

Authority and Contemporary International Arbitration

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1. 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

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¹ See generally the remarkable survey and bibliography in Derek Roebuck, *Sources for the History of Arbitration*, 14 ARB. INT’L 273 (1998).

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) (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 was founded in 1966, the first ICSID arbitration did not occur until 1972. From that point one to

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 international arbitration over domestic litigation,⁵ and States of all levels of wealth and power have felt the need to rewrite their laws to make them more “arbitration friendly”.⁶ 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.

This growth has not come without controversy, however. 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,⁷ or where significant consequences will result for an individual or group not represented in the arbitration itself.⁸ In addition, the view is increasingly expressed that

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 DERAIS & ERIC A. SCWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* (2d ed. 2005) (“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 DRAHOZAL & NAIMARK, *supra* n. 2, at 3 (“Arbitration is the dispute resolution mechanism of choice for parties to international contracts.”); Richard H. Kreindler, *Aspects of Illegality in the Formation and Performance of Contracts*, 6 INT’L ARB. L. REV. 1 (2003).

⁵ Loukas Mistelis, *INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2006* (2006), at 5 (“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%.”).

⁶ For example, since the adoption of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) in 1985, legislation based on the Model Law has been adopted in 59 countries. Status, 1985 – UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Mar. 8, 2009).

⁷ See, e.g. Damon Vis-Dunbar, *Meg Kinnear Elected as Secretary-General of ICSID*, INVESTMENT TREATY NEWS, Mar 3, 2009 (noting that “the Centre has come under criticism on a number of fronts from civil society groups”), available at <http://www.investmenttreatynews.org/cms/news/archive/2009/03/03/meg-kinnear-elected-as-secretary-general-of-icsid.aspx> (last visited Mar. 8, 2009).

⁸ See generally James Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in

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.⁹ Perhaps most notably, however, given the traditional consensual basis of arbitration, arbitration awards are themselves increasingly being challenged in court by the losing party, even in the face of consistent efforts on the part of States to make them almost unchallengeable.¹⁰

In short, while arbitration has unquestionably been a success in the international dispute resolution “marketplace”, effectively resolving problems still faced by international litigation,¹¹ 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.

It will be argued in this article that this increasingly important “legitimacy” problem derives from the fact that a dispute resolution mechanism initially designed to be invoked after a dispute had arisen, between parties who both wished to arbitrate, is now being applied in a far broader range of situations, usually involving a pre-dispute arbitration agreement, and often involving one party that does not wish to arbitrate at all. This change has meant that the characteristics that previously resulted in parties to an arbitration accepting and voluntarily abiding by the award delivered by the arbitrator rarely now exist. 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

HUMAN RIGHTS AND INTERNATIONAL INVESTMENT LAW (Ernst-Ulrich Petersmann ed. 2009).

⁹ See generally Tony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on “Japanese Non-Litigiousness”*, 40 N.Y.U. J. INT’L L. & POL. 29 (2007). See also Karen Mills, *Cultural Differences and Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator’s Perspective*, TRANSNAT’L DISP. MGMT., vol. 5(4) (2008).

¹⁰ See, e.g. Alan Rau, *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”).

¹¹ 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.”).

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 itself produces desirable results.

Part 2 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 3 of the article will then apply this analysis to traditional arbitration,¹² establishing the particular types of authority that led parties to accept arbitral awards as binding.

Part 4 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. In so doing it will illustrate that these differences mean that the forms of authority that were 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 in certain specific instances an arbitral award may indeed be authoritative for the parties to the arbitration, this authority will derive

¹² 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 20th 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

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 5 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 itself delivers authority to that judgment, it might be argued that as international arbitration formalizes procedurally an authoritative “institution”¹³ 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 6 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 awards will be viewed by parties as authoritative where they are delivered through procedures specifically designed for the identity of the parties and the nature of the dispute.

Part 7 will then conclude the article 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

manner more consistent with that of pre-20th Century arbitrations than of arbitration as it is currently practiced in international commercial arbitration.

¹³ The term “institution” is here presented in “scare quotes” to emphasise 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 organising 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 TURNER, *THE INSTITUTIONAL ORDER* 6 (1997).

than merely encouraging arbitrators to use the power they already possess to design procedures to match the specific dispute at hand, an additional role should be added to contemporary international arbitration in the form of a “procedural mediator”. 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, and not 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.

2. 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 generalized 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 section of the article will focus upon judicial, rather than arbitral, decisions. This analysis will then be built upon in subsequent sections 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 initially to be clear on the kind of authority that is being addressed in this

article. The “authority of law” is an oft-addressed question within contemporary jurisprudence, and has been the subject of work by some of the most important contemporary legal theorists.¹⁴ However, 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 pronouncement of those figures, whether they agree with them or not.¹⁵ 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 they receive, the type of authority relevant to this discussion is what can be called the “social” analysis of authority.¹⁶ 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, then, 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 individuals have for obeying the decisions of

¹⁴ See, e.g. Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 271 (Jules L. Coleman ed. 2001); Stephen Perry, *Second Order Reasons, Uncertainty, and Legal Theory*, 62 S. CAL. L. REV. 913 (1989); LESLIE GREEN, *THE AUTHORITY OF THE STATE* (1988); JOSEPH RAZ, *THE AUTHORITY OF LAW* (1970) .

¹⁵ 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.”).

¹⁶ See generally Eduardo Zambrano, *Authority, Social Theories of*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND

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 supplemented with additional factual detail whenever a particular social group, or even individual, was being discussed.¹⁷

Two additional points need to be made before entering into the substantive discussion, to ensure that it is clear what this discussion is attempting to address. Firstly, 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 of resisting a decision’s enforcement, are in no way challenging the binding nature of law itself. 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.

