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The Vocation of International Arbitrators

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INTRODUCTION

International arbitrators are exceptionally talented individuals. Most speak multiple languages.[1] They boast rich and multi-national educations from the world's most prestigious universities,[2] and have vast experiences working in the highest echelons of diverse legal systems. Their multi-faceted, multi-cultural legal training is often supplemented by technical or industry specific expertise, and their cumulative credentials are frequently parlayed into professorships

1. A good illustration is available on iaiparis.com, a searchable website directory of international arbitrators, where it is possible to identify candidates based on particular combinations of language competences. But even if you enter what would seem to be improbable pairs, such as Uzbek and Spanish, or Russian and Arabic, you can usually find a candidate. These random searches, for example, yielded respectively Noah Rubins, an American who, in addition to Uzbek and Spanish, is also skilled in English, French and Russian, or Samir A. Saleh, a Lebanese and British citizen, who in addition to Russian and Arabic, is also fluent in English and French.

2. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 18-21 (1996) (discussing and citing examples of the importance of a prestigious education in building a career as an arbitrator).

and enhanced by rich scholarly research.[3] The most experienced of these arbitrators are appointed and re-appointed to the most important international disputes,[4] where they resolve everything from delicate matters of diplomacy to controversies involving sums larger than the annual operating budget of some smaller nations. This profile depicts the elite individuals who adjudicate virtually all international commercial and trade-related disputes.[5] But as extraordinary as they are as individuals, their vocation as international arbitrators remains largely undefined at either a descriptive or a normative level.

In two other articles, one published and one forthcoming, I propose respectively a methodology for developing clearer standards of conduct for international arbitrators, and an approach to review of allegations of misconduct that more accurately reflects parties' expectations.[6] This Essay takes up some questions that fall between the cracks of those two works. The first article considers the functional role of arbitrators in relation to the parties during the proceedings and the ethical obligations that flow from that role, but it does not consider their functional role in the larger systemic context, and what additional obligations might stem from that role. Meanwhile, my analysis in my forthcoming article of how to enforce conduct standards does not address what consequences might apply when arbitrators violate their ethical obligations, but their

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3. *See id.* at 19-21 (explaining the development of the career of famous arbitrator Pierre Lalive).

4. *See id.* at 35.

5. *See* KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 8 n.62 (1993) (citing ALBERT JAN VAN DEN BERG ET AL., ARITRAGERECHT 134 (1988) (estimating that 90% of all international agreements contain arbitration clauses).

6. Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 55-56 (2005) [hereinafter Rogers, *Developing Standards of Conduct*] (proposing a theory and methodology for developing standards of conduct to guide international arbitrators); *see also* Catherine A. Rogers, *Misbehaving Arbitrators and Consenting Parties: Enforcing Standards of Impartiality in International Arbitration* [hereinafter Rogers, *Misbehaving Arbitrators*] (working draft on file with author) (explicating the distinction between standards of conduct and standards of enforcement and proposing an approach for reconciling the two in the context of award enforcement and in light of the parties' agreement).

misconduct is not sufficiently egregious to warrant disqualification or rejection of the award. Addressing these remaining issues requires a clearer definition of the vocation of the arbitrator within the larger international arbitration system and the market for arbitrator services.

To understand at a descriptive level how the arbitration community is currently organized and regulated,[7] I rely in Part I on sociological frameworks that have been developed in literature on Weberian theories of the professions.[8] I describe how arbitrators operate in a largely private and under-regulated market for services, access to which is essentially controlled by what might be considered a governing "cartel" of the most elite arbitrators. This market has come under increased pressure in recent years because the number of arbitrators and arbitration proceedings has increased sharply and their work product has come under greater scrutiny. At least partially in response to these pressures, arbitrators have begun to display a "professional impulse,"[9] meaning efforts to present themselves as a profession. Sociological accounts of the professions tell us that in seeking to present themselves as a profession, international

7. In the context of this Essay, I use the terms "regulate" and "regulatory" to refer generally to all mechanisms that function to monitor and control conduct, and not only to the more limited sense of legislatively imposed, command-and-control mechanisms.

8. RICHARD L. ABEL, AMERICAN LAWYERS 15 (1989) (explaining that while there are many competing theories of the professions, the approach of Max Weber and those who follow in his tradition conceive of the attributes of professions as strategies to attain a competitive advantage in a relatively free market). Under this view, "[p]rofessions are distinguished by the strategies of social closure they use to enhance their market chances." *Id.* Except as otherwise indicated, in this Essay I rely predominantly on Weberian-based conceptions of the professions.

9. I use the term "professional impulse" or "professional project" to connote efforts to invoke the notion of professionalization, specifically through many of the traditional markers of professionalization, such as autonomy and self-regulation through ethical standards and organized associations. For classical definitions of professions, see Susan M. Olson & Albert W. Dzur, *The Practice of Restorative Justice: Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 60; Juliana Birkoff et al., *Is Mediation Really a Profession?*, DISP. RESOL. MAG., Fall 2001, at 10, 11 (using Andrew Abbot's definition of a profession to analyze mediator service and to present it as a profession to obtain the benefits of professionalization); Herbert M. Kirtzer, Note, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC'Y REV. 713, 716-18 (1999) (describing three definitions of the term "profession").

arbitrators are inevitably seeking to express what has developed as a shared identity, as well as to obtain certain benefits associated with professionalization, such as added prestige, exclusivity, and regulatory autonomy. However, these descriptive sociological accounts of why groups such as international arbitrators seek professional status do not provide a very satisfying normative justification for *why* they might rightly be regarded as something other than ordinary occupations and service providers.[10]

Sociological theories of the professions are helpful in understanding how various groups are socialized to share a collective identity and seek to gain advantages in the marketplace, but they are inadequate for the task of providing a normative justification for differentiating professions from other occupations and for altering their relationship to the State.[11] In the context of lawyers, the proffered justification for differentiating the legal profession rests on a "purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy."[12] The implied contract was said to be premised on certain features of lawyers' work, which ostensibly justified the bargain, namely a "community orientation" or a sense of "altruism" that puts the good of clients and society above lawyers'

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10. *See* Kirtzer, *supra* note 9, at 713-16 (outlining the traditional distinction between service providers—which encompass accountants, consultants and paralegals—and professionals, such as attorneys).

11. *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 200 (2001) ("Descriptive sociology enters not at the stage of providing the theory of the concept, but at the preliminary stage of providing the raw materials about which one is to theorize.").

12. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995); *see also* Bernard Barber, *Some Problems in the Sociology of the Professions*, *in* THE PROFESSIONS IN AMERICA 15, 18 (Kenneth S. Lynn et al. eds., 1965) (describing four attributes of a profession: generalized and systemized knowledge, community orientation, internal controls through socialization and ethical codes, and a system of rewards). *But see* Kirtzer, *supra* note 9, at 717 (defining the "two key elements" of a profession as being the exclusivity of their membership and their application of abstract knowledge, but noting that professions have added notions of altruism, regulatory autonomy and service to these key features).

own naked self-interest.[13] As a normative model, however, this account turned out to be largely factually unsupportable and conceptually faulty. While the most devastating blow may have been a growing doubt regarding the existence of lawyers' presumed altruism,[14] those doubts raise deeper questions about why unilateral expressions of altruism should excuse any individual or group in society from state regulation.[15] Instead of theories of the profession, I offer in Part II a preliminary conceptual analysis of the normative underpinnings of the vocation of the modern international arbitrator. I provide an account of the justice function of modern international arbitration (as contrasted to the dispute resolution function of settlement and the international arbitration model of yesteryear), and I explore what implications this distinction holds for differentiating arbitrators' role from other legal service providers, such as attorneys. I then explore the ways in which international arbitration is

13. For classical articulations of this position, see EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 5-13 (Cornelia Brookfield trans., Greenwood Press 1983); WILBERT E. MOORE, THE PROFESSIONS: ROLES AND RULES 13 (1970) ("A distinctive feature of full-fledged professions, noted by most students, is a service orientation."); *see also* Kirtzer, *supra* note 9, at 729 (arguing that the justification for insulating professions from competition is usually "justified primarily in terms of the 'public interest' or 'public protection.'"). There are important distinctions to be made between the assertions of groups that they possess a public-spirited commitment and the actuality of those groups' professed commitments. Even more importantly, there is a distinction between the assertion or actuality of those commitments and the normative implication of those commitments.

14. The most forceful proponents of this view are Richard Abel and Ronald Rotunda. ABEL, *supra* note 8, at 35 (stating that proponents of this view "simply assume[] that independent professionals exhibit such desirable traits and then explore[] the threats to their hypothetical autonomy"); Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of* Florida Bar v. Went For It, Inc., 49 ARK. L. REV. 703, 713 n.36 (1997) (arguing that the only difference between trade unions and professions is the latter's sanctimoniousness) (citing ELIOT FREIDSON, PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE 369 (1970)); Rotunda, *supra*, at 706 n.10 (defining professions as "conspiracies against the laity") (citing GEORGE BERNARD SHAW, THE DOCTOR'S DILEMMA xv (1911)).

15. The proffered argument is that regulation is unnecessary because altruism ensures good behavior in the absence of state oversight. While this explanation may predict compliance and consequently provide a justification for expending limited resources on enforcement, it does not explain why an exemption for regulation should be created in the first place.

developing a vibrant, if perhaps still fledgling, public realm. This public realm is comprised of procedural and decisional commitments to honor mandatory law claims and public policy concerns, as well as a range of public goods that are produced not only for the international arbitration community, but beyond. What emerges from this analysis is an understanding that the modern international arbitrator is not simply an instrumentality of the parties' collective will expressed through the arbitration agreement, but instead an integral part of a larger system that depends, in part, on them performing their role as responsible custodians of that system.

With this background, I return in Part III to the market for international arbitrator services, this time to evaluate it in light of obligations and expectations attendant with their role as custodians of the international arbitration system—a system that includes a vibrant public realm. In the U.S. domestic arbitration context, where arbitrators have a much narrower and less custodial role, failures to voluntarily take up efforts at self-regulation have provoked other potential regulators to step in to fill the perceived gap. The need for regulation is greater in the international context because international arbitrators operate as custodians of a system that is imperative for international trade, but that also exceeds the easy reach of traditional State regulatory mechanisms, and must be kept out of their grasp to maintain its neutrality. I propose certain innovations that would increase the rigor and transparency in the market for services and in international arbitrators' self-regulation, improvements that may be regarded as having been implicitly promised in existing rumblings of professionalism, but as yet have not been fully delivered.

I. AN ABRIDGED BIOGRAPHY OF THE INTERNATIONAL ARBITRATOR

The forefathers of the modern international arbitrator were a small, intimate group of European "grand notables" or "Grand Old Men," as they were sometimes called,[16] who undertook the project of

16. *See* DEZALAY & GARTH, *supra* note 2, at 34-37 (clarifying that they were referred to in masculine terms because there were literally no women at the time, and there still are few); *see also* Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration*, *in* THE COMMERCIAL WAY TO JUSTICE: THE 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE

forging the international arbitration system back from the 1930s through the 1950s. Initially, they confronted a wide variety of cultural, political, historic, practical, economic, and legal obstacles.[17] It was the enormity of these impediments that highlighted the creativity and ingenuity that they brought to bear on their task, which was nothing less than creating a workable system of international adjudication that would serve the international trade community for generations to come.[18] While this elite group was a relatively tight league, their initial absolute control over the market for arbitrator services seemed justified by their exceptional expertise and was buffered by their professed approach to arbitration as "a duty, not a career."[19]

The international arbitrator of today inevitably retains some characteristics of her forefathers, but she has also evolved dramatically, in her profile, in the nature of her work, and with respect to the system in which she operates. I render below a sketch of the modern international arbitrator, the market she operates in, as well as its limitations. I close by identifying efforts by international arbitrators to cast themselves not simply as an occupation whose product is dispute resolution services, but as a profession entitled to all the privileges associated with that designation.

OF ARBITRATORS 229, 229-41 (Geoffrey M. Beresford Hartwell ed., 1996) (surveying the limited participation of, systematic discrimination against, and recent progress for women in international arbitration); K.V.S.K. Nathan, *Well, Why Did You Not Get the Right Arbitrator?*, MEALEY'S INT'L ARB. REP., July 2000, at 10 (noting that "the majority in a multi-member international arbitral tribunal is always white" and interpreting a British arbitrator's commentary as improperly suggesting that "arbitrators from developing countries and women simply do not or cannot satisfy the selection criteria" for arbitrators).

17. *See* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 774 (2002).

