures is overwhelmingly left in the hands of the arbitrators, who usually have total freedom so long as the procedure adopted allows each party to fully and fairly present its own case. As already argued, however, these arbitrators will have been selected for strategic reasons rather than because of any particular understanding of the identity of the parties. Consequently the procedures they select, however fair and balanced, will not be ones specifically designed to deliver an award authoritative to the parties in question.

In contrast to this situation, when parties have participated in a proceeding that was specifically designed to match both their identities and their dispute, they will each have reason to regard the award as authoritative. Such a procedure will be able to provide the arbitral panel with insight into the parties and their relationship that is necessary to deliver "insight"-based authority to the award.

109. Park, supra note 48, at 289 ("[O]nce the arbitration begins, litigants almost by definition are more like a bickering old couple than an amorous twosome, and thus may not agree on much.").
110. See supra note 74.
111. Park, supra note 48, at 281 ("Arbitrators can conduct proceedings in almost any manner they deem best, as long as they respect the arbitral mission and accord . . . fundamental fairness . . . .")
If, then, it is granted that authority can only be delivered to contemporary international arbitral awards through the tailoring of the procedures of the arbitration to the specific parties involved in the dispute, the current means by which those procedures are selected are manifestly incapable of performing this task. Rather than delivering procedures tailored to the parties and the dispute, procedures are predominantly adopted to suit the pre-existing preferences of arbitrators and to ensure a formalized and "objective" hearing of the dispute. As a result, the awards delivered, no matter how fair and balanced the arbitral proceeding, do not possess the "insight"-based authority that procedure is capable of delivering.

The final part of this Article will build upon the argument that the procedures adopted in an arbitration are capable of delivering "insight" authority to the resulting award. It will propose two specific alterations to current international arbitral practice, which it will be argued would suffice to return authority to contemporary international arbitral awards.

VII. A PROCEDURAL SUGGESTION FOR RESTORING AUTHORITY TO ARBITRAL AWARDS

This Article has argued that the traditional means by which authority was delivered to arbitral awards are no longer available in international arbitration and that no alternative means of delivering authority to awards has been developed. This final part of the Article briefly outlines a means by which "insight"-based authority can be returned to international arbitral awards, with only an alteration to the current system rather than a revolution. Importantly, the argument is merely that the process described here should be available as an option, not that it should be mandatory, as any system designed to increase the rate at which arbitral awards are accepted, rather than challenged, must be a free choice of the parties rather than imposed upon them.

As has been argued, while international arbitration may be structurally incapable of delivering authority to awards, it still remains possible for individual awards to possess "insight"-based authority when they have been delivered as a result of procedures designed specifically for the parties to the dispute. The proposal offered here, then, specifically addresses the means by which arbitral procedures should be determined and the role of arbitrators in contemporary arbitration. As this description suggests, the proposal involves two elements: one addressing the means by which the arbitral institution under which the arbitrations in question would be held can contribute to the proper design of the
arbitral proceedings and the other addressing the role that arbitrators serving in those arbitrations should be seen as undertaking.

In contemporary international arbitration, arbitral institutions are ultimately merely administrative bodies. They resolve challenges to arbitrators, process documentation, and perform other similar administrative duties; they also adopt institutional arbitral rules to provide a backup system should the parties be unable to reach agreement on a matter essential to the conduct of the arbitration. They do not, however, provide any form of significant guidance to parties on how their arbitration should be run. Rather, in recognition of the desired control of parties over the nature of their own arbitral proceeding, institutions merely facilitate the arbitration designed by the parties or by the arbitrators they have selected.

However, as argued above, the current structure of international arbitration means that leaving the selection of procedures either to the parties or to the arbitrators they have selected is very unlikely to result in the delivery of an authoritative award. Only when the procedures can be seen to have been designed by a genuinely independent third party, with particular attention paid to the identities of the parties and the nature of their dispute, will the parties to the arbitration have any reason to view the resulting award as authoritative. Rather than leading to a conclusion that authority is simply impossible for arbitral awards, though, this situation provides an opportunity for arbitral institutions to assist parties in securing an authoritative award by providing an independent individual capable of designing the procedure of the arbitration in a form to which the parties and arbitrators must then adhere.