Secondly, 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, in the case of acquiescence this is not because of any authority attached to the award, but because of some element

BEHAVIORAL SCIENCES (N.J. Smelser & P.B. Baltes eds. 2001).

¹⁷ 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, “review of William Outhwaite, *The Future of Society*”, *PHIL. IN REV.* (2006).

external to the judgment itself. 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 themselves see the correctness of the conclusion.

These clarifications being made, it is first 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 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.¹⁸

Indeed, it is precisely because of the underdetermined¹⁹ 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

¹⁸ There are, of course, many writings on the nature of legal reasoning. Excellent general treatment of the topic can be found in MARTIN GOLDING, *LEGAL REASONING* (1984); NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978); EDWARD LEVY, *AN INTRODUCTION TO LEGAL REASONING* (1948).

¹⁹ "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 derived from 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).

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. The question, then, is how a legal decision itself, 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.²⁰ Raz’s theory is normative, rather than social, so 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 thus 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 pre-emption thesis. In general terms, Raz’s argument is that an authority’s decision does not merely give those subject to it²¹ 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

²⁰ 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).

²¹ That is, in the present discussion, the parties to the dispute.

pre-emption thesis);²² in addition, for the decision to be authoritative, the decision-maker must base her decision upon the same reasons that those subject to the decision should themselves appeal to in making their own decision – after all, the authority’s decision is intended to replace their decision, not merely be an alternative (this is the dependence thesis);²³ 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 himself 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).²⁴

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, however, on Raz’s conception the authority’s decision is one that the recipients of the decision would themselves 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 themselves would have reached, thereby eliminating the need for them to derive the conclusion themselves.²⁵

²² JOSEPH RAZ, *THE MORALITY OF FREEDOM* 46 (1988) (“the 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 (1999) (“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.”).

²³ Raz, *supra* n.22 (*The Morality of Freedom*) at 47 (“all 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”).

²⁴ *Id.* at 53 (“the 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”).

²⁵ Raz, *supra* n.20, at 214.

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 one could not currently get oneself. While Raz adopts the service conception of authority as part of a normative analysis of authority, then, it nonetheless is clearly also applicable in the context of the social analysis being performed here.

(a) 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. Firstly, 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. However, 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 cases, in which the disputants simply could not themselves have reached the conclusion reached 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 itself, such as the judge’s professional

standing, or other personal characteristics.

(b) 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 the disputants could theoretically have reached themselves. Instead, the authority delivers a decision the disputants themselves cannot rationally understand 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.

(i) The “Insight” Rationale for Authority

Importantly for the present discussion, the “personal” rationale can itself be broken down into three distinct aspects. Firstly, 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.²⁶ Nonetheless, despite the judge’s inability to provide a rationally defensible basis for his conclusion, the parties accept the decision as satisfactory and binding. Unlike with respect to the “efficiency” rationale for authority, then, where the parties were at least theoretically able to evaluate the validity of the judge’s decision,²⁷ 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 takes in her reasoning will ultimately be correct ones. The judge

²⁶ 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).

²⁷ Even if they did not actually perform the analysis.

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 judgements 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 judgement 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 necessary characteristics.²⁸

(ii) The "Expertise" Rationale for Authority

A second variant of the "personal" rationale for authority arises when the parties may 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 allows the judge to reason to a conclusion that the parties could not justifiably reach by themselves.²⁹

²⁸ For example, certain individuals may simply presume that an individual holding high judicial office must have the characteristics justifying reliance on her judgement, or else she would not have made it to that level. Consequently, any judgement 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.

²⁹ 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 itself 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 & JOSEPH CRUZ, *CONTEMPORARY THEORIES OF KNOWLEDGE* (2d ed. 1999). Important individual accounts are RICHARD SWINBURNE, *EPISTEMIC JUSTIFICATION* (2001); TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* (2000); ALVIN GOLDMAN,

The “expertise” rationale, however, does not merely appear in cases involving legally unsophisticated parties, but can also exist where the disputants are sophisticated legal actors, with highly paid attorneys to consult, but where the judge is an individual with acknowledged specialized insight into the legal subject matter of the dispute.³⁰ 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, then, 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.

(iii) The “Institutional” Rationale for Authority

The final version of authority is distinguishable from both the “insight” and “expertise” variants of “personal” authority, 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.³¹

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).

³⁰ The question of when an individual is justified in relying upon the views of an expert is itself a specialized topic within epistemology, but a good general treatment is provided in DOUGLAS N. WALTON, *APPEAL TO EXPERT OPINION* (1997).

³¹ That is, what is sought by the parties to the dispute is not a judgement 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 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

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.³²

In its most basic variant, this form of authority will arise where the parties to the dispute both belong to a single community and both desire a validation of their actions as in accordance with the norms of the community.³³ If the judge herself 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.

However, a second variant of institutional authority should also be acknowledged, as it can exist even where the parties do not come from a single community with identifiable norms, but nonetheless both recognize themselves as 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

relations are created by society, not by legal propositions.”); Eugen Ehrlich, *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.”).

³² 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, *MORAL RELATIVISM AND MORAL OBJECTIVITY* (1996). While the current discussion need take no stance on moral relativity, 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, *The World Well Lost*, in *CONSEQUENCES OF PRAGMATISM* (1982). For a critique of such views see ROBERT KIRK, *RELATIVISM AND REALITY* (1999).