18. *See id.* at 775-77. The hallmark of their success was the drafting in 1958 of the Convention on the Recognition and Enforcement of International Arbitral Awards. June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

19. DEZALAY & GARTH, *supra* note 2, at 34.

A. THE NAISSANCE OF THE MODERN INTERNATIONAL ARBITRATOR

With the explosion in international trade and, consequently, trade-related disputes, the field of international arbitrators experienced significant expansion and diversification in the past two decades.[20] Even in the last ten years, there has been a near doubling in the number of annual cases filed.[21] Moreover, while international arbitration had been a predominantly European affair, modern pressures forced it to diversify, even if still imperfectly. New and increased participation by developing countries, which agreed to arbitration in order to attract foreign investment, brought new parties to international arbitration.[22] New entrants also came from the United States as American companies began participating more vigorously in international trade and American law firms took note of the large profits to be made in providing international arbitration services.[23] Both groups eventually introduced to the system "home-grown" arbitrators, who better reflected their own expectations and legal

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20. *See, e.g.*, Elena V. Helmer, *International Commercial Arbitration: Americanize, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 38 (2003) (citing various statistics, including those indicating that "two-thirds of all cases brought to ICC arbitration arose in the last 20 years of its 75-year existence") (quoting W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 2 (3d ed. 2000)).

21. TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH app. A (R. Naimark & Christopher R. Drahazol eds., 2005).

22. *See* Arthur D. Harverd, *The Concept of Arbitration and Its Role in Society*, *in* THE COMMERCIAL WAY TO JUSTICE 17, 20-22 (Geoffrey M. Beresford Hartwell ed., 1997); Donald Francis Donovan, *International Commercial Arbitration and Public Policy*, 27 N.Y.U. J. INT'L L. & POL. 645, 650-51 (1995); *see also Legalization of International Arbitration in Turkey*, 10 WORLD ARB. & MEDIATION REP. 209 (1999) ("The Turkish parliament's decision to approve a constitutional amendment allowing for international arbitration in investment disputes should attract foreign investors to the multi-billion dollar energy projects currently awaiting funding . . . ."); David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. INT'L L. REV. 2, 15 (2001) (discussing the potential for China to develop a more reliable international arbitration enforcement record).

23. Carbonneau, *supra* note 17, at 778 ("[L]eading international lawyers on Wall Street [eventually realized] that transborder arbitration was a force to be reckoned with in international commerce."); Helmer, *supra* note 20, at 40 (reporting that since the 1970s and early 1980s, "[t]he number of American law firms and lawyers offering arbitration services (either as counsel or, in the case of individuals, also as arbitrators) is on the rise").

cultures,[24] although a new generation of European arbitrators had also come of age.[25]

Another important trend, related to the expansion and diversification of the field of international arbitrators, is that they have also become more expressly entrepreneurial. As premier arbitrator Jan Paulsson has explained, "the age of innocence has come to an end . . . [and] the delightful discipline of a handful of academic *aficionados* . . . has become a matter of serious concern for great numbers of professionals determined to master a process because it is essential to their business."[26] Arbitrators typically earn lavish fees,[27] and as a consequence, the new international arbitrator has been said to regard her position as a primarily entrepreneurial venture.[28] The consequences of these trends are that international arbitrators are less constrained by shared traditions or by an inherent sense of obligation, which means ultimately that they are less subject

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24. With regard to developing countries, local arbitrators were regarded as necessary to counter-balance what was regarded as biased Western-centric visions that European tribunals imposed in earlier arbitrations. *See, e.g.*, Ahmed Sadek El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Juridicial Culture?*, *in* INTERNATIONAL DISPUTE RESOLUTION: TOWARDS AN INTERNATIONAL ARBITRATION CULTURE 47, 47-48 (Albert Jan van den Berg ed., 1998) (noting that, despite the long history and current popularity of arbitration in Arab nations, the Arab legal community remains hostile toward transnational arbitration because of biased treatment by Western arbitrators); John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, DISP. RESOL. J., Aug.-Oct. 2000, at 32, 33 (explaining that there "remains a huge task" to convince developing nations that they can expect a fair hearing before international arbitration tribunals); DEZALAY & GARTH, *supra* note 2, at 43-45.

25. DEZALAY & GARTH, *supra* note 2, at 34-37.

26. *Id.* at 37. In a similar vein, David Hacking reflects, "The small community of international arbitrators, who know and trust one another, is gone. Peer-group control will no longer be here to preserve the 'ethics' of international arbitration." David Hacking, *Ethics, Elitism, Eligibility: A Response: What Happens if the Icelandic Arbitrator Falls Through the Ice?*, 15 J. INT'L ARB. 73, 77 (1998).

27. *See* John Yukio Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 1 (1999) (noting that fees can run into the millions of dollars).

28. *See* DEZALAY & GARTH, *supra* note 2, at 34-36 (asserting that the new generation of international arbitrators view their predecessors as amateurish and idealistic).

to the informal social controls that operated when the community was still comprised of an elite in-group.

B. THE IMPERFECT MARKET FOR INTERNATIONAL ARBITRATOR SERVICES

While the number of arbitrators has expanded, two major factors impede the development of a competitive and open market for arbitration services.[29] First, even with expansion, the field continues to be dominated by an elite group of insiders who are variously, though not without objection, referred to as a "cartel," a "club,"[30] or a "mafia."[31] These individuals, both through informal processes and their effective control over arbitral institutions, exert significant influence over who gets appointed as an arbitrator.[32] Arbitrator selection is often in the hands of members of the same "club," who are either operating in the institutions or already appointed as party-appointed arbitrators. In either situation, they are likely to favor other "members" of their "club."[33] This effect is compounded by the fact

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29. *See* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 365 n.218 (1999) (doubting the existence of competitive forces in the market for arbitrators).

30. Iran-United States, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 336 (1984) (describing "'professional' arbitrators" as "forming an exclusive club in the international arena" and as being "automatically brought into almost any major dispute by the operation of predetermined methods") (cited in Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 250 (1996)).

31. *See* Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 J. INT'L ARB. 13, 19 (1997) (arguing against the term "mafia").

32. *See* Lucy F. Reed, *Drafting Arbitration Clauses*, *in* INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 2002, at 553, 577 (PLI Litig. & Admin. Practice, Course Handbook Series No. 670, 2002) (noting that "parties locked in a dispute are rarely able to come to such an agreement" about who should preside over an arbitration). Under some rules, such as those of the ICC, a sole arbitrator or the chairperson is generally appointed by the institution in the absence of the party agreement because, after a dispute has arisen, it is relatively rare that the parties agree about the nature and identity of the person best suited to preside. *Id.* Under other rules, or by party agreement, arbitral chairpersons are appointed by the party-appointed arbitrators. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 497-98 (1997).

33. As Dezalay and Garth describe, there is a "mixing of roles," such that:

that prior service as an arbitrator is the preeminent qualification for an arbitrator-candidate.[34] As a result, the market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate.[35]

In addition to the significant barriers to entry, there are also severe information asymmetries that prevent the market for arbitrator services from being fully competitive. While there is a notable trend to change the status quo, which is described in greater detail below,[36] most arbitration is confidential, most awards are not published, and most institutional decisions regarding challenges to arbitrators are rendered without reasoned explanation and without publication.[37]

> [T]he same individuals who belong to the networks around the central institutions of arbitration are found in the roles of lawyers, co-arbitrators, or chairs of the arbitral tribunal. The principal players therefore acquire a great familiarity with each other, and they develop also, we suspect, a certain connivance with respect to the role held by the adversary of the moment.

DEZALAY & GARTH, *supra* note 2, at 49. This conclusion is based on reports from several arbitration insiders, one of which claims, "Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends—people you know." *Id.* at 50. Another more junior member described how "'[t]hey nominate one another. And sometimes you're counsel and sometimes you're arbitrator.'" *Id.* It is precisely this practice that has given rise to calls for arbitrator candidates to disclose prior service and relationships with counsel and other arbitrators. *See* Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, MEALEY'S INT'L ARB. REP., April 2001, at 11, 37 & n.44 (describing differences between American and European perspectives about the importance of disclosing relationships with counsel and other arbitrators).

34. *See* Eric W. Lawson, Jr., *Arbitrator Acceptability: Factors Affecting Selection*, ARB. J., Dec. 1981, at 23 (arguing that previous service as an arbitrator "is the *sine qua non*, for there is no other recognized route of entry into the profession of arbitration").

35. Dezalay and Garth provide an explanation for what appears to be a contradiction between expansion of the field, on the one hand, and barriers to entry and maintenance of control by a tight in-group on the other. They explain that the influx of newcomers, while participating intermittently in individual arbitrations, remain on the periphery of the field of international arbitration practice. DEZALAY & GARTH, *supra* note 2, at 37.

36. *See infra* notes 145-153 and accompanying text.

37. *See* W. LAWRENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 13.03 (3d ed. 2000) [hereinafter ICC ARBITRATION] (noting that despite acknowledged ambiguities in terms like "independent," the ICC has declined to publish criteria defining the meaning of such terms or adopt the IBA's guidelines in this area). One notable

The combined effect of these features creates significant information asymmetries that impair parties' ability to make fully informed decisions in selecting arbitrators.[38]

The only apparent respite from this cone of silence, when an arbitrator is challenged in a judicial proceeding at the award enforcement stage, is not as effective a resource as might be imagined. In that situation, information may be publicly available, but it is not readily accessible to most parties. In the United States and most other common law jurisdictions, judicial opinions are published and (particularly in the United States) are electronically searchable. As a result, if an arbitrator candidate's conduct or work product had been the subject of challenge in a U.S. court, an English-speaking party (or their English-speaking counsel) has access to the relevant information. Absent these preconditions, however, linguistic, cultural, and practical barriers present formidable obstacles to the decisional history and past conduct of arbitrator candidates. As a result, typically information about an arbitrator's conduct and decisional track record (as well as anecdotal information that might be useful in the selection process) is available to a relatively closed circle of arbitration insiders who treat such information as proprietary.[39]

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exception to opacity of institutional challenge procedures is the CPR, which publishes the specific procedures used for evaluating challenges to arbitrators, even if it appears that the outcome of those procedures remain unpublished.

38. This observation has frequently been confirmed:

> Acquiring information about arbitrators is costly, and parties may not have substantial resources to invest in learning about the reputations of arbitrators or arbitral institutions. Moreover, arbitrations often take place under the guise of confidentiality, so even assuming that a party were willing to undertake the investment, the party may be stymied in its efforts to learn much about an arbitrator's or an institution's reputation.

Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 195 (2004).

39. As one commentator explains:

> Not surprisingly, there are potential difficulties in obtaining anecdotal information about arbitrator candidates. Some individuals and firms regard this information as confidential or proprietary; some limit the availability of this type of intelligence to a circle of close, professional friends or colleagues; and in a day when everyone is bombarded by unwanted inquiries, there may

C. THE IMPERFECT REGULATION OF THE IMPERFECT MARKET

Market imperfections usually signal a need for correction through regulation. Notwithstanding the limitations and distortions in the market for arbitrator services, however, it remains a largely under-regulated market.[40] The role of national courts is intentionally minimized in the international arbitration context to insulate decision-making processes from national bias or interference,[41] and legislatures' support for international arbitration has traditionally

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be resistance to the effort involved in digging out and forwarding such information, even when there is no other reason to withhold it.

Francis O. Spalding, *Selecting the Arbitrator, What Counsel Can Do*, ADR CURRENTS, Fall 1997, at 8, *reprinted in* WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR 351, 355 (PLI Litig. & Admin. Practice, Course Handbook Series No. 578, 1998).

40. *See, e.g.*, Dora Marta Gruner, Note, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 962 (2003) (proposing, among other things, an international regulatory body that would monitor arbitrators and assure their expertise and integrity). Concerns about under-regulation can also be seen as the motivation behind calls for an elimination or diminution in the immunity afforded to arbitrators. *See, e.g.*, Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 2-3 (2000); Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 460 (2004). Most calls for arbitrator certification or licensing have arisen in the context of domestic arbitration, where the concerns raised by non-regulation are arguably much more severe and the prospect of licensure or certification is much more feasible. *See, e.g.*, David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 126-28 (1999) (proposing arbitrator licensing and oversight mechanisms for employment discrimination claims); Theodore A. Levine & Peter R. Cella, *Arbitrator Training and Selection*, 63 FORDHAM L. REV. 1679 (1995) (discussion of same regarding securities arbitration); Nicole Buonocore, *Resurrecting a Dead Horse–Arbitrator Certification as a Means to Achieve Diversity*, 76 U. DET. MERCY L. REV. 483, 483, 496 (1999) (proposing certification for labor arbitrators as a way to promote diversity); David A. Hoffman, *Certifying ADR Providers*, B. B.J., Mar.-Apr. 1996, at 9. While there are inevitably multiple reasons why academic interest in regulation of international arbitrators has been relatively muted, including the fact that they may be considered more competent than their domestic counterparts, the topic may also be less appealing to the primary authors of most articles on international arbitration, who are themselves practicing international arbitrators.

41. *See* Franck, *supra* note 40, at 27.

taken the form of policies of non-interference.[42] As a result, the primary regulators of international arbitrators are the arbitral institutions, the most eminent being the International Chamber of Commerce in Paris, the London Court of International Arbitration, and the Stockholm Chamber of Commerce.

Within the framework of arbitral institutions, arbitrators are formally regulated through institutional appointment procedures, party selection procedures, and challenge procedures.[43] As described above, in practice the appointment process places a significant premium on pre-existing membership in the "club." This practice does not mean that favoritism displaces all forms of quality control because both arbitrators and institutions have reputations that may be damaged in the long-term by repeated appointment of incompetent or overtly corrupt arbitrators.[44] But it does seem fair to assume that

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42. *See* Gruner, *supra* note 40, at 924.