It should first be emphasized that the suggestion being made is not that those individuals currently serving as case administrators at arbitral institutions should be asked to commence designing

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113. See, e.g., ICC RULES OF ARBITRATION (2008); LCIA ARBITRATION RULES (1998); SCC ARBITRATION RULES (2010).

114. Arbitral institutions will provide general guidance in the form of statements regarding which procedures have worked well or poorly in prior arbitrations held under that institution. However, they will not provide the kind of highly personalized guidance under discussion here.
arbitral procedures for the arbitrations that they assist. While sometimes enormously capable, such individuals are employed in their roles because of their ability to assist parties, not because they are viewed as having any particular insight into the specific identities and desires of the parties with whom they are working. Parties, then, would rarely be appreciative of efforts by such individuals to instruct them on how their arbitration should be run.

Instead, what is being proposed here is the creation of the role of "procedural special master," whose role would be to design an arbitral procedure that would genuinely serve both parties' needs and interests. Although the need to deliver an award authoritative to the parties would suggest that the procedural special master's recommendations should only be adopted with the consent of both parties, it is proposed instead that while the identity of a procedural special master should be a matter of agreement between the parties, the special master's recommendations should be taken as binding on the parties, absent agreement by both parties to reject one or more of them. This is important because procedural special masters would work with parties who have reached a point at which agreement on any issue likely to be dispositive to the case is highly unlikely. There would therefore be a very high probability that such parties, and certainly their attorneys, even if they enter into discussions with the procedural special master in good faith, would ultimately refuse to agree to any procedure that they see as even slightly favorable to the other side. Consequently, a procedural special master must have the power simply to mandate certain procedures once both parties have been heard and their views seriously considered, unless both parties agree that a certain procedure should not be adopted. However, it should be emphasized that this does not preclude the special master from offering an explanation for the procedures to the parties when questions are raised, as without such an explanation the risk is high that a party will decide the procedures were not fairly selected.

It might be argued that arbitrators already have the power to design the procedures of an arbitration to suit the parties and that the creation of the role of procedural special master is therefore unnecessary. As has been mentioned, however, arbitrators are ultimately tied up too tightly in the context of the arbitration for it to be possible to view them as providing a clearly impartial choice of procedures. Just as importantly, this objection ignores the fact that arbitrators are selected due to their possession of a very specific set of skills, and thus individuals perfectly suited for the role of arbitrator will often be very poor at understanding and balancing the different perspectives on procedural justice that underlie the design of successful dispute resolution procedure.
Nonetheless, it should be emphasized that precisely because the procedural special master must have the ability to impose procedures upon the parties, party consent is essential to both the use of a procedural special master and to the identity of that mediator. This is an area in which an arbitral institution is able to be of particular importance, as the parties are unlikely simply to know a particular individual with not only the deep knowledge of arbitral procedure necessary for the role but also the level of understanding of both parties necessary to design a suitable dispute resolution procedure. Arbitral institutions, then, could develop panels of procedural special masters just as they currently often have panels of arbitrators. The individuals on these panels would be appointed to the panel precisely because they possess the professional qualities necessary to perform the role well, and the parties would need only select an individual they find mutually acceptable.

Once appointed, the procedural special master would consult with the parties and their attorneys to develop the procedures, which would be specifically tailored to the parties and the nature of the dispute, taking into account their cultural backgrounds, individual needs and preferences, and the facts and likely procedural issues of the case. The special master would, however, remain formally attached to the arbitration throughout its course to ensure that any additional significant procedural elements are addressed by the same individual and thus resolved in a way consistent with the original procedural model. It could, of course, be highly inefficient to require the special master to decide all procedural issues as they arise, suggesting that once the initial rules are put in place, the arbitrators should decide remaining issues until a party requests the special master's involvement.