³³ The term “community” as used here should not be misunderstood, as it refers solely to a form of social organisation 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 similarly Nancy S. Kim, *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

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.³⁴ Thus a decision by a highly regarded English, for example, on French law, will be less authoritative on the meaning of French law on a given issue 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 them or not.³⁵ Moreover, a form of socialization will be experienced by many judges, as the constant interaction with the same colleagues over a period of years leads to an increasing level of consensus on many, although not all, elements of the law.³⁶ As a result, even though the judgment delivered in a particular case is merely 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.

national or other large-scale level).

³⁴ 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 COMMUNICATION MONOGRAPHS 443 (2007) (noting differences between Dutch and French students in the means of evaluation of anecdotal, statistical, causal and expert evidence); Ara Norenzayan, et. al., *Cultural Preferences for Formal Versus Intuitive Reasoning*, 26 Cognitive Sci. 653 (2002) (East Asian university students display a preference for intuitive reasoning, while European American students display a preference for formal reasoning); Richard E. Nisbett, et al., *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 Psych. Rev. 291 (2001) (East Asian individuals attend for more to context than Western individuals, who attend primarily to the specific object under discussion, and the application to it of formal rules).

³⁵ 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 74-75 (Francis H. Buckley ed. 1999). However, 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).

³⁶ Jordi Blanes i Vidal & Clare Leaver, *Behavior in Networks of Collaborators: Theory and Evidence from the English Judiciary* (2006) (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), available at

What is distinctive about the “institutional” rationale for authority, then, is that while the parties superficially are recognizing the authority of the judge delivering 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 it is believed that he serves as an accurate guide to the views that would be expressed by a broader community to which she belongs. Consequently, while both the “insight” and “expertise” rationales for authority primarily rely upon some specific characteristic of the judge, the “institutional” variant refers only secondarily to the judge, but primarily to the respect accorded 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 where the parties receiving that decision themselves 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. 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 must therefore conform to these answers in order to provide the necessary service.³⁷

While this may initially seem a technical matter of legal theory, raising the traditional dispute as to whether judges “make” or “find” the law,³⁸ 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 is to the theoretical question as to 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 cannot see the judge as providing them with a service, as there is no “correct” answer 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.³⁹ 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.⁴⁰ 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.⁴¹

³⁷ 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 answer 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).

³⁸ 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”).

³⁹ 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.”).

⁴⁰ In the classic quotation from Holmes, “[t]he 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).

⁴¹ By contrast, the conception of legal decision-making, as effectively involving appointing a legal specialist to determine how the law applies to the facts of the case at hand, can arguably be defended as existing in cases involving “ordinary”, legally unsophisticated parties, who view a judge as part of a legal system in which the judge determines the law laid down by the legislature, and then applies it to the facts of various cases. Parties with such a view of legal decision-

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.⁴² 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 variants 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 could have done themselves. While the decision of the judge may indeed coincide with what the parties themselves 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” and

making can indeed be said to understand the judge as primarily a mediator between the parties and the correct result, using her expertise to deliver them closer to the legally correct conclusion than they would have been able to reach themselves. The ongoing prevalence of this view of the legal process can be seen clearly in the consistent complaints about “judicial activism”, which only make sense against a background presumption that judges apply the law laid down by the legislature, rather than invent it themselves. See, e.g. RORY LEISHMAN, *AGAINST JUDICIAL ACTIVISM: THE DECLINE OF FREEDOM AND DEMOCRACY IN CANADA* (2006); PAUL CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* (2003).

⁴² It is, of course, not a logical impossibility that a legally unsophisticated party would become involved in an international arbitration, but the likelihood is low enough that it can for all practical purposes be ignored. However, see Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 Nev. L. J. 341 (2007) (noting that the combination of increased small-scale cross-border transactions, and the popularity of arbitration with companies involved in international business, serves to increase the probability that consumers and other legally unsophisticated parties will find themselves in an international arbitration).

“institutional”. Indeed, as will be argued, all of these variants are ultimately capable of providing the required authority, as none requires that the parties possess any particular view regarding the pre-existing correctness of a legal decision.

With respect to both “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 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 argument. 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 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” parties in international arbitration may be.

Part Three of this article will now apply this analysis of authority to traditional arbitration,

clarifying which versions of authority lay behind the success of arbitration prior to its recent arrival as the primary form of international dispute resolution.

3. 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 arbitrator to the dispute resolution process. While there are no strict procedural rules in accordance with which arbitrations must be conducted,⁴³ and the degree to which they are subjected to State control can also vary greatly,⁴⁴ the necessity of an independent, third-party decision in an arbitration unavoidably places great emphasis upon the individuals selected to serve on an arbitral panel.⁴⁵ Indeed, while the degree of independence of arbitration from State law enforcement has always been questionable,⁴⁶ the importance of the identity of the arbitrator and his power to control the proceedings over which he presides have remained consistent.⁴⁷

With respect to the authority of arbitral awards, the primary virtue of traditional arbitration was the authority of the arbitrator as seen by the parties.⁴⁸ Whatever procedural rules were adopted for the

⁴³ JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEN 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.”)

⁴⁴ 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.”)

⁴⁵ 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.”).

⁴⁶ *See, e.g.* Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval “Law Merchant”*, 21 *Am. U. Int’l L. Rev.* 686 (2006) (arguing that contrary to the views expressed by many commentators, courts were intimately involved in medieval English arbitration).

⁴⁷ William W. Park, *The 2002 Freshfields Lecture – Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion*, 19 *Arb. Int’l* 279, 281 (2003) (“noting “an emphasis on broad grants of procedural discretion to the arbitrators”).

⁴⁸ Richard Garnett, *International Arbitration Law: Progress Towards Harmonisation*, 3 *MELBOURNE J. INT’L L.* (2002), at p.

arbitration itself, the fully consensual and party-controlled nature of arbitration meant that the award was delivered by an individual the parties saw as having genuine insight into their relationship and the context in which they were operating.