43. Arbitral institutions may also exercise some general oversight functions, such as ensuring arbitrators make timely decisions. The most active regulator in this regard is the ICC, which not only remains relatively involved in administering the arbitration, but also reviews the substance of the award to ensure coherence and to control against basic errors.

44. As described in more detail below, there are significant reasons to doubt the efficacy of reputational sanctions for arbitral institutions. Arbitral institutions are move visible than arbitrators, and therefore would seem more readily subject to market reaction, but that hypothesis may be overly optimistic given how arbitral clauses, where institutions are selected, are drafted. Anecdotal evidence and my own personal experience suggest that many, if not most, international arbitration clauses are drafted by corporate lawyers or non-lawyer businesspersons who have little or no dispute resolution experience and conduct little or no research. *See* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 682 (1994) (suggesting that there are limits to what professionals can do without jeopardizing their own collegial relationships and referral networks); Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 413 (1993) (noting that arbitration clauses, even by companies as large as Union Carbide, are often "included in agreements almost as afterthoughts"). To some extent, this trend is changing, but there are a number of historical examples that suggest there is significant room for concern. One particularly illustrative example involved a Canadian company that was persuaded to designate the *Centre national d'arbitrage* ("CAN") as the arbitral institution to administer any dispute that arose. When a dispute arose, CAN ordered the Canadian company to pay upwards of 90 million francs in damages. As it turned out, the institution was a non-existent front put forth by the opposing party in an effort to defraud the Canadian company. *See* W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION:

membership in the same club may dim otherwise more vigilant efforts to gauge quality, assess shortcomings, or privilege rival newcomers.[45]

Arbitral institutions' disclosure and disqualification rules and procedures also operate as a source of regulation.[46] As I have argued elsewhere, however, many of the disclosure and disqualification standards are precariously indeterminate,[47] with the result being that too much discretion is vested in arbitrators' exercise of their judgment at a time they have a heightened self-interest in being retained.[48] Exacerbating this problem, arbitral institutions

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CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 542-43 (1997). While this example is unusual in that it involves intentional deceit, with some degree of regularity and on their own volition, parties designate nonexistent institutions or misname the institution they intend to designate. *See* ICC ARBITRATION, *supra* note 37 (providing multiple examples of clauses in which parties designated non-existent arbitral institutions and discussing the jurisdictional problems that arise as a result).

45. Notably, only a few arbitral institutions have express policies of refusing to reappoint arbitrators who have been found to have violated their codes of ethics or arbitral rules. *See* American Arbitration Association, *Failure to Disclose May Lead to Removal From the National Roster of Neutrals* [hereinafter AAA, *Failure to Disclose*], *at* http://www.adr.org/sp.asp?id=22241 (last visited Aug. 28, 2005); *Camera Arbitrale Nazionale e Internationale Milano, Code of Ethics of Arbitrators*, art. 13 [hereinafter *Arbitrator Code of Ethics*] (noting that an arbitrator who doesn't apply with the Code of Ethics will be replaced and may also be refused participation in future proceedings because of the violation), *at* http://www.camera-arbitrale.it/show.jsp?page=169945 (last visited June 26, 2005).

46. *See, e.g.*, *Arbitrator Code of Ethics*, *supra* note 45, art. 7, § 2 (requiring that arbitrator-candidates disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties"). Article 7, section 3 also requires disclosure of similar information discovered later in the proceedings.

47. *See* Rogers, *Developing Standards of Conduct*, *supra* note 6, at 71-72 (arguing that even if phrased as an objective standard, the ICC standard for disclosure affords arbitrators tremendous discretion because it is framed as a vague qualitative standard and not as a requirement for disclosure of clearly identified categories of information).

48. As I have previously argued:

> A decision to disclose a conflict or withdraw based on a challenge can result in the arbitrator having to forego or relinquish hundreds of thousands dollars in potential fees. The process of evaluating a potential conflict of interest, in other words, is itself infected with palpable self-interest.

Id.

intentionally maintain as secret the reasoning underlying their rulings on arbitrator challenges, even as against the parties, and arbitral rules grant institutions the exclusive power to interpret and apply their own rules,[49] thus insulating their decisions from any later judicial oversight.

Courts reviewing final arbitral awards, meanwhile, have an intentionally minimal role to play, and are particularly ill-suited to provide substantive oversight of arbitrators.[50] The standards for national court review of arbitral awards were designed with a strong pro-enforcement bias, which severely limits the grounds for refusal to enforce.[51] The purpose of the pro-enforcement bias is to avoid having the substantive decision-making effectively shifted back to national courts under the guise of award review, with attendant risk that awards would have less currency.[52] The effect, however, is that only the most odious incidents of arbitrator misconduct are captured in the intentionally porous review standards.

One other way national courts might become involved in regulating international arbitrators might be through professional

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49. *See* INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ICC ARBITRATION 35 (1994) (noting that with challenges to international arbitrators, the decisions of the ICC Court of Arbitration "on all such questions are final and the reasons for the Court's decisions are not communicated").

50. *See id.* at 77; Rogers, *Misbehaving Arbitrators*, *supra* note 6.

51. Courts in the enforcement jurisdiction can only refuse to enforce arbitral awards based on one of five narrowly defined procedural grounds or two additional catch-all provisions that protect national interests of the enforcement jurisdiction (that the issue in dispute is not capable of settlement by arbitration or offends the public policy). New York Convention, *supra* note 18, art. V. These grounds are intentionally limited to what might be considered the "most basic notions of morality and justice," William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 649 (1989), in order to avoid shifting decisionmaking power back to national courts under the guise of award review. *See* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION: BREAKDOWN AND REPAIR 113 (1992).

52. *See* Rogers, *Misbehaving Arbitrators*, *supra* note 6 (elaborating analogous arguments against vesting in national institutions regulatory authority over attorneys' activities in international arbitration).

liability lawsuits brought by aggrieved parties.[53] Liability controls, however, are neither widely available nor particularly effective in the international arbitration context. In many countries, arbitrators are either absolutely immune from liability or are qualifiedly immune, meaning they can only be held liable in narrow situations usually involving intentional, bad faith malfeasance or unjustified withdrawal.[54] There are solid reasons for this immunity, most importantly a need to avoid having claims against the arbitrator substitute for a substantive appeal of the award.[55] Once again, however, the effect of these protections against liability is that only rare examples of arbitrator misconduct are actionable.

Reputational sanctions are another form of control frequently proposed as an alternative to formal regulation.[56] While theoretically possible, reputational sanctions are not feasible in light of the information asymmetries and market distortions described above. Although academic scholars occasionally assume away information asymmetries to make the elegant simplicity of their theories seem more plausible,[57] the potential for information asymmetries in international arbitration is dramatically magnified because of political, geographic, cultural, and linguistic barriers. In addition to

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53. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 806-07 (1992) (describing "liability controls" as alternatives to formal discipline as a means of regulating lawyer conduct).

54. *See, e.g.*, Franck, *supra* note 40, at 6-15 (surveying the laws of Germany, Turkey, Qatar, Libya, Argentina, Lebanon and Spain, among others); *see also* Mark W. Levine, *The Immunity of Arbitrators and the Duty to Disclose*, 6 AM. REV. INT'L ARB. 197, 204-05 (1995).

55. Other arguments invoked to justify arbitrator immunity involve analogies to their judicial counterparts, who enjoy judicial immunity. *See* Franck, *supra* note 40, at 18-19. As I have argued elsewhere, the judicial analogy does more to confuse than to clarify issues involving the role of international arbitrators. *See* Rogers, *Developing Standards of Conduct*, *supra* note 6, at 83. Concerns are also raised that liability concerns will negatively affect arbitrator decision-making or diminish the pool of individuals willing to act as arbitrators.

56. *Cf.* Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1756-57 (1998) (discussing information asymmetries as an obstacle to development of market-based substitutes for attorney ethics).

57. *See, e.g.*, Rutledge, *supra* note 38, at 199 ("[This article] assumes that these participants [in arbitration] have perfect information about the market.").

information asymmetries, other dynamics may constrict the flow of information about arbitrator transgressions. In the analogous context of the market for lawyer services, professional and psychological barriers often prevent lawyers from reporting perceived misconduct by other lawyers.[58] While there has been no comparable empirical research in the international arbitration context, it seems reasonable to infer that these forces may be even more formidable obstacles for arbitrator self-policing. Unlike attorneys, who compete more directly for business, international arbitrators rely directly, if not explicitly, on other arbitrators and arbitration specialists for their business.[59]

At a more systemic level, there may also be incentives for those in the "governing cartel" to avoid "outing" deviant arbitrators and decrying their decisional products as invalid for fear of injuring the legitimacy or perceptions of legitimacy of the international arbitration system. Intuitively, as noted above, the arbitrators and institutions who comprise the inside core of the international arbitration community could not repeatedly appoint or recommend corrupt or incompetent arbitrators without themselves suffering negative consequences. As a result, internal, informal sanctioning may still exact a toll on transgressing arbitrators, but there remain significant obstacles to reputational sanctions meaningfully regulating the larger market for international arbitrators.

This introduction to the international arbitrator and the market in which she operates is admittedly incomplete. Another important trend, which acts to counterbalance some of the problems described above, is a shift toward the "professionalization" of international arbitrators.

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58. *See* Rhode, *supra* note 44, at 681-82, 702-03 (suggesting that such issues as the importance of maintaining collegial relationships and the negative perception of whistle-blowing deter lawyers from reporting other lawyers' misconduct).

59. DEZALAY & GARTH, *supra* note 2, at 50 (finding that several of those interviewed confirmed the interdependence of arbitrators).

D. THE PROFESSIONAL IMPULSE OF INTERNATIONAL ARBITRATORS

There is no universally accepted sociological definition of a "profession,"[60] and some claim that the term is not a legitimate descriptive category, but is instead a subterfuge for advancing the economic ambitions of those invoking it.[61] Nevertheless, the term undeniably connotes prestige, and it has some universally recognized core markers that those pursuing such prestige invoke in an attempt to distinguish themselves from other occupations.[62] I do not seek to evaluate whether international arbitrators actually satisfy the criteria for any particular definition of a profession,[63] but rather to suggest

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60. *Compare* Barber, *supra* note 12, at 18, *with* Kirtzer, *supra* note 9, at 717 (defining the "two key elements" of a profession as being the exclusivity of their membership and their application of abstract knowledge, but noting that professions have added notions of altruism, regulatory autonomy and service to these key features).

61. Ronald Rotunda argues that the term is simply a tool to rationalize anti-competitive behavior that would otherwise not be tolerable and insulate members from ordinary standards of care. Rotunda, *supra* note 14, at 706.

62. *See id.* at 705 (proposing that many occupations seek to be recognized as a profession, and occupations already acknowledged as a profession jealously guard their status). Many commentators agree that the rise from "occupation" to "profession" carries a number of necessary corollaries, including the concept that it is appropriate for a profession to impose entry restrictions, and engage in price fixing, peer review, and the elimination or regulation of advertising. *Id.* at 705-06.

63. The international arbitrator community has several other inherent features of a profession that, while some regard them as important to the project of defining whether a group belongs to the category of "professions," are not particularly relevant to my project. One example is that members of a profession are "bound by a sense of identity" and operate within "fairly clear social boundaries." *See* William J. Good, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194-200 (1957) (quoted in MAGLI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 55 (1977)); ABEL, *supra* note 8, at 37. Also, the "'rationalization' of arbitration know-how" may be seen as part of the effort to transform an artisanry into mass production under Weberian visions of the professions. *See* DEZALAY & GARTH, *supra* note 2, at 37. Finally, they similarly transitioned from a sense of duty to a more expressly entrepreneurial orientation. *See, e.g.*, Samuel J. Levine, *Faith in Legal Professionals: Believers and Heretics*, 61 MD. L. REV. 217 (characterizing the noted decline in the "professionalism" legal practice as demonstrated by a shift from an "honorable calling" to a commercial business activity). Similarly, the Special Committee on Professionalism of National Academy of Arbitrators summarized:

> [T]here are those among us who view arbitration primarily as a business. They are likely to concentrate more on self-interest than the interest of the

that international arbitrators demonstrate some of the markers of professionalization and have consciously invoked the nomenclature of professionalism. Regardless of their actual status, this professional impulse spotlights international arbitrators' conduct,[64] and, since professionalization implies self-regulation, it may create unfounded expectations about arbitrator self-regulation that have not fully matured.

1. Controlling Membership

According to most sociological profiles, one of the hallmark features of a profession, as part of its efforts to self-regulate, is an effort to control entry to the profession, either formally or informally.[65] These efforts are often undertaken for the stated purpose of protecting the public from incompetent practitioners, even if critics often contend that they also represent an effort to limit competition both from within the field and without.[66] As noted above, international arbitrators have been a relatively closed community, with entry controlled not by formal licensing, but through screening and promotion in an informal, tight-knit community.

> profession. . . . We recognize that arbitrators are no less ambitious than other professionals; we recognize that many of us are dependent on arbitration fees for a livelihood.