The involvement of a procedural special master would go a significant way toward restoring authority to arbitral awards by ensuring that the procedures used in an arbitration are designed to match the parties involved. However, as noted above, it is impossible to entirely separate the procedure of an arbitration from the arbitrators presiding over it. Consequently, it is also desirable

115. See, e.g., Qualification Criteria for Admittance to the ICDR International Roster of Neutrals, supra note 81.

116. This is, of course, not an ideal solution, as any party requesting the involvement of the procedural mediator would then risk alienating the arbitrators in its case. However, so long as the procedural mediator has initially performed her job properly, serious issues that would require her subsequent involvement should be rare. She will, after all, have significant experience on which to draw with respect to the kinds of procedural issues likely to arise and can therefore proactively address such issues in the rules constructed for the arbitration.
that a change be adopted in the role arbitrators are perceived as performing in international arbitration.

It is a standard view in international arbitration that all arbitrators, including those nominated by the parties, should be both independent of the parties and able to decide impartially between them.117 This is often contrasted with the traditional rule in domestic arbitration in the United States, where party-appointed arbitrators were regarded as “advocates” on the panel for the views of the party that appointed them to that panel.118

However, while this insistence upon independence and impartiality for all arbitrators on the panel is in itself desirable, it has come to be enmeshed in the judicialization of the role of the arbitrator, with the consequence that arbitrators are viewed as ideally not only independent and impartial but also detached from the parties and wholly objective. As argued above, though, this precludes the three-arbitrator panel from performing its ideal function as a displacement of the negotiations of the parties.

The recommendation being proposed here, then, is that while arbitrators should still retain an obligation to be genuinely independent and impartial, they should also be encouraged to see themselves as the party’s representative on the panel. Their ultimate decision on any matter should, of course, be made from an impartial perspective, but throughout deliberations a party-appointed arbitrator should see herself as responsible for understanding the legal position of the party that appointed her and then conveying those arguments to the other arbitrators. In turn, of course, in order to be able to decide matters fairly and objectively she must also be open to the views of the other side. Her responsibility, then, is solely to effectively express the legal position of the party that nominated her, not to attempt to help that party win. Only in this way can a tribunal reach the ideal of serving as a displacement of the parties’ negotiations, carefully attending to the arguments advanced by both sides, and then deciding based on a genuine understanding of the perspectives of both parties rather than merely as a result of a detached judgment on the facts and the law.

While both of these suggestions are likely to be highly controversial, the argument of the preceding parts of the Article have attempted to establish that these suggestions are indeed

117. GARNETT ET AL., supra note 46, at 82.
118. BORN, supra note 45, at 875 (“Historically, party-nominated arbitrators in the United States have been understood to have a measure of partiality towards the party that appointed them.”).
necessary if international arbitral awards are to regain their lost authority.

VIII. CONCLUSION

This Article has attempted to demonstrate that contemporary international arbitration is currently not fulfilling its full potential as a dispute resolution procedure even though this fact is not widely perceived in the arbitration community. While international arbitration as a form of dispute resolution grows continually more popular, it has steadily and unavoidably become detached from the elements that delivered its original validity. As a result, it gradually resembles less and less a system designed genuinely to resolve disputes between parties and more merely a means of getting an enforceable judgment in a business context in which enforceable judgments have been traditionally rare. As a result, contemporary international arbitration risks becoming solely a means of enforcement rather than anything that genuinely resembles dispute resolution. This Article has argued that the involvement of procedural special masters and the reconceptualization of the role of party-nominated arbitrators can help resolve this situation and return authority to arbitral awards.

While many parties in international arbitration will undoubtedly initially be happy to remain within the current system and will reject any suggestion that procedural rules should be imposed on their arbitration, or that arbitrators should be anything other than judicial, it is to be expected that a significant market already exists of parties who wish a genuine resolution to their dispute rather than merely an award that can be enforced by whichever party is victorious. If the services suggested here were offered by any arbitral institution, they would therefore be happily used, even if only as an alternative to the now-dominant approach to arbitration, rather than as a replacement for it.