Indeed, precisely because of this insight of the arbitrator into the relationship between the parties, particular emphasis was placed on the arbitrator's role as settler of the dispute, rather than as judicial arbiter.⁴⁹ The participants were usually in some form of ongoing relationship, and had selected as arbitrator an individual with a connection to either the parties themselves or the social context in which they operated. As a result, the decision of the arbitrator 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 to at least allow both parties to feel that justice had been served.⁵⁰ Moreover, as the agreement to arbitrate itself was reached post-dispute and the procedural elements of the arbitration were determined with the mutual consent of the parties, even the losing party had reason to view the result as binding.⁵¹

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,⁵² but rather the esteem of the parties for the particular

2 (“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 types of disputes that arose. In this way, areas of recognised expertise could be developed without excessive legal formality.”).

⁴⁹ Edward Powell, *Settlement of Disputes by Arbitration in Fifteenth-Century England*, 2 L. & HISTORY 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 neighbours.”)

⁵⁰ *Id.* 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.”).

⁵¹ Michael Mustill, *Comments on Fast-Track Arbitration*, 10 J. INT’L ARB. 121, 123 (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.”).

⁵² Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 Arb. Int’l 1, 7 (2002) (“One of the great strengths of arbitration is its procedural flexibility, which permits the process to be tailored to

individual serving as arbitrator. As either a prominent and experienced figure in the same industry as the parties, or perhaps merely an individual both parties respected,⁵³ the arbitrator was able to deliver a decision that although not always legally binding on the parties,⁵⁴ was nonetheless usually sufficient to preclude any further disputation.

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 arbitrator, his “expertise” in a certain area, or his 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 arbitrator was not selected because he was viewed as having an ability to reach the correct result more efficiently than the parties. After all, while the arbitrator may indeed have possessed the ability to reason quickly to reliable legal conclusions, the lack of strict application of the law in traditional arbitration meant that the arbitrator did not as such deliver a legal conclusion, but rather a decision based on the law, but independently judged to be appropriate.⁵⁵ Consequently, as there was no pre-existing correct answer to which the arbitrator could lead the parties, the parties could not view the award as authoritative for reasons of “efficiency”.

By contrast, the arbitrator could have been viewed by the parties as authoritative due either to

the particular needs of each case.”); Thomas Allen, *Institutional Rules: Straitjacket or Scaffold?*, in INTERNATIONAL COMMERCIAL ARBITRATION: DEVELOPING RULES FOR THE NEW MILLENNIUM 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.”).

⁵³ Powell, *supra* n. 49, 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.”).

⁵⁴ Zeyad Alqurashi, *Arbitration Under the Islamic Sharia*, *Transnat’l Dispute Mgmt*, at 2-3 (2004) (discussing that both binding and non-binding awards existed under traditional Islamic law).

⁵⁵ Powell, *supra* n. 49, 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.”)

their perception of him as possessing the “insight” required to settle their dispute in a mutually satisfactory way, or because of his 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 arbitrator was usually not selected because his view was seen as an accurate indicator of the views of a larger and ultimately more important legal institution. After all, even if an arbitrator has had long experience with the law to be applied, and genuinely desires 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 an individual 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 themselves have made.⁵⁶ That is, when an English court delivers an interpretation of a point of English law, English law itself is changed.⁵⁷ 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 precisely 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

⁵⁶ 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.”).

⁵⁷ “Changed” should here be understood as including situations in which the decision in question merely affirms previous

arbitrator applied 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.⁵⁸ In 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.

Moreover, prior to the mid-20th Century courts often had highly negative attitudes towards arbitration.⁵⁹ Consequently, even where an arbitration had already taken place, in accordance with a valid arbitration agreement, a court would nonetheless often require parties to re-litigate the entire dispute, rather than simply granting enforcement of an arbitral award that it regarded as undermining the right of courts to control the application and interpretation of the law.⁶⁰ 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 the courts were highly likely to insist upon a full trial no matter the content of the decision. In so far as an arbitral award possessed authority derived from the “institutional” rationale, then, it did not come from the arbitrator’s representativeness of the judges of a particular legal system.

However, this does not mean that all institution-based authority was lacking in arbitral awards.

caselaw. Such a decision still “changes” the law in so far as it adds to the support for the dominant rule.

⁵⁸ 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* 503 (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.”) (emphasis in the original) 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.

⁵⁹ Lew, *supra* n.43, 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.”); Born, *supra* n.44, at 29 (“Many nations historically regarded international commercial arbitration with a mixture of suspicion and hostility”).

⁶⁰ Sarah Rudolph Cole & Kristen M. Blankley, *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.”).

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 arbitrator may have been selected due to his 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.⁶¹ If, for example, a highly regarded member of a local trading community sat as an arbitrator in a dispute between two other members of that community, any decision he 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 where 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 arbitrator of certain personal characteristics. He 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 arbitrator was personally representative of a particular social group, rather than because he possessed a certain place in an institutional hierarchy, such as a court system.⁶²

Part Four 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

⁶¹ 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* n.33.

⁶² This does not mean that hierarchy was entirely irrelevant, of course, as 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

authority possessed by awards delivered in traditional arbitration.

4. The Loss of Authority in Contemporary International Arbitration

This section 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,⁶³ 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 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.⁶⁴ It will be argued here that this situation is largely attributable to the effect on the role and standing of arbitrators of certain procedures currently adopted in international arbitration, and the interaction of those procedures with the increased “judicialization”⁶⁵ 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 only

incapable of delivering the requisite authority to the award.