REPORT OF SPECIAL COMMITTEE ON PROFESSIONALISM OF NATIONAL ACADEMY OF ARBITRATORS, at E-1, E-4 (Bureau of Nat'l Aff., Daily Lab. Rep. No. 106, June 4, 1987) (cited in Alan Scott Rau, *Integrity in Private Judging*, S. TEX. L. REV. 485 (1997)).

64. For example, sometimes professional status is expressly invoked as an argument against the need for formal regulation. *See* Ali Malek QC & David Quest, *Partiality of Barrister Arbitrators: A Response to Dr. K. V. S. K. Nathan*, MEALEY'S INT'L ARB. REP., Spring 2000, at 15, 22 (arguing in response to criticism of possible arbitrator bias based on social relationships that "it should be assumed that a *professional* arbitrator, even if he meets an advocate socially in chambers, will not discuss the case any more than he would with an acquaintance at another chambers or in firm of solicitors") (emphasis added).

65. *See* ABEL, *supra* note 8, at 27 (noting that entry restrictions to a profession may be "formal or informal, visible or invisible" but "their principle object is to protect members from competition with each other as well as with outsiders" although "such restraints may also enhance the profession's status by conferring an aura of disinterest").

66. *See id.*

Some recent developments suggest an effort to signal formal control over entry. Many existing arbitral institutions, such as the International Chamber of Commerce ("ICC") and the American Arbitration Association ("AAA"), now offer new training programs for those wishing to become international arbitrators.[67] Several other organizations, such as *iaiparis.com*, have begun creating registers or rosters of eligible international arbitrators. While undoubtedly helpful at resolving some of the market failures described above, that does not seem to be their only purpose. By invoking designations such as "institutes" with "members," these resources imply the trappings of professional licensing, suggesting exclusivity and a substantive process of selecting. Making these implications more explicit, many of these resources assert that their aim is to improve quality and increase transparency in arbitrator selection,[68] which suggests a commitment to larger systemic goals of the sort often invoked by professions to justify the exclusivity of their organizations. In other words, they suggest a form of control over who becomes a part of the community of international arbitrators as part of a larger effort to protect the public.

These resources undoubtedly provide a valuable service in helping to rectify some of the market failures described earlier. They make various individuals readily identifiable, whereas in years past the same information would have to be gathered in costly piecemeal efforts, often by word of mouth.[69] By creating broader access in a

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67. *See* DEZALAY & GARTH, *supra* note 2, at 47 (arguing that the expansion of bureaucracy at the ICC is part of a concerted "effort to bring in newcomers").

68. *See, e.g.*, International Arbitration Institute, *Chairman's Message: Emmanuel Gaillard* (explaining that the purpose of the site and the "Institute" is to "promote transparency in the international arbitration community" and provide previously unavailable "access to the international arbitration community itself"), *at* http://www.iaiparis.com/pages_p_html.asp (last visited June 30, 2005); Juris Publishing, *Roster of International Arbitrators* [hereinafter *Roster*], *at* http://www.jurispub.com/books.asp?id=164 (last visited August 21, 2005).

69. *See supra* notes 37-39 and surrounding text (noting that the confidential character of most arbitration proceedings and a general dearth of public information regarding individual arbitrators has made it difficult for clients to make informed decisions in choosing arbitrators). The *Roster of International Arbitrators* expressly advertises itself as providing relief for parties "frustrated in their desire to collect the names of all persons who deserve consideration." The advertisement states:

"competitive" context to a wide range of candidates, particularly new candidates,[70] these resources significantly reduce the costs of identifying potential candidates, and they may effectively diminish the less meritocratic forces of the so-called "favor bank"[71] that have prevailed as a primary mechanism determining who is selected to serve as an arbitrator.

Notwithstanding these benefits, however, it is unclear to what extent some of these resources operate as much more than an elite and sophisticated version of The Yellow Pages. While these directories imply, through their invocation of professional nomenclature, that those listed have been selected through some sort of quality control screening, it is not entirely certain what, if any, substantive minimum requirements exist. Selection criteria appear to be primarily quantitative, measured by a certain number of experiences as an arbitrator. While undoubtedly valuable information about a candidate, the number of prior appointments is not necessarily an accurate gauge of quality given the self-referential nature of the appointment process. Nor is it the most valuable information about arbitral candidates.

My point is not to detract from the utility of these resources, which are unquestionably valuable, or to question the competency of those listed, who as noted in the Introduction include some exceptionally talented individuals. My point is only to highlight the professional rhetoric employed by these sources. Even if they are predominately creating a marketing device, their notable restraint and subtlety are consistent with a professional impulse. Self-imposed restraints on

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> It is impossible, even for the most active and wide-ranging lawyer, to obtain on his own appropriate information on possible candidates. He may consult others, but their knowledge will also be limited. Furthermore, international arbitration awards are most frequently kept confidential, so that outsiders cannot judge arbitrators by the products of their performances. Institutions engaged in administering international arbitrations normally keep their lists confidential. In any event, these lists are not the products of the kind of comprehensive, and therefore costly and time consuming, search for eligible candidates that we conducted for the publication of this volume.

Roster, *supra* note 68.

70. International Arbitration Institute, *New Members Listing*, *at* http://iaiparis.com/portrait.asp?Id=newmem (last visited August 21, 2005).

71. *See* DEZALAY & GARTH, *supra* note 2, at 51.

advertising or controls on fees, such as the apparently wide-spread reluctance to charge cancellation or commitment fees,[72] are consistent with efforts by groups to enhance their professional status.[73]

2. Codes of Ethics and Self-Regulation

Another factor scholars point to as a measure of a profession is that they create their own ethical standards, often compiled in a code, to articulate and govern the conduct of their members.[74] These codes then provide a basis for self-regulation, which is considered both one of the independent features of any profession and one of the goals of professionalization projects.[75] For many sociologists, self-regulation through a code of ethics is the definitive characteristic of a profession,[76] and for international arbitrators, it is one of the most visible.

The process of formalizing ethical rules and self-regulation usually begins when informally enforced shared social norms begin to break down.[77] In the community of international arbitrators, it was

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72. In an extensive survey, John Gotanda documents that, notwithstanding an absence of legal and ethical prohibitions, most arbitrators do not charge cancellation fees, and many regard them as "immoral." John Yukio Gotanda, *Setting Arbitrators' Fees: An International Survey*, 33 VAND. J. TRANSNAT'L L. 779, 797 (2000). These attitudes and behaviors are similar to the "widespread convention that lawyers and physicians do not discuss fees in advance." ABEL, *supra* note 8, at 27-28.

73. Such restrictions are common among various professions, and economists have confirmed that advertising bans and fee schedules increase consumer prices. ABEL, *supra* note 8, at 27-28.

74. *See* MOORE, *supra* note 13, at 116 ("One prominent way in which professional associations operate as agencies of self-regulation is in the development of codes of conduct."); Barber, *supra* note 12, at 18.

75. Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 AM. B. FOUND. RES. J. 31, 31-32 (1986) (reporting that sociologists regard self-regulation as the defining characteristic of a profession).

76. *See* ABEL, *supra* note 8, at 37 (describing the role of self-regulation in a "structural functionalist" model of the professions).

77. *See* Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 250 (1996) (noting that in the early American legal profession, "[t]here [were] only a few persons in the profession

precisely when the community expanded and shared understandings dwindled that several codes were developed.[78] The first code of ethics for international arbitrators,[79] developed in 1987 by the International Bar Association ("IBA"), is called the IBA Rules of Ethics for Arbitrators ("IBA Code"). It is a voluntary code that must be adopted by the parties to be applicable.[80] More recently, several newer institutions outside of the mainstream of European international arbitration circles have introduced codes,[81] and the IBA has revised and updated its Code to coincide with more modern

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and they kn[e]w what they [were] supposed to do. In the rare case that somebody [was] tempted to lapse from grace, the prospect of disapproval by one's peers [was] deterrence enough").

78. *See* Martin Hunter, *Ethics of the International Arbitrator*, 53 ARB. 219, 220 (1987) (concluding the world of commercial arbitration to be no longer a club of gentlemen, but one that needs explicit guidelines for conduct).

79. An earlier code for arbitrators was not directed at international arbitrators, but domestic arbitrators. Not surprisingly, it was promulgated by a joint committee that included an already established professional organization, the American Bar Association, and the American Arbitration Association. James H. Carter, *Introductory Note*, 26 I.L.M. 583 (providing an introduction to the International Bar Association's Guidelines for International Arbitrators). It is also not surprising that the first of such codes was an initiative by Americans, who have been historic frontrunners in the promulgation of formal, written ethical codes and are regarded as the most fastidious about conflicts of interest. *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1150 (1999) (noting that in some countries, professional ethics are handed down as an oral tradition, whose strictures address only the most obvious conflicts of interest).

80. *See* Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 631 (1989) (proposing language by which ethical codes can be incorporated in the arbitration agreement); Dr. Iur. Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT'L L. REV. 221, 250 n.71 (suggesting contract language for parties to incorporate the International Bar Association's Ethics for International Arbitrators into their agreements).

81. *See, e.g.*, American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes*, *at* http://www.adr.org/sp.asp?id=21958 (last visited June 30, 2005); Milan Chamber of Commerce, *International Arbitration Rules: Code of Ethics of Arbitrators*, *at* http://www.jus.uio.no/lm/milan.chamber.of.commerce.international.arbitration.rules.2004/a1 (last visited June 29, 2005); Singapore International Arbitration Centre, *Code of Practice: Code of Ethics for an Arbitrator*, *at* http://www.siac.org.sg/codeofethics.htm (last visited June 30, 2005).

arbitration practices.[82] At about the same time, what had been a predominantly domestic AAA/ABA Code of Ethics was revamped to take account of significant changes in international practice, such as increased concern about pre-selection disclosure requirements and the declining acceptability of contacts between parties and party-appointed arbitrators.[83]

Despite its name, the IBA cannot accurately be understood as a supranational regulatory authority like the American Bar Association because it does not license members and it cannot impose any penalties for noncompliance.[84] Moreover, while structured as a "Code" and referring to "Rules," the Introductory Note of the IBA Code states that they are not meant to operate as "rigid rules," but instead as articulations of "the manner in which the abstract qualities (such as impartiality, independence, competence, diligence, and discretion) should be assessed in practice."[85] As such, the "rules" in the IBA Code might be better understood as a statement of "professional culture,"[86] even if the IBA Code's rules regarding disclosure brought a level of clarity far superior to the vague, qualitative standards contained in most arbitral rules.[87]

Conspicuously absent from these attempts to formalize ethical obligations are the premier, historically central institutions, such as the ICC, the Stockholm Chamber of Commerce, and the London

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82. The open-textured nature of the original IBA Code's provisions, particularly with regard to what constituted an impermissible conflict for arbitrators, had proven to be somewhat problematic. They enabled recalcitrant parties to delay commencement of arbitral procedures with overly aggressive challenges, while simultaneously failing to given adequate guidance for uniform application by courts. International Bar Association, *IBA Develops New Arbitrator Guidelines*, DISP. RESOL. J., Feb.-Apr. 2004, at 7.

83. *See* Rogers, *Developing Standards of Conduct*, *supra* note 6, at 111-12.

84. *See* Daly, *supra* note 79, at 1158-59.

85. Carter, *supra* note 79, at 584.

86. This same observation has been made about the IBA's "Code" for attorneys. *See* Daly, *supra* note 79, at 1159 (referring to the Code as a statement of "professional culture").

87. *See* International Bar Association, *supra* note 82 (noting that the new IBA Arbitrator Guidelines would improve upon arbitral rules defining obligations to disclose and the nature of conflicts of interest in vague qualitative terms that left tremendous discretion to arbitrators).

Court of International Arbitration. None of these institutions have adopted formal codes, nor taken steps to make their processes for reviewing arbitrator challenges more formal or transparent.[88] Notwithstanding the development of ethical codes, the most significant control function is exercised by arbitral institutions as part of the selection and challenge process.[89] The rules that apply during these processes, however, are vague qualitative standards that provide little guidance, and the specifics of institutional decision-making applying these standards are secreted away, even as against the parties.[90] Moreover, only a few institutions have published policies of sanctioning arbitrators who digress from their professional obligations.[91] There are a few exceptions to this general state of affairs, which I take up in Part III.[92]

E. CONCLUSION

International arbitrators' efforts to claim the mantle of a profession demonstrates an internal desire to operate and be recognized as a coherent group entitled to certain privileges normally associated with professions. Mixed in with this evidence of professional impulse are some pragmatic benefits for the system, which some might argue justifies a degree of professional autonomy. But neither the sociological description nor the pragmatic objectives provide a

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88. *See* ICC ARBITRATION, *supra* note 37, § 13.03, at 212 (observing that it is best to challenge as infrequently as possible, following the maxim "better the devil you know than the one you don't"); *see, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ICC ARBITRATION 35 (1994) ("The Court's decisions on [arbitrator challenges] are final and the reasons for the Court's decisions are not communicated.").

89. *See supra* notes 43-45 and accompanying text.

90. *See supra* note 49.