⁶³ Redfern & Hunter, *supra* n. 58, at 305 (“As the practice of international commercial arbitration becomes more sophisticated, challenges to the jurisdiction of arbitral tribunals become more frequent.”)

⁶⁴ 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 cannot be attributed to anything inherent in international arbitration itself.

⁶⁵ 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 the proceedings before national courts. Over the past decades, the arbitral process has undergone a fundamental transformation which is often characterized as the ‘judicialisation’ of arbitration”.)

proceeded to a hearing where 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, arbitration agreements are predominantly signed at the time of the initial contract, before any dispute has arisen, and are designed to be broad enough to catch a wide range of potential future disputes. 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.⁶⁶

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 than for the other side.⁶⁷

⁶⁶ *Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration* (2007) (“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.”).

⁶⁷ YVES DERAÏNS & 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.”); Elizabeth T. Baer, *Selecting and Challenging Arbitrators in International Commercial Arbitration*, unpublished, International Arbitration Seminar, King & Spalding, October 2000, *quoted in* Keith E.W. Mitchell, *Arbitrator Selection and Appointment Under the North American Free Trade Agreement*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 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.”); KEITH E.W. MITCHELL, *ARBITRATOR SELECTION AND APPOINTMENT UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 313 (Todd Weiler ed. 2004) (“Generally, a party attempts to select an arbitrator predisposed to a favorable consideration of their case, but not legally biased such as

Acknowledging this reality, contemporary international arbitral institutions have adopted a mechanism for selecting arbitrators that is intended to avoid the most likely problems. While traditional arbitration often involved only a single arbitrator, mutually agreed upon by both parties, the more contentious nature of contemporary international arbitration means that agreement between the parties on a single arbitrator will often be unlikely to get. As a result, were such agreement necessary, many arbitrations would simply fail to take place, and parties either would be forced into court litigation, or an “appointing authority”⁶⁸ would simply impose an arbitrator of its own choosing upon the parties.⁶⁹

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.⁷⁰ Under this system, each party gets to select and nominate an arbitrator, with broad freedom restricted solely by constraints on the ultimate fairness of the proceeding.⁷¹ Those two arbitrators will then themselves usually agree upon the selection of a third arbitrator, to chair the panel.⁷²

The rationale behind this approach from the perspective of the authority of the resulting award

to result in disqualification.”). On a more specific level, one practitioner has listed the following “[a]ttributes for party-appointed arbitral candidates:... Philosophical predisposition to your case; [(i)] previous arbitral decisions for or against claimant and for what sums; [(ii)] previous procedural or jurisdictional decisions similar to those likely to arise in this case; [(iii)] written favorably on issues likely to arise.” Elizabeth T. Baer, *Selecting and Challenging Arbitrators in International Commercial Arbitration*, unpublished, International Arbitration Seminar, King & Spalding, October 2000, *quoted in* Earl McLaren, *Effective Use of International Commercial Arbitration: A Primer for In-House Counsel*, 19 J INT’L ARB. 473 (2002).

⁶⁸ An appointing authority is an individual or institution empowered to select arbitrators for an arbitration where selection by the parties themselves has failed to occur. Redfern & Hunter, *supra* n. 58, at 228-30.

⁶⁹ 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 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.

⁷⁰ 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”).

⁷¹ The specific constraints adopted vary between jurisdictions, but in broad terms arbitrators are expected to be able to be both “independent” of the parties and “impartial” between them. Otto L.O. de Witt Wijnen, Nathalie Voser & Neomi Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT’L 433, 443 (2004) (“Most of the jurisdictions surveyed apply the same standard of impartiality and independence for judges and arbitrators.”).

⁷² Born, *supra* n. 44, at 616 (“Typically, each party (in a two-party dispute) nominates an arbitrator and the two party-

is that this selection mechanism will serve to generate an authoritative panel, by ensuring that each party has one arbitrator that it can view as possessing the ability to deliver authority to the award. Consequently, where the three arbitrators confer and agree upon a decision, each party has a reason to accept the result, as concurred in by the arbitrator they recognize as having the requisite authority. Moreover, even if not all three arbitrators agree, absent a particularly vociferous dissent from its nominated arbitrator,⁷³ the losing party still has reason to accept the panel's decision, as while its arbitrator may disagree with the resolution, the disagreement will likely turn on a point of interpretation, rather than a fundamental disagreement.

While on its face this is an eminently well-designed procedure, ensuring that both parties are in some way represented on the arbitral panel, and avoiding the difficulties of requiring genuine agreement on the identity of each arbitrator, 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 certainly overwhelmingly highly regarded individuals, particularly at the higher levels of international arbitration.⁷⁴ However, 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 particular parties involved in the arbitration themselves view that particular arbitrator as capable of delivering an appropriate decision, to which they will be content to bind themselves. Historically, of

nominated arbitrators (or 'co-arbitrators') endeavor to agree upon a presiding arbitrator (or 'chairman'.")

⁷³ Dissents being rare in international arbitration. Christopher R. Drahozal & Richard W. Naimark, *Commentary*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION* 260 (Christopher R. Drahozal & Richard W. Naimark eds. 2005) ("the vast majority of ICC awards are unanimous (at least on their face)"); Derains & Schwartz, *supra* n.67, at 308 ("Indeed, the use of dissenting opinions has not generally been encouraged in international arbitration"). On the legal status of dissenting opinions in international arbitration see JEAN-FRANCOIS PLOUDRET & SEBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 673-79 (2007).

⁷⁴ For example, admission to the ICDR International Roster of Neutrals, from which the International Centre for Dispute Resolution suggests arbitrators to parties, requires, *inter alia*, a "[m]inimum of 15 years of senior-level business or professional experience." Qualification Criteria for Admittance to the ICDR International Roster of Neutrals, *available at* <http://www.adr.org/si.asp?id=4495> (last visited October 6, 2008).

course, as discussed above, this authority was assured by the fully-consensual, post-dispute nature of arbitration, as the arbitrator was selected by agreement of the parties, specifically to resolve the particular dispute in which they were involved. However, the procedure operating in contemporary international arbitration, as just described, is simply poorly designed for the purpose of delivering an arbitrator with genuine authority for the parties.

An important obstacle to the selection of an authoritative arbitral panel arises under the system currently adopted, as if each party nominates one arbitrator, it will almost always be the 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 where 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 it.⁷⁵ Even in such a case, then, where 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 towards some central element of its case. Consequently, to draw a parallel with traditional arbitration, this is simply not an individual to whom they 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 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 genuinely an 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, as if the arbitrator works from presumptions rejected by the non-nominating party, it 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 sub-section 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, and the other of whom was selected by that party’s nominee. Consequently, since at least one of those individuals must support an award for it to receive the required majority approval, an authoritative award should still be able to be delivered.

There are, however, two difficulties with this argument. Firstly, 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. However, 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 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 it was indeed proper that it lost the dispute.

Moreover, even where the party has indeed nominated an arbitrator 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. The party, after all, has not selected the Chair,

⁷⁵ See citations *supra*, n.67.

but has at best consented to a negotiated agreement on an individual acceptable to both parties. That is, while 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 traditional arbitration neither party was obligated to arbitrate, but both agreed to do so because each saw arbitration as advantageous to its position, and saw the specific arbitrator agreed upon as acceptable. Consequently, both parties had an incentive to cooperate in selecting an arbitrator genuinely acceptable to both parties, as 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.⁷⁶ Consequently, if either party refuses to agree upon the Chair, an individual will simply be selected by the relevant appointing authority, and the arbitration will progress as normal.⁷⁷ 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, and an incentive to use it.⁷⁸ Ultimately, then, the two parties will simply settle upon an individual who is inoffensive to both, but authoritative for neither.

The Chair, then, will very rarely be able to deliver any authority to the award herself,⁷⁹ leaving all authority to be delivered by the party's own nominated arbitrator. One important consequence of this situation is that if the 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.

⁷⁶ As 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.

⁷⁷ Born, *supra* n. 44, at 616 (“Where the co-arbitrators are unable to reach agreement, an ‘appointing authority’ is delegated authority to select the presiding arbitrator.”).

⁷⁸ 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.

Moreover, as dissenting opinions are extremely rare in arbitration,⁸⁰ 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.

Only, then, if a party has approached the arbitral selection process with no particular eye for strategic advantage, and the arbitrator it 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 that is 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 under a single arbitrator who has been selected by the parties from a list prepared by an arbitral institution.⁸¹ This may initially seem to 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 for delivering an authoritative award.⁸²

⁷⁹ Those rare situations being when both parties do indeed agree upon a Chair who both parties view as authoritative.

⁸⁰ See citations *supra* n. 73.

⁸¹ Redfern & Hunter, *supra* n.58, at 224 (“A variation on this system, sometimes used by arbitral institutions, particularly the ICDR and the Netherlands Arbitration Institute, and by appointing authorities under the 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.”).

⁸² There might be instances where 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.

B. The Three-Arbitrator Panel as Displaced Party Negotiation

However, while 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 itself 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 section of the article will be 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 in the previous section, while 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, 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.⁸³ Rather, the

⁸³ Moses, *supra* n.70, 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.”)

desirability of a three-arbitrator panel arises from the way it allows each party to select an arbitrator, and thereby have its substantive views and perspective represented on the panel.⁸⁴

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. However, where 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.

Where parties have approached arbitrator selection in a good-faith attempt to ensure views that are genuinely important to it are represented on the panel, the panel moves beyond being just a result of tactical choices by parties attempting to ensure a favorable result, to become a deliberative body that includes one individual who can be expected to advance the views substantively held by each of the parties, and a third individual who holds substantive views at least acceptable to both parties.

In an ideal situation, then, a three arbitrator panel can be seen not as a judicial body appointed

⁸⁴ Redfern & Hunter, *supra* n.58, at 219 (“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.”)

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 will therefore be unlikely to discuss their dispute seriously with a view to achieving a settlement. Moreover, it will usually be the case that some form of settlement negotiations have previously taken place, but a resolution acceptable to both parties will not have been reached.

Under the view proposed here of a three-arbitrator panel, however, the panel will not only deliberate about the case as presented by the parties, but will do so from perspectives representing the substantive views of the parties. Importantly, however, 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 themselves are unlikely to be able to undertake substantive negotiations due to the antagonism between them.

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, as the decision will have been reached by a panel that has 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 their points of view on the subject matter in dispute, so this settlement-by-arbitral proxy is also authoritative, and 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 in a dispute, rather than as objective proxies for the parties in a settlement negotiation.⁸⁵

In the litigious context of contemporary arbitration this judicialization is indeed a desirable characteristic in arbitrators, as it is an effective means of minimising bias on the part of arbitrators. However, the insistence upon judicialization of arbitrators rests upon a fundamental confusion between neutrality and detachment, where the former is sought, but by means of 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.⁸⁶ 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.

However, 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.⁸⁷ However, one can also be neutral because one knows or cares deeply but equally about both sides to the dispute, or because one knows or cares deeply about one side, but also cares deeply that a just and fair decision be made, rather than just one favorable to the party one knows.

⁸⁵ Catherine A. Rogers, *The Ethics of International Arbitrators*, in *THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* 632 (Lawrence W. Newman & Richard D. Hill eds. 2008) (“Today, only a few jurisdictions continue to rely on expressly on judicial standards [regarding impartiality], though reasoning by analogy continues to find favor among courts and commentators.”).