91. Both the AAA and the CNIAM have a stated policy of refusing future appointments to arbitrators who are found to have violated their ethical codes. *See* AAA, *Failure to Disclose*, *supra* note 45; *see also* Chamber of National and International Arbitration of Milan, Code of Ethics of Arbitrators, art. 13, *available through* http://www.cameraarbitrale.it (last visited Aug. 20, 2005). Other arbitral institutions may limit future appointments as an informal and covert sanction, but informal regulation based on vague and unarticulated standards may do more harm than good for the legitimacy of international arbitration.

92. *See infra* notes 188-192.

normative justification for international arbitrators' claim to special status. In the absence of normative justification, assertions of profession-hood may be regarded, as Ronald Rotunda and Richard Abel have argued, as simply a rationalization for anti-competitive behavior that would otherwise not be tolerable.[93] Moreover, professional claims that operate as nothing more than apologetics may provoke, as occurred with the U.S. legal profession, critical reaction or efforts to assert more direct control.[94]

Apart from how arbitrators perceive or present themselves, there are separate questions of whether the institutions that support the international arbitration system will or should expect that arbitrators perform professional obligations that exceed the simple boundaries of the obligations created by the contractual relationships through which they come to serve as arbitrators. Analysis of these issues requires first an account of the function of the international arbitrator and an investigation into the public realm of international arbitration.

II. THE NORMATIVE UNDERPINNINGS OF INTERNATIONAL ARBITRATORS' VOCATION

International arbitrators have until now acted as a relatively autonomous and informally self-regulating group, even if current regulation remains somewhat fragmented and, as I describe in Part III, efforts to impose external regulation are mounting. While traditional conceptions of the profession provide little guidance for future efforts either at self-regulation or external intervention, a clear understanding of the vocation of the international arbitrator can have implications for both. To that end, in this Part, I engage in a conceptual analysis of the work of international arbitrators. I argue in Section A that the product of international arbitrators' work is justice, and it is this aspect of their work that distinguishes them from other legal service providers. In Section B, I take up more generally the public realm of the international arbitration system, in which the justice function that distinguishes international arbitrators is manifest.

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93. *See* Rotunda, *supra* note 14, at 706.

94. *See* ABEL, *supra* note 8, at 17 ("The reduction of sociological analysis to little more than professional apologetics eventually stimulated a critical reaction.").

A. JUSTICE AND THE PRIVATE ARBITRATOR

One of the principle objections to private forms of dispute resolution, most specifically settlement and mediated settlement, is that they "almost never satisfy [the] principle of justice."[95] This objection can seem puzzling since we often refer to settlements as "fair" and "just," and we might even speculate that in the aggregate parties are more satisfied with settlement outcomes than the outcomes of litigation or modern international arbitration.[96] In this section, I seek to explain first why the final end product of international arbitration is justice as opposed simply to dispute resolution,[97] and consequently why the vocation of the international arbitrator is normatively distinguishable from other private legal service providers (i.e., lawyers).[98]

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95. Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 104 (1986); *see also* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (postulating that settlement is not, in a generic or general sense, preferable to judgment).

96. *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 502 (1985) (arguing that critics of settlement fail to address "the most effective argument" in favor of settlements, namely that "[i]f the parties make their own agreement they are more likely to abide by it, and it will have greater legitimacy than a solution imposed from without"); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 50 (1992) ("[I]f willing litigants who would lose at trial perceive settlement as more just or fair, their tendency to comply with settlements might be greater than their tendency to comply with litigated judgments.").

97. In claiming that the product of international arbitral decision-making is justice, I am not arguing against those who posit that domestic arbitration procedures can be "unjust" because they fail to provide adequate procedural safeguards for vulnerable individuals whose original consent to arbitration may be dubious. *See* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 7 (1997); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 54 (1987). Moreover, I am arguing not that one or all of international arbitration's procedures ensure just results, but that the specific aim of arbitration as a process is justice.

98. My purpose in this Essay is obviously not to explicate a comprehensive jurisprudential theory of arbitral adjudication. I seek only to provide sufficient criteria to understand the nature of the international arbitrator's vocation and to explore what expectations might bare on their comportment based on that vocation.

When the various forms of dispute resolution are classified, arbitration is usually grouped with settlement as an "alternative" to judicial adjudication. The primary basis for this distinction is that both settlement and arbitration, as well as mediation and other forms of alternative dispute resolution ("ADR"), exist only as a consequence of party consent,[99] whereas judicial adjudication is predicated on the coercive power of the state.[100] Coercive power, however, is not an essential feature of justice, even if the justice of an outcome is relied on in part to legitimate its exercise of coercive power.[101] As such, the relationship between coercive power and the jurisdictional origins of various dispute resolution forms does little to explain the distinctive natures of their final products.

A better approach for conceptually analyzing their final products is to consider how each mechanism generates its final product. A settlement agreement is crafted and consented to after parties assess the political and practical realities they would face in pursuing their claims through adjudication.[102] A settlement is produced, in other words, through agreed compromise based on self-interested

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99. *See* Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 846 (1990) ("[S]ettlement derives its authority from the consent of the parties."); MEDIATING LEGAL DISPUTES § 14.3.4, at 402 (Dwight Golann ed., 1996) ("[M]ediation is by definition a consensual process."); Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 345 (1989) ("Arbitration . . . normally requires the advance consent of the parties, usually by contract.").

100. *See* Jeffery R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 932 (2004). (distinguishing public litigation as based on the coercive power of the state); Richard Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 958 (2000) (arguing that there is a scale on which dispute resolution procedures are situated closer or further away from coercive governmental power).

101. Jules L. Coleman & Brian Leiter, *Determinancy, Objectivity and Authority*, 142 U. PENN. L. REV. 549 (1993).

102. As Coleman & Silver explain:

> Settlement is a contractual exchange. Parties settle because they expect settlements to make them better off than they would be if they continued to litigate. A plaintiff may prefer settling at a particular price now to the risk of losing at trail or to the prospect of waiting years to recover. A defendant may want to avoid the risk of liability or to be free of the burdens of litigation.

Coleman & Silver, *supra* note 95, at 106.

evaluations by the parties and it occurs irrespective of what the outcome would be or should be through formal adjudication.[103]

By contrast, modern international arbitration outcomes are like judicial outcomes in that they are produced by an objective tribunal's reasoned application of established rules to facts.[104] By requiring that the outcome of their dispute be warranted by reasons provided in a given set of rules, parties in international arbitration have created the possibility of objectively evaluating the quality of those outcomes.[105] In other words, determining what result a given rule requires in relation to a particular factual situation is in some sense independent of what an individual adjudicator subjectively believes it to be.[106] As a consequence, the commitment to determining the appropriate

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103. *See id.* at 106-07. In arguing that settlement does not aim to provide justice, I do not mean to discount the importance of settlement. Many salutary benefits flow from settlement such that it can rightly be considered an integral and necessary part of virtually all systems. While settlement and mediation do not aim to provide legal justice, they clearly provide "justice" as that term is used in the popular vernacular. In fact, it may well be that on average, more parties regard settlement agreements as providing "just" or fair outcomes than they would have received after a full adjudication. *See* Bundy, *supra* note 96, at 50. Justice or fairness in this colloquial sense results because an individual party calculates that the terms of the settlement will maximize its own interests, and those terms correspond with a similar calculation made by the opposing party based on opposing interests. In this sense, settlement can be regarded as a mutual decision to pursue the efficient solution.

104. I refer to established rules instead of "law" for the obvious reason that parties may choose to be governed by a set of rules that do not meet the necessary conditions to be considered law.

105. *See* Coleman & Leiter, *supra* note 101, at 588. Some proceduralists argue that party participation is what makes the product of an adjudicatory process just. This account fails to provide a meaningful basis for distinguishing settlement or mediation, where parties enjoy more direct participation and control than in adjudicatory processes, even though the final agreement is by definition a political or pragmatic, not a justice-based, resolution. *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 510 (2003) ("The reason we have a system of adjudication is to decide cases and produce good outcomes. The idea is not to provide people with a chance to participate or to give them another opportunity in their lives to exercise autonomous choice."). Even if not the definitive criteria, procedures can obviously affect the perceived fairness of adjudication, and hence the legitimacy of its outcomes.

106. *See* Coleman & Leiter, *supra* note 101, at 599.

outcome necessitates some degree of adjudicator objectivity or impartiality.[107]

While impartiality is a critical feature of the international arbitrator's function, it would be misleadingly simplistic to say that all adjudicators do is impartially investigate and apply the requirements of the applicable rules. Any set of rules is necessarily characterized by some degree of indeterminacy,[108] which means that to perform their task of applying governing rules to the facts, judges and international arbitrators must exercise some degree of discretion.[109] Because the outcome must be justified by the applicable rules, however, adjudicators' discretion is a bounded discretion.[110] At this point it is important to note that not all types of boundaries are created equal. If the set of rules selected by the parties is too immature or underdeveloped, such that there is a shortage of rules to address a significant range of situations, it might be indeterminate in important ways that would leave international arbitrators' discretion

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107. *See* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 280-90 (1987); Coleman & Leiter, *supra* note 101, at 599-600 & n.85 ("[A] procedure for reaching decisions is objective by virtue of its relative freedom from partiality to one side or the other").

108. There exists considerable debate about the degree of indeterminancy that exists in the law. On the one hand, proponents of the Critical Legal Studies school contend that all law is largely if not completely indeterminate. For one of the founding texts of the CLS movement, see ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975). Others, most notably Ronald Dworkin, deny indeterminacy in the law, claiming that there are right answers to all legal disputes. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1976); *see also* Coleman & Leiter, *supra* note 101, at 634 (arguing that Dworkin's commitment to determinacy may have softened in recent years). While I reject strong-form conceptions of either indeterminacy and determinacy, it is not necessary for my more modest purposes here to give a precise account of the nature of indeterminacy implicated in the international arbitration context, though it seems clear that the international arbitration system is able to guarantee on average less determinacy than more mature legal systems.

109. *See* Coleman & Leiter, *supra* note 101, at 565 (explaining the positivists' position that when judges are faced with the penumbra of general legal terms, "a judge has no option but to help fix the meaning through the exercise of a discretionary authority") (citing H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-15 (1958)).

110. While there is complex debate surrounding questions about the nature of objectivity and the nature and extent to which judicial decision-making is bounded, I do not take up the details of those debates here.

effectively unbounded.[111] In that event, even if an impartial arbitrator were appointed, the actual decision would more resemble a settlement in which the unbounded discretion of a neutral is substituted for the self-interest of the individual parties. Since such an outcome could not be evaluated against an external, objective set of rules, it could not be said to be justified in the same way that the product of bounded discretion could be.[112] To sum up, then, in contrast to settlement's consensual compromise premised on subjective self-interest, modern international arbitration requires the objective application of rules to facts and the exercise of bounded discretion to ensure that the final outcome is warranted by the applicable rules; that is, to ensure that the final outcome is justified.

With this explanation of international arbitration's justice-producing function, we can now consider what normatively differentiates the international arbitrator's work from other legal service providers. A good place to start is with those who assume that in fact they are not distinguishable in any important respect. International arbitrators are sometimes characterized as essentially retained representatives of the parties, distinguishable from attorneys only because they are retained collectively by all the opposing parties

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111. *See* Coleman & Leiter, *supra* note 101, at 575. This problem might actually characterize early international arbitration, in which arbitrators functioned more to impose an equitable compromise solution than apply the selected law. *See* Rogers, *Developing Standards of Conduct*, *supra* note 6, at 66.

112. If a body of applicable rules is significantly indeterminate, it does not follow that it cannot provide any guidance in resolving a given dispute. Indeterminacy only means that decision-maker discretion will operate more forcefully in reaching the final decision, but it is not a basis for disregarding the law selected by the parties, as some highly controversial decisions have done. *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1512 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter INTERNATIONAL COMMERICAL ARBITRATION] (describing cases involving Abu Dhabi, Saudi Arabia and Egypt in which arbitrators either disregarded or supplemented the chosen law on the grounds that it was not sufficiently developed). It is in part these cases that generated a suspicion of international arbitration in developing countries. *See* El-Kosheri, *supra* note 24, at 47-48 (discussing the transformation of the Arab attitudes toward transnational arbitration); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000) (discussing third world concerns that international arbitration has tended to resolve disputes in favor of the economic interests of the north).

instead of by an individual party.[113] Under this conception, the arbitrator's vocation would be delimited to providing those services specified in the parties' contract[114] and the legitimacy of outcomes could only be measured by the extent to which the arbitrator satisfies the parties' collective interests.[115]

Intuitively, this account seems incomplete. It cannot account for why, in our discourse, we would describe a decision that ignores otherwise applicable mandatory law as "unjust," even if it were satisfactory to the parties, while we would regard as "just" an award that reaches outside the narrow confines of the parties' collective self-interests to apply mandatory law or to invalidate a contract as against public policy, even if it were displeasing to the parties. The reason is that when parties agree generally that the justification of the

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113. This is the implication of Andrew Guzman's conceptualization of the arbitrator. Guzman conceives of the contract between the parties and the arbitrator as an agreement to exchange the arbitrator's dispute resolution services for private gain for the arbitrators. *See* Andrew Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1316-24 (2000). To be fair, Guzman is addressing the issue in the context of domestic arbitration, where arbitration practice is significantly different in ways that may alter this analysis.

114. Guzman's commitment to arbitrators' role being solely a function of contract is revealed in his proposed mechanism for ensuring application of mandatory law—implication of a mandatory contract term, for which parties can sue in case of breach. Guzman also relies on the existence of a contractual relationship to differentiate arbitrators from judges. It is worth noting here Bradley Wendel's thoughtful work in the area of attorney professionalism, in which he persuasively argues that attorneys should adopt an interpretive stance toward law in which they "respect the achievement of law" as oppsed to simply contorting it to suit their client's interest. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1168-69 (2005).

115. Even if I believe the foregoing is sufficient to understand the fundamental reasons why the international arbitrators' vocation can be understood as provider of justice, the practice of international arbitration nevertheless raises numerous questions that I have not answered, and will not be able to in the space of this Essay. For example, parties select applicable law and parties can still (even if they rarely do) empower the arbitrators to decide according to equitable, not established legal, principles. Moreover, even when arbitration is subject to established bodies of rules, those rules are necessarily subject to significantly greater indeterminacy in the international arbitration context than in domestic judicial settings and international arbitral awards are generally issued with articulated reasons, but they need not be. The issues raised by these variations, and innumerable others, highlight that my attempt to reconceptualize the vocation of international arbitrators is necessarily provisional.

award is to be measured by the extent to which the outcome is warranted by reasons provided by a given set of rules, the requirements of those rules are independent of the parties' more narrow subjective desires. Since the justice of the final award is measured by the extent to which it is warranted by reasons that derive from rules selected by the parties, deviations to satisfy parties' narrower collective interests are justified.

This analysis assumes that parties are agreeing to submit disputes to resolution in accordance with rules that require arbitrators to subvert parties' subjective interests. This assumption is consistent with modern international arbitration, in which parties generally select established national law[116] and, as I examine in more detail in the next section, invoke the relatively established rules and procedures that are part of international arbitration's public realm. Parties could opt out of these constraints, for example, by designating the open-textured decisionary principles used in international arbitration of yesteryear,[117] or by avoiding the decisional baggage that is part of the institutional arbitration system in favor of disengaged ad hoc procedures.[118] But the modern reality is that parties do not. They want law-bound decisions embedded in the reliable constraints of the established international arbitration system.[119] They want, in other words, the outcomes of their disputes

116. Whereas in earlier years, parties would authorize international arbitrators to apply vague, compromise-oriented principles, today parties virtually always reject these vaguer doctrines in favor of national law. *See* Rogers, *Developing Standards of Conduct*, *supra* note 6, at 66-67.

117. *See* S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 933 (1998) (describing earlier arbitral procedures and doctrines that entrusted significant equitable powers to arbitrators).

118. If these conditions were met, the final product of the process could probably not rightly be considered "justice," but simply dispute resolution, distinguishable from settlement only because the arbitrator's discretion was substituted for the subjective will of the parties.

119. *See* Detlev Vagts & W. Michael Reisman, *International Chamber of Commerce Arbitration*, 80 AM. J. INT'L L. 268 (1986) (suggesting that ad hoc arbitration has declined in popularity because parties have traded off the "maximum suppleness" offered by ad hoc arbitration for the predictability of institutionalized arbitration).

to be warranted by reasons, apparently even if that means subverting other interests, such as a desire to escape certain mandatory laws.[120]

B. THE PUBLIC SIDE OF "PRIVATE" INTERNATIONAL ARBITRATION

International arbitration is often assigned to the "private" side of that invisible—and some might say dubious—divide between public and private international law.[121] Even those who doubt the efficacy of the overarching distinction may nevertheless have reason to regard international arbitration as predominantly a private affair. International arbitration, which often goes under the moniker "international commercial arbitration," usually involves private parties who create arbitral jurisdiction through private agreement.[122] The actual proceedings are usually held in "private," and arbitral decisions, which are usually maintained as confidential, are generally regarded as affecting only the specific parties involved and not any future cases or the public at large.[123] Moreover, international arbitrators resolve matters involving primarily contract-based disputes, as opposed to matters of traditionally "public" concern.[124] As with other stark dichotomies, however, this public-private distinction tends to rely on rudimentary dissimilarities that preclude more nuanced appreciation of the true nature of either aspect, let

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120. This analysis obviously does not mean that it is impossible for arbitrators to operate essentially as representatives of the parties' collective interests. Instead, I am positing the more modest thesis that generally in international arbitration, that is not the case.

121. *See* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

122. *See* Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 121-22 (2003).

123. *See* Clyde C. Pearce & Jack Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311, 340 & n.99 (2000) ("Awards bind only the disputing parties.").

124. The New York Convention applies to "commercial" disputes. 9 U.S.C. § 202 (2000) ("An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as *commercial*, including a transaction, contract, or agreement . . . falls under the Convention.") (emphasis added). However, the definition of "commercial" is extremely broad.

alone their overlap, cross-referencing, and blurring at the margins.[125] As has been previously observed, "it is difficult to untangle private litigation from the public's business,"[126] so not surprisingly in the context of international arbitration, there remains an unmistakably vibrant "public realm."[127]

To date, the modest efforts to explore the "public" side of arbitration have concentrated on the domestic U.S. context and have focused almost exclusively on the question of whether arbitration implicates state action such that it is subject to U.S. constitutional procedural protections.[128] There are, however, numerous other ways in which so-called "private" international arbitration implicates the

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125. *See* Dinesh D. Banani, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, 26 B.C. INT'L & COMP. L. REV. 355 (2003); Derek W. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U. L. REV. 929, 933 (1986) (describing the interplay of public and private sources of law and legal methodologies in disputes involving both state and private entities).

126. Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 962. Scales is not specifically referring to arbitration, but his insight nevertheless applies.

127. *See* Buys, *supra* note 122, at 135 ("While in most instances, international commercial arbitration probably does not impact large segments of civil society . . ., the general public may still be affected in a variety of ways."); *see also* Carbonneau, *supra* note 17, at 774 ("Despite its service to the wealth-creating ambition of the international business community, ICA represents an idealistic experiment in transborder understanding and cooperation.").

128. The most extensive and forceful of these investigations has been undertaken by Richard Reuben and Jean Sternlight. *See* Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997); Reuben, *supra* note 100, at 1047-50 (asserting that private arbitration invariably incorporates a constitutional dimension); Sternlight, *supra* note 97, at 1 (arguing that mandatory arbitration involves state action, but may deprive individuals of certain constitutional rights); *see also* Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1178-97 (2004) (concluding that state action is not present when a private litigant exercises a peremptory challenge in an arbitral proceeding); Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*, 32 AM. BUS. L.J. 583, 601-16 (1995) (exploring the rationale used by some courts to analyze whether state action is present in arbitration); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 559-67 (1994) (finding that there is no state action in arbitral awards that provide for punitive damages).

"public realm." These public facets have affected and should affect conceptions of the international arbitrator's vocation.

1. Public Law Claims in International Arbitration

One of the significant distinctions between modern international arbitration and early-modern arbitration up through the 1970s is that the modern version is characterized by the application of law to a given dispute. While generally orbiting around an underlying contractual arrangement, international arbitration disputes also often involve claims based on public and mandatory law, such as antitrust, securities fraud, and intellectual property,[129] as well as certain mandatory contract law rules that reflect commitments to public interests.[130] These claims are unmistakably imbued with a "public"

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129. It was because of their social value that most public law claims, such as patent, antitrust and securities, had previously been considered non-arbitrable. *See* Julia A. Martin, Note, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 937 (1997); *see also* Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 255 (1987) ("Despite its perceived shortcomings, arbitration is capable of serving many important interests, both public and private."). In civil law countries, there remains significant resistance to entrusting mandatory law claims to arbitral processes. *See* Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 474-75 (1999) (arguing that the "inarbitrability of mandatory law claims traditionally was, and still is in most countries, a fundamental premise of international arbitration").

130. Either to protect the parties to the contract or other third parties who may be affected, certain contract rules are crafted as immutable, mandatory rules. *See* Ian Ayres & Robert Gertnert, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) (recognizing the duty to act in good faith is an "immutable" rule); Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 611 (2003) (discussing the mandatory rule that parties cannot agree to prevent modification of their contracts in the future); Menkel-Meadow, *supra* note 96, at 500-01 (arguing that it can be hard to distinguish "private" from "public" oriented disputes). I do not and need not contend that international arbitration affords the same potency to the private attorney general as our clandestine warrior would have in a U.S. court in a purely domestic case.

essence in that, to co-opt Owen Fiss's words, adjudicating them helps us "give our society an identity and inner coherence."[131]

Not only does international arbitration incidentally encounter these socially important claims, it adjudicates claims involving transnational applications of mandatory law more often,[132] and arguably more effectively, than domestic national courts. National courts must fight competing claims to prescriptive and judicial jurisdiction, and their judgments face significant obstacles to enforcement abroad.[133] As a consequence, one nation's assertion that a particular law is mandatory does not necessarily make it inescapable if another nation adjudicates the case or refuses to enforce the judgment.[134] In contrast to the hurdles facing

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131. Here I quote Owen Fiss somewhat ironically because he argues that public values should be expressed only through public adjudication. While his most vehement charges are laid against settlement, he also objects to arbitration and mediation. Owen M. Fiss, *The Supreme Court, 1978 Term–Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11 (1979). Fiss is also referring most specifically to what might be considered "core" public claims, such as claims of equality and liberty. While I don't claim that international arbitration ever or even occasionally implicates these values that Fiss is most concerned with, I do maintain that the public mandatory law claims presented in international arbitration present important, even if not core, matters of public concern. There are some who agree that international arbitrator implicates public interests, but are not always effective at serving them. *See, e.g.*, Wai, *supra* note 121, at 263 ("State-based private law often includes protection of third parties and social interests among its substantive objectives, but there may be a tendency for private adjudicators to ignore arguments about the protection of individuals and groups not party to the actual decision in their interpretation of these laws.").

132. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 262 (2001) (noting that nearly all of antitrust enforcement is through private litigation and arbitration); *see also* BERGER, *supra* note 5, at 8 n.62 (citing VAN DEN BERG ET AL., *supra* note 5, at 134. Notably, the consignment of public law claims to private litigation is a uniquely American phenomenon, which might make this statement less true (or at least applicable to a narrower range of cases) as applied to other countries.

133. Gary Born refers to these problems collectively as "the peculiar uncertainties of transnational litigation." GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2 (2d ed. 2001).

134. *See* John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodations of Conflicting Public Policies*, 64 N.C. L. REV. 219, 224 (1986). This argument has also been advanced by some commentators, who point out that expert arbitrators may be substantively superior

transnational litigation, anecdotal evidence suggests that international arbitration is doing a reasonably robust job of enforcement in individual cases.[135] Far from completely undermining the public concerns embodied in mandatory rules, international arbitration is capable of ensuring, and at least to some discernable extent does ensure, their vitality.[136]

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to lay juries. *See* Gruner, *supra* note 40, at 944. Still, there remain detractors who contend that arbitation downplays public interests because "[t]he goal of arbitrators is to resolve the dispute presented in a manner responsive to the interests of the parties. Unlike judges, arbitrators need not, and generally should not, consider broader public interests as well." Buxbaum, *supra* note 132, at 245. *But see* McConnaughay, *supra* note 129, at 456 (arguing that international arbitral awards "are far less likely than public judicial decisions to effectuate the purposes of the mandatory laws").

135. In contrast to the legendary problems faced in attempts to enforce U.S. antitrust judgments abroad, in its amicus brief urging the Supreme Court to permit the arbitration of antitrust claims in *Mitsubishi v. Soler*, the ICC provided numerous examples of cases administered under the auspices of the ICC in which various national competition laws were "adeptly handled" and the public policy interests of the relevant countries were taken into account. Amicus Curie Brief of International Chamber of Commerce at 4-5, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (Nos. 83-1569, 83-1733). For example, international arbitration may be better at preserving the immutable rule of good faith than U.S. courts have been. *See* Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1247-57 (1999) (criticizing the trend in U.S. courts to transform the mandatory rule of good faith into a default rule that the parties can modify). *But see* Gruner, *supra* note 40, at 945 (speculating that "public claims are still relatively rarely arbitrated internationally").

136. When speaking about an international context, such as international arbitration, there is an inherent ambiguity in the terms "public" and "public realm." On the one hand, there are national public constituencies that count on domestic mandatory laws to be given expression through international arbitration, which perhaps most closely corresponds to what Fiss refers to when he uses the term "public values." However, there is a sense in which international arbitration intentionally subverts national conceptions of "the public" to an international conception of "the public." This distinction is borne out in the significant debate over whether the public policy exception in Article V of the New York Convention refers to domestic or international public policy. *See* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 260-69 (Pieter Sanders ed., 1987). In the context of my argument, the distinction between a national and an international public raises obviously important questions about the nature of community and its relation to the "public realm," as well as questions about the precise meaning of the "public realm" in the international context. Notwithstanding the importance of these questions, I leave them for future

Skeptics of private arbitration may be unimpressed by evidence that arbitrators are generally willing to enforce the mandatory rules encompassed in law selected by the parties.[137] The real problem with arbitration, they might argue, is that international arbitration allows parties to contractually circumvent the mandatory law of one nation by choosing the law of another. Certainly, it is true that parties, for both legitimate and illegitimate reasons, intentionally seek to avoid mandatory national laws.[138] But it is also true that international arbitration does not provide a complete escape.[139]

Arbitrators have developed a range of what might be considered specialized arbitral conflict of law rules to justify applying "foreign"

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consideration as time and space limitations preclude me from addressing them in the context of this Essay.