⁸⁶ RICHARD GARNETT, ET AL., *A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* 82 (2000) (“An arbitrator has a duty of impartiality in all dealings regarding the arbitration.”).

⁸⁷ See, for example, the impartiality 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.” S. Pook, *The Woman Who Hit Boycott for Six*, *DAILY TELEGRAPH*, 13 Nov., 1998 (quoted in ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN A CHANGING CONSTITUTION* (2002)).

This is an important distinction to make because very rarely will any legal dispute be resolvable on purely logical grounds.⁸⁸ 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 comes not 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 will come 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 does not serve 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 Seven of this article will address, among other things, a means by which the traditional connection between arbitrators and parties can be restored, enabling the delivering of awards with "insight"-based authority, but without also creating an unacceptable risk of bias on the part of arbitrators. The next section of the article, however, will address the possibility that even though

⁸⁸ See citations *supra* n.18.

arbitrators themselves are now rarely able to deliver authority to an arbitral award, the development of contemporary international arbitration has resulted in the creation of an institution that can itself deliver the desired authority, much as a structured court system can provide the authority of a court judgment even if the parties don't regard the judge himself as authoritative in any particular manner.

5. 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 towards 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 international arbitration. Just as the authority of a court decision can be derived from the authority of the court structure, rather than 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 themselves. 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. Firstly, there is the very thing that has been behind the increase in popularity of arbitration itself, namely the desire to avoid local idiosyncrasies in dispute resolution.⁸⁹ Businesses

⁸⁹ Claus Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Richard W. Naimark & Christopher R. Drahozal eds. 2005) (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).

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, but 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 towards 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 since 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, businesses benefit little from an arbitral system that is everywhere the same, as 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, then, 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 since 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.⁹⁰ 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 where either party originates from, 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.⁹¹

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

However, 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 be most likely to 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

⁹⁰ Redfern & Hunter, *supra* n.58, at 26 (“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.”).

⁹¹ For example, the rating by Chambers & Partners of the top 25 firms in international arbitration does not include a single

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.⁹² 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, as 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,⁹³ 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 attempting 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 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

firm outside Europe and the U.S.A. See <http://www.chambersandpartners.com/Editorial.aspx?ssid=30382> (last visited Mar. 24, 2009).

⁹² Redfern & Hunter, *supra* n.58, at 315 (“Once an arbitral tribunal is established, day-to-day control of the proceedings begins to pass to the tribunal.”).

often at odds to both parties in any specific dispute.⁹⁴ Consequently the rules in question are themselves 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 were the defensive rationale 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 in an arbitration are. 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 necessary for the creation of an authoritative institution is simply unavailable. Consequently, 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 Six 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.

6. The Shift from Authority of Arbitrators to Authority of Procedure

⁹³ Poudret & Besson, *supra* n.73, at 485 ("international arbitration proceedings tend towards uniformity").

⁹⁴ 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 themselves.

It has been argued in this article 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 is authoritative for both parties, and can thereby deliver an award authoritative for them.

Unfortunately, such situations are highly unlikely in the context of 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 section of the article will argue, however, that these difficulties should not be viewed as precluding contemporary arbitral awards from being authoritative. Instead, arbitral awards can still be authoritative where 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, as no matter how much authority a judge and/or judicial authority might themselves have, if a party feels they were not procedurally fairly treated 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 procedure and 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 deliver authority to the resulting award.

Of course, arbitration already provides parties with the ability to design their own dispute resolution procedure, so that 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 standardly 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, at best merely referring to the rules of a particular arbitral institution or the UNCITRAL Arbitration Rules.⁹⁵ Such rules, however, by design, provide only the bare-bones of an arbitral procedure, as they are intended to apply only where parties cannot themselves agree on necessary procedural rules.⁹⁶ That is, they are designed to ensure that the arbitration will function, not that it will function well. The selection of such rules, then, can hardly be taken as a substantive endorsement by the parties of a particular way of conducting 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 has arisen, and it is unavoidably necessary to decide the procedures to be adopted, all efforts at amicable negotiation between the parties will have failed, and 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 the attorneys. They will, that is, not be attempting 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,⁹⁷ and even such agreements will overwhelmingly reflect the procedural judgments of the attorneys, rather than the identities of the parties.

⁹⁵ 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.” See http://www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt (last accessed Mar. 24, 2009).

⁹⁶ Born, *supra* n.44, at 450 (“[A]ll leading institutional rules provide only a general framework for arbitral proceedings. Within the broad framework rules, the parties and tribunal are left free to work out the details of particular arbitral procedures as they see fit.”).

⁹⁷ Park, *supra* n.47, 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.”).

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,⁹⁸ very little effort is put into design of the arbitral procedures. Instead, choice of procedures is overwhelmingly left in the hands of the arbitrators themselves, who usually have total freedom so long as the procedure adopted allows each party to fully and fairly present its own case.⁹⁹ As already argued, however, these arbitrators themselves 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.

By contrast to this situation, however, where 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, as such a procedure will be able to provide the arbitral panel with the insight into the parties and their relationship necessary to deliver “insight”-based authority to the award.

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 is 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 was, do not possess the “insight”-based authority that procedure is

⁹⁸ See citations *supra* n.67.

⁹⁹ Park, *supra* note 47, 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.”).

capable of delivering.