137. Notwithstanding some skepticism expressed at a theoretical level, it is generally understood in the arbitration community that arbitrators have an obligation to apply the mandatory rules of the governing law chosen by the parties. *See* Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of* Mitsubishi, 39 VA. J. INT'L L. 647, 668 (1999) ("The evidence suggests that international arbitrators are deeply concerned about their reputation for respecting mandatory rules."); *see also* INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 112, ¶ 1517. The same is not necessarily true in U.S. domestic arbitration. *See* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 720-21 (1999) (noting how "[t]he widespread belief among [U.S. domestic] arbitrators that they are under no duty to apply the law is consistent with standard expectations about arbitration" that many parties choose arbitration because it provides a less legalistic process than litigation).

138. For example, a foreign investor might seek to avoid the instability of the host country's law, particularly the possibility of nationalization of its investment. Avoidance can also occur unintentionally when one country's law is selected before the parties know what categories of "foreign" mandatory claims may later arise. *See* Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?*, 10 INT'L TAX & BUS. LAW. 59, 74-75 (1992) ("[P]arties specifically exclude the application of mandatory rules of public law of the place of performance of the contract by an exclusive choice of law clause.").

139. An interesting question, which would be virtually impossible to test empirically, is whether international arbitration is more successful at enforcing mandatory law claims than national litigation—with all its jurisdictional and procedural limitations—would be. The prevailing assumption, at least in jurisdictions that willingly submit mandatory law claims to arbitration, is presumably "yes" or at least "probably."

mandatory law[140] or limit parties' ability to avoid mandatory law. For example, to protect the integrity of their own work product, arbitrators can, and often do, apply foreign mandatory law if failure to acknowledge it could interfere with the enforceability of the final award.[141] There are also other, less widely accepted theories under which international arbitrators have supplemented or disregarded parties' choice of law, most notably when foreign mandatory law would have affected performance of the contract had the parties not contracted around it. Finally, one of the most important and accepted bases for avoiding parties' choice of law is that application of it would violate public policy. According to most arbitration experts, "[t]here is no doubt that arbitrators are entitled to disregard the provisions of governing law chosen by the parties where they consider provisions to be contrary to international public policy."[142] This rule is applied with some degree of regularity to void contracts for bribery, even if bribery would not invalidate the contract under the law chosen by the parties and the issue of bribery was not raised by either party.[143] These doctrines and rules provide a meaningful,

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140. "Foreign mandatory law" refers to mandatory law of a jurisdiction other than that selected by the parties. *See* Daniel Hochstrasser, *Choice of Law and "Foreign" Mandatory Rules in International Arbitration*, 11 J. INT'L ARB. 57, 81 (1994).

141. *See* Homayoon Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 AM. REV. INT'L ARB. 43, 59 ("In practice . . . international arbitrators often feel constrained to apply the domestic public policy rule of the country whose courts can effectively review, quash and vacate the final award under the 'second look' doctrine, regardless of its 'application worthiness.'"); Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 227, 255 (Pieter Sanders ed., 1987) (suggesting that arbitrators must keep an eye toward the mandatory law of the like enforcement jurisdiction or jurisdictions to ensure that their award is enforceable); William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 649 (1989) (same).

142. INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 112, ¶ 1533 (noting that even those commentators who argue for strict autonomy acknowledge the importance of this principle).

143. In the first case that portended this rule, ICC Award No. 1110, ¶ 24 (1963), the tribunal refused to adjudicate the case in which a British company agree to pay bribes to an Argentinean intermediary. The tribunal concluded that it had no arbitral jurisdiction. *Id; see also* INTERNATIONAL COMMERICAL ARBITRATION,

even if not impermeable, bulwark against erosion of the public realm in international arbitration.

2. Public Goods Generated by International Arbitration

In addition to creating space for enforcement of national mandatory law, international arbitration also generates several "public goods"[144] that are unmistakably part of its public realm. These goods come in the form of rule-making, which provides guidance to future parties and arbitrator tribunals, and in the development of a uniquely skilled group of individuals who are capable of confronting the complexities of a transnational system of justice.

Even in the absence of a formal system of stare decisis,[145] and despite the confidential and "private" nature of international arbitration, arbitration proceedings generate procedural rules and practices, and to a lesser extent substantive rules, that serve as

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supra note 112, ¶ 1468 (noting the ICC's determination that "contracts which seriously violate *bonos mores* . . . cannot be sanctioned by courts or arbitrators"). Later tribunals have instead affirmed that they had jurisdiction over the dispute, but ruled that a contract for bribery was void as against international public policy. *Id.* at 823-24. Arbitration's enforcement of public values peaked in cases where arbitral tribunal findings have led to criminal prosecutions for bribery that may have otherwise gone undetected. It should be noted, however, that there have been occasions when this approach has not been followed, such as the notorious case of *Northrop Corp. v. Triad International Marketing S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987), where the tribunal held that the contract was enforceable and a U.S. court later affirmed that finding.

144. This vein of my analysis was inspired by David Luban's thoughtful essay, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995). A "public good" is a positive externality, meaning "a beneficial product that cannot be provided to one consumer without making it available to all (or at least many others)." *Id.* Jules Coleman and Charles Silver were the first to elaborate the theory that trials produce public goods, meaning that they benefit not only the parties but also third parties, because the opinions and precedents produced by private adjudication are "sources of information about things that can and cannot lawfully be done in a society." Coleman & Silver, *supra* note 95, at 114-15.

145. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES, COMMENTARY AND MATERIALS 100 (1994) (stating that published awards fail to "command stare decisis respect" like a court decision).

precedent for future arbitrations and beyond.[146] Take, for example, the above-described rule that allows voiding a contract for bribery as contrary to public policy.[147] This rule began as a procedural rule against the exercise of arbitral jurisdiction. The case establishing that rule was reported, elaborated on, and then incorporated into the rich literature regarding international arbitration procedure. Later, it was transformed into a substantive rule for invalidating contracts, and it thus became part of the generally accepted principles of international arbitral decision-making, forming non-binding but highly persuasive rules to guide future tribunals.[148] This rule and others like it are consulted by parties in arbitration, and familiarity with them may be

146. *See* Buys, *supra* note 122, 122-23 & n.7 ("Although arbitral awards have no precedential value, the reasoning of the arbitrators may be persuasive to other arbitrators confronting the same or a similar issue.").

147. *See supra* note 143 and accompanying text. Similar evolutions have taken place with regard to the development of established limitations on parties' ability to agree on procedures, such as the requirement that the parties be treated equally. ALAN REDFERN & MARTIN HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 292-93 (2d ed. 1991).

148. *See* Kenneth Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 DEF. COUNS. J. 271, 279 (1997) ("Publication of arbitral awards . . . is becoming more common, thus alleviating the difficulties associated with a lack of precedent."); Klaus Peter Berger, *International Arbitration Practice and the Unidroit Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 149 (1998) (stating that "arbitral awards more and more assume a genuine precedential value within the international arbitration process"); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 719 (2000) ("With each passing year, there is an ever-increasing volume of reported arbitral awards (particularly in civil law jurisdictions, as well as in the United States), and arbitrators are tending more and more to refer to previous awards rendered in similar cases, thus gradually developing a system of arbitral precedent."); *cf.* Bernard H. Oxman, *International Decisions*, 96 AM. J. INT'L L. 198, 205 (2002) (noting that with regard to non-commercial contexts "the [ICJ] has invoked other international arbitral awards . . . on [some] occasions, and has even brought some within the ambit of "precedents" that it will consider on a par with its own prior decisions"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 (1986) (noting that while adjudicative opinions are not formally treated as stare decisis under international law, arbitral awards and other international court decisions have been treated as highly persuasive evidence of customary international law).

said to measure an arbitrator's professional sophistication and competence.[149]

While international arbitration's treatment of bribery may be among the most famous lines of precedents, it is by no means the only procedural innovation. Unusual procedural cases are often published for the express purpose of providing guidance to future arbitrators. One particularly important recent example is the tribunal's decision in the infamous case of the kidnapped Indonesian arbitrator, which will undoubtedly be important precedent in any future case in which foul play has fallen upon a member of the tribunal.[150] At a less dramatic and less observable level, international arbitration has also generated its own set of hybridized evidentiary procedures designed to bridge gaps between civil and common law procedural traditions.[151] The evolution of these now well-settled procedural norms occurred less through formal exchange of published opinions than through the cross-pollenization that comes with the overlapping experiences of those in the international arbitration community.

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149. Unlike conventional domestic arbitration, in which arbitrators are most often industry specialists, international arbitrators, "like public court judges, tend to be generalists in substantive legal knowledge but specialists in legal procedure." Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 96 (2000); Bryant G. Garth, *Diffusion and Transformation: Reflections on a Theme*, 4 DISP. RESOL. MAG. 4, 5 (1998) ("[T]he success of this transnational system of private justice has come in part through the development of a cadre of professional arbitrators, well-versed in arbitration techniques.").

150. One commentator rightly applauds "the extraordinary fortitude and intellectual rigor with which the members of the Arbitral Tribunal approached their task in this case while in a virtually constant state of siege." Marc J. Goldstein, *International Commercial Arbitration*, 34 INT'L LAW. 519, 530 (2000). He further opines that "[i]nternational arbitrators and counsel for parties in such proceedings may well refer to these awards, for generations to come, for the guidance they provide in combating a deliberate campaign of sabotage against the arbitration proceedings by the state party." *Id.*

151. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313 (2003); Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA J. INT'L COMP. L. 57 (2002).

In addition to procedural precedents, certain substantive commercial rules have developed and are used by arbitrators to supplement national choice of law provisions:

> Recent scholars have noted that certain rules of law have taken on an international character and are being employed by arbitrators when resolving transnational disputes. Some of the principles upon which international arbitrators have regularly relied include, inter alia, the duties to bargain in good faith, to mitigate damages, and to renegotiate contracts, as well as numerous maritime issues.[152]

The complexities of rule-making for the transnational context and international arbitrators' close and integral relationship to that context means that they are arguably more efficient and effective at creating certain types of transnational rules than actors in either the national or international legislative contexts could be.[153]

The effect of the substantive and procedural rules produced by international arbitrators is not limited to application through informal precedent.[154] Many of the rules developed in the international

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152. Mark Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 29, 30-31 (1991). As noted above, the substantive rule that contracts for bribery are void as against international public policy began as a procedural rule, but evolved into a substantive rule of contract law that supplements parties' choice of law. Some other examples of established "arbitral law," which straddle the line between substance and procedure, include lines of arbitral decisions that address whether the signature on a contract of a state-owned entity is sufficient to subject the state itself to arbitral jurisdiction, and how the scope of an arbitral clause should be interpreted. *See* INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 112, ¶ 508. As one eminent commentator has explained, "on reading the ICC awards and their commentaries, one significant phenomenon becomes clear: the more recent awards are based on earlier decisions, and the decisions reached are generally consistent." *Id.* ¶ 384.

153. *See* Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 117 (2004) ("Increasingly, nation states are becoming less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration. This is spurred on by the march of globalization and the need for international commercial law.").

154. It should also be noted that apart from arbitral proceedings, the international arbitration community affects the making of national policy,

arbitration context have subsequently been relied on in legislative efforts to develop rules and laws that apply both in and outside of the international arbitration context. For example, the drafting committee for the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") essentially codified the hybridized practices that were already in use in international arbitration.[155] These IBA Rules can be adopted by parties to an international arbitration, which makes them formally binding on the arbitrators who are appointed to decide the dispute. Moreover, regardless of whether the American Law Institute's ("ALI") current efforts at drafting transnational rules of civil procedure took any inspiration from the IBA Rules,[156] they nevertheless will be a yardstick against which the products of the ALI's project will be measured.

With regard to substantive rules, international arbitration has become a resource for national lawmaking. The commercial rules and norms developed by international arbitrators have been restated as *lex mercatoria,* and subsequently relied on, at least in part, by the legislative efforts undertaken by the United Nations Commission on International Trade Law ("UNCITRAL") in drafting the Principles of International Commercial Contracts,[157] and by the drafters of the

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legislation and jurisprudence through activities other than adjudication, such as lobbying or commission reports. *See* DEZALAY & GARTH, *supra* note 2, at 45-46.

155. As one commentator describes:

> Drafted by a working party composed of arbitration specialists with civil-law and common-law backgrounds, the IBA Rules primarily restate and generalize practices that were already in use in international arbitration. These practices sought to achieve compromise solutions taking into account both common-law and civil-law approaches to evidentiary issues.

Kaufmann-Kohler, *supra* note 151, at 1323.