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

7. A Procedural Suggestion for Restoring Authority to Arbitral Awards

The argument of this article has been 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 section will briefly outline 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 where they have been delivered as a result of procedures designed specifically for the parties to the dispute. The proposal offered here, then, will specifically address 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 will resolve challenges to arbitrators, process documentation, and other similar administrative duties,¹⁰⁰ and will 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.¹⁰¹ 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 themselves, 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 themselves or to the arbitrators they have selected is very unlikely to result in the delivery of an authoritative award. Only where 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, however, 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

¹⁰⁰ For an excellent discussion of the practices of the ICC, arguably still the pre-eminent international arbitration institution, see *Inside the ICC's Case Management Processes (Parts I-II)*, available at <http://www.cpradr.org/tabid/45/articleType/ArticleView/articleId/359/Default.aspx> and <http://www.cpradr.org/tabid/45/articleType/ArticleView/articleId/369/Default.aspx> (last visited Oct. 19, 2008).

¹⁰¹ 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 personalised guidance under discussion here.

currently serving as case administrators at arbitral institutions should be asked to commence designing arbitral procedures for the arbitrations 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 how their arbitration should be run.

Rather, what is being proposed here is the creation of the role of “procedural mediator”. Just as professional mediators addressing the substantive issues of a dispute specialize in interacting with the parties, developing an understanding of their needs and views, and attempting to devise a solution that will be acceptable to both sides, so a procedural mediator would perform the role of designing an arbitral procedure that would genuinely serve both parties’ needs and interests.

However, unlike proposals made by traditional mediators, which are not binding on the parties unless they have consented to them, it is proposed here that while the identity of a procedural mediator should be a matter of agreement between the parties, the mediator must ultimately have the right to simply mandate certain procedures, whether they are consented to by the parties or not. This is important because while substantive mediators are working with parties who have at least a partial commitment to reaching a settlement by agreement, procedural mediators are working with parties who have reached a point at which agreement on any issue likely to be dispositive to the case is highly unlikely. There will therefore be a very high probability that such parties, and certainly their attorneys, even if they enter into discussions with the procedural mediator in good faith, will ultimately refuse to agree to any procedure that they see as even slightly favorable to the other side. Consequently, a procedural mediator must have the power simply to mandate certain procedures once both parties have been heard and their views seriously considered. However, it should be emphasized that this does preclude that an explanation for the procedures should be offered 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 themselves already have the power to design the procedures of an arbitration to suit the parties, and that the creation of the role of procedural mediator 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, however, this objection ignores the fact that arbitrators and mediators simply do not possess the same sets of skills, and thus individuals perfectly suited for the role of arbitrator will often be very poor mediators.¹⁰²

Nonetheless, it should be emphasized that precisely because the procedural mediator must have the ability to impose procedures upon the parties, party consent is essential to both the use of a procedural mediator, 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 themselves are unlikely simply to know a particular individual with the deep knowledge of arbitral procedure necessary for the role, but also the personal characteristics desirable in a mediator, and who is acceptable to both parties. Arbitral institutions, then, could develop panels of procedural mediators, just as they currently often have panels of arbitrators.¹⁰³ The individuals on this panel will have been appointed to the panel precisely because they possess the professional qualities necessary to perform the role well, and the parties need only select an individual they find mutually acceptable.

Once appointed, the procedural mediator 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

¹⁰² Louis A. LaMothe, *Choosing Who and What*, in ALTERNATIVE DISPUTE RESOLUTION 65 (Nancy F. Atlas et al., eds. 2000) (“Those people, used to judging, sometimes have trouble turning it off. They want to decide disputes, tell parties how they think the case will turn out, arm-twist, and otherwise act as they did in settlement conferences back on the bench.”)

¹⁰³ See, e.g. Qualification Criteria for Admittance to the ICDR International Roster of Neutrals, *available at*

dispute, taking into account their cultural background, individual needs and preferences, and the facts and likely procedural issues of the case. The mediator would, however, remain formally attached to the arbitration throughout its course, to ensure that any additional significant procedural elements were 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 mediator to decide all procedural issues as they arose, suggesting that once the initial rules were put in place, the arbitrators themselves should decide remaining issues, until a party requested the mediator's involvement.¹⁰⁴

The involvement of a procedural mediator would go a significant way towards restoring authority to arbitral awards, by ensuring that the procedures used in an arbitration are designed to match the parties. However, as noted above, it is impossible entirely to separate the procedure of an arbitration from the arbitrators presiding over it. Consequently, it is also desirable that a change be adopted in the role arbitrators are seen 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.¹⁰⁵ 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.¹⁰⁶

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,

<http://www.adr.org/si.asp?id=4495> (last visited October 6, 2008).

¹⁰⁴ 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 performed her job properly initially, serious issues that would require his 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 could therefore proactively address such issues in the rules constructed for the arbitration.

¹⁰⁵ Garnett, *supra* n.86, at 82.

¹⁰⁶ Born, *supra* n.44, 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.").

with the consequence that arbitrators are viewed as ideally not just independent and impartial, but also detached from the parties and wholly objective. As argued above, however, 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 views of the party that appointed her, and then conveying those views 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 express well the views 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 views advanced by both sides, and then deciding based on a genuine understanding of the perspective of both parties, rather than merely as a result of a detached judgment on the facts and the law.

While both of the suggestions made in this section of the article are likely to be highly controversial, the argument of the preceding sections of the article has attempted to establish that they are indeed necessary if international arbitral awards are to regain their lost authority.

8. Conclusion

This article has attempted to demonstrate that a genuine crisis exists in contemporary international arbitration, even though it 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 were traditionally rare. As a result, contemporary international arbitration risks becoming solely a means of enforcement, rather than anything that genuinely resembles dispute resolution. It has been argued in this article that the involvement of procedural mediators and the reconceptualizing of the role of party-nominated arbitrator 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 not-insignificant 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. Were the services suggested here 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.