156. There are some striking similarities, particularly regarding the introduction of evidence, between the IBA Rules and the ALI in its Principles and Rules of Transnational Civil Procedure, even if the drafts do not explicitly acknowledge reliance on the IBA Rules or arbitral practice. *Compare* Joint American Law Institute/UNIDROIT Work Group on Principle and Rules of Transnational Civil Procedure, Draft Principles and Rules of Transnational Civil Procedure, at 19.3 (allowing courts to accept direct witness testimony in written form), *with* International Bar Association, IBA Rules on the Taking of Evidence in International Commercial Arbitration, art. 4(4) (granting the arbitral tribunal the authority to obtain written "witness statements" of direct testimony).

157. *See* Klaus Peter Berger, *The* Lex Mercatoria *Doctrine and the Unidroit Principles of International Commercial Contracts*, 28 LAW & POL'Y INT'L BUS.

Vienna Convention on the International Sale of Goods.[158] These legislative uses for the products of international arbitration demonstrate the ability of "private" adjudication to engage in meaningful rule-making, some of which ends up guiding expressly public lawmaking and adjudication.[159]

To the extent that I have mapped the terrain of international arbitration's rule-making function, its borders seem to only be growing. Commentators, most of them well-known arbitrators, continuously call for increased transparency through the publication of reasoned awards and an increased reliance on precedent in arbitral decision-making.[160] Moreover, international arbitration has

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943, 947-58 (1997). Significant debate surrounds efficacy of the *lex mercatoria*, and to a lesser extent the UNIDROIT Principles, in light of modern needs for the clarity and predictability that many suppose can only come from a fully developed national system. *See* Alejandro Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 3 TUL. J. INT'L & COMP. L. 93, 112 (1995) (demonstrating the limitations of *lex mercatoria* because it requires "a search for diffuse rules found in, among other areas, trade usages, customs and legal scholarship"). Despite this criticism, parties select the *lex mercatoria* and, in increasing numbers, the UNIDROIT Principles. *Id.* at 110-13.

158. The CISG has been acceded to by the United States and thus applies as the governing law in all contracts between Americans and citizens of other signatory nations. Berger, *supra* note 157, at 943 n.120 (noting that the CISG may "be viewed as an attempt to codify rules and principles of the *lex mercatoria*").

159. Importantly, these critics focus on domestic arbitration, where the publication of precedents, and even the articulation of reasons underlying the decisions, is rare. *See* Reuben, *supra* note 100, at 1083 ("The AAA Rules for Commercial Arbitration, reflecting what may be viewed as the traditional approach [in domestic arbitration], do not require arbitrators to disclose their reasoning and, indeed, the organization in the past has expressly discouraged the practice as a hedge against judicial review."). *But see* Rau, *supra* note 32, at 538 nn.183 & 188. In fact, some civil law systems treat unreasoned awards as unenforceable violations of public policy. *See* James T. Peter, *Med-Arb in International Arbitration,* 8 AM. REV. INT'L ARB. 83, 86 & n.21 (1997).

160. *See* William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration,* 12 BROOK. J. INT'L L. 629, 630 (1986) (calling for greater transparency in the arbitral process and more uniform rules of procedure and publication of awards as means to increase legitimacy and lawfulness of international commerical arbitration); *see also* Richard M. Buxbaum, *Introduction*, 4 INT'L TAX & BUS. LAW. 205, 208 (1986); Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39 (1984); Julian D.M. Lew, *The Case for the Publication of Arbitration Awards*, *in* THE ART OF

conquered new areas as it has become incorporated into the fixed landscape of trade-related disputes, which in turn has increased the rate of publication of awards and accentuated public aspects of the arbitral process.[161] It produces precedents that, while not as systematic or authoritative as a common law network of cases, guide future parties and arbitral tribunals. These precedents increase the degree of certainty and order in future arbitral proceedings, even if they are not formally binding. In other words, international arbitral decisions are not simply a method for resolving disputes, but also a superior source of rule-making for the international arbitration community.[162] In a meaningful sense, international arbitration produces precedents that are public goods.

Apart from its rule-making function, international arbitration generates other public goods that together ensure the existence and vitality of international arbitration as an efficient and effective mechanism for adjudicating most of the world's international commercial and trade-related disputes. One public good international arbitration produces is a group of highly skilled arbitrators. Just as trials may allow lawyers to hone their advocacy skills[163] or judges to enhance their trial management skills,[164] arbitrators can only become

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ARBITRATION 226-29 (Jan C. Schultz & Albert Jan van den Berg eds., 1982); Bernardo M. Cremades & Steven L. Plehn, *The New* Lex Mercatoria *and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317, 336-37 (1984) (suggesting "the formation of institutions which give arbitrators access to prior arbitration awards and require them to follow a more or less strict rule of *stare decisis*").

161. *See* Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. DISP. RESOL. 69, 86 (2003) ("The most important body of international arbitration jurisprudence emanates from . . . the Iran-United States Claims Tribunal. The significance of these decisions as persuasive authority is second to none."). Alford also notes that published "NAFTA Chapter 11 awards [are] quickly becoming an important source of international arbitration jurisprudence." *Id.*

162. *See* Carbonneau, *supra* note 17, at 774 ("In a word, [international commercial arbitration] has been a vital engine in the creation of a trans-border rule of law.").

163. *See* McMunigal, *supra* note 99, at 856-61.

164. *See* Luban, *supra* note 144, at 2623-24.

competent through experience arbitrating actual cases.[165] It is for this reason that one of the primary inquiries parties make when selecting an arbitrator is into the person's experience as an international arbitrator.[166] Moreover, while there exist some established courses for those who wish to become arbitrators, the most valuable training is on-the-job guidance by seasoned arbitrators.[167]

Perhaps the greatest public good created by individual international arbitrations is with regard to the integrity and legitimacy of the international arbitration system. David Luban has argued that judicial authority can be conceptualized as a public good that is furthered by adjudication.[168] He explains that when disputants rely on the judgment of a court to resolve their controversies, they "enhance the court's claim as an authoritative resolver of controversies."[169] Under this view, litigants are "subsidiz[ing] judicial authority that is available for future litigants."[170] Even if Luban's substantive position is overtly antagonistic to arbitration,[171]

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165. While experience in prior cases may be a necessary measure of competence, it is not necessarily a sufficient one, particularly when one considers market distortions that affect appointment. *See supra* notes 32-35 and accompanying text.

166. *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 96-97 (2000).

167. *See* Pierre A. Karrer, *So You Want to Become an Arbitrator? A Roadmap* (analogizing the process of becoming an arbitrator to the process of becoming an orchestra conductor—starting as an assistant and following in the footsteps of a mentor), *available at* http://www.plplaw.ch/topic_become_arbitrator.php (last visited Aug. 28, 2005). A similar phenomenon has evolved in domestic arbitration. Seth E. Lipner, *Report of the Shadow Arbitration Policy Task Force on Securities Arbitration Reform*, 1998 ABA SEC. SEC. LITIG. & ARB. J-69, J-75 (discussing a proposal that "new arbitrators be required to observe at least two arbitrations before being added to the roster of arbitrators. This 'hands-on' training, required of mediators, will improve the performance (and consistency) of apprentice arbitrators").

168. *See* Luban, *supra* note 144.

169. *See id.* at 2625.

170. *See id.* (explaining that authority has a "reflexive character," meaning that increased authority inspires further use by litigants, which in turn increases the court's authority).

171. *See id.* ("[W]hen litigants go elsewhere for resolution—private arbitration, nongovernmental agencies, or private bargaining—the salience of adjudication

it captures a more generalized insight, which can be fairly commandeered for international arbitration.[172] Just as recurrent use of national courts enhances judicial authority, parties consistently resorting to international arbitration enhances the system and reinforces its legitimacy to the point that it is considered the uncontested preference for international parties.[173] That authority and legitimacy, in turn, encourages parties to voluntarily comply with arbitral awards,[174] which is an essential precondition for the effective functioning of the system.

C. CONCLUSION

The extent of international arbitration's public realm and the ability of international arbitrators to take cognizance of public issues not presented by the parties should not be overstated.[175] Particularly

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fades and the authority of the court weakens."). Luban also acknowledges that adjudication is not universally viewed as a public good, or as superior to other forms of dispute resolution. Judith Resnik is the most prominent proponent of this view. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 535 (1986).

172. In reality, as explained above, international arbitration is not effectively diverting cases from judicial adjudication, since domestic courts are largely unable to efficiently produce judgments that can be enforced outside the United States. REISMAN ET AL., *supra* note 44, at 1215 ("[A]rbitral awards as a whole enjoy a higher degree of transnational certainty than judgments of national courts.").

173. As Tom Carbonneau explains:

> Because business transactions cannot take place without a functional system of adjudication, ICA has enabled parties to engage in and pursue international commerce. As a result, it has had an enormous impact upon the international practice of law, the structuring of a de facto international legal system, and the development of a substantive world law of commerce.

Carbonneau, *supra* note 17, at 773.

174. Although there are no reliable statistics, general consensus is that the overwhelming majority of international arbitral awards are voluntarily complied with. *See* BORN, *supra* note 133, at 704 ("Many international arbitral awards do not require either judicial enforcement or confirmation, because they are voluntarily complied with."); Elisabeth M. Senger-Weiss, *Enforcing Foreign Arbitral Awards*, DISP. RESOL. J., Feb. 1998, at 70, 71-72 ("The majority of arbitral awards are satisfied through the voluntary compliance of the parties involved . . . .").

175. *See* Shalakany, *supra* note 112, at 443 (arguing that despite being generally recognized as "necessary and inevitable," international arbitration is not the "omnipotent denationalized judiciary it is fancied to be").

in developing countries and in trade-related contexts, arbitral awards can have significant social implications that reach far beyond the stark confines of private commercial relationships.[176] Even under a conceptualization of international arbitrators as justice-providers, it is unlikely they could, under the current conceptions and institutional structures, strive to effectuate deep structural social change.[177] Their justice function and their contributions to a public realm, however, do significantly raise the ante on how their work will be evaluated both by the parties to particular cases and more generally.[178]

III. THE FUTURE OF INTERNATIONAL ARBITRATORS' VOCATION

The professional impulses that I describe in Part I may be principally intended, as Weberian theories of the profession suggest, as efforts to gain a market advantage for the international arbitrator industry. But whatever their intended function, these inclinations toward professionalization may also have the unintended effect of creating certain expectations regarding the values the very term "profession" emotes—quality control, transparency, ethical conduct, self-regulation, and the like. If these implicit promises turn out to be elusive,[179] international arbitrators may unwittingly be inviting

176. *See* Bernardo M. Cremades, *Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Clavo Doctrine and Other Jurisdictional Issues*, DISP. RESOL. J., May-July 2004, at 78, 84 ("The often enormous social implications of arbitral awards, especially in the least developing countries, require arbitrators to strictly comply with their obligations.").

177. It is this function that Owen Fiss championed as the critical role for public courts to play. *See* Owen Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEH. 121, 128 (1982); Owen Fiss, *The Supreme Court, 1978 Term–Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

178. *See* Banani, *supra* note 125, at 363; Shalakany, *supra* note 112, at 424.

179. *See, e.g.*, Franck, *supra* note 40; Christian Hausmaninger, *Civil Liability of Arbitrators–Comparative Analysis and Proposals for Reform*, 7 J. INT'L ARB. 5 (1990). Perhaps the most aggressive and least realistic proposal comes in the context of domestic arbitration as a means to control arbitrator decisions that implicate mandatory law. *See* Guzman, *supra* note 113.

external controls.[180] Competition to regulate arbitrators is already emerging, although at this point predominately in the domestic arbitration context.

Self-regulation and market-based mechanisms seem clearly preferable to national interference, but they must be buttressed and made more effective. In Section A below, I consider how some of the existing efforts at self-regulation can be made more effective, while in Section B I urge a more active role for arbitral institutions in this process. Finally, in Section C, I consider how their vocation as justice-providers and the increasing discernment of a public realm in international arbitration may suggest the need to impose new, more expressly public-oriented obligations on international arbitrators.

A. INCREASED TRANSPARENCY IN THE MARKET FOR INTERNATIONAL ARBITRATION SERVICES

The market for international arbitrators' services, as I describe in Part I,[181] suffers from sometimes severe barriers to entry and information asymmetries. The proliferation of directories and rosters of potential international arbitrators undoubtedly have salutary side-effects in increasing the public availability of the identity of potential candidates. To provide a true quality control function or shed real light on the otherwise opaque market, however, they must do something more than simply provide access to international arbitrators' self-crafted and self-serving profiles. Currently, none of the information resources appears to collect, either independently or through voluntary disclosure from participating candidates, information about whether those arbitrators listed have ever been challenged for bias or whether any of their awards have been refused enforcement. In addition, these factual profiles could be supplemented with feedback from former parties or other arbitrators regarding their past experiences with particular candidates. While relatively modest proposals, creating public access to such information would go a long way toward overcoming the

180. *See* Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues and the Struggle for Public Space*, 78 TUL. L. REV. 1687, 1702 (2004); ABEL, *supra* note 8, at 38.

181. *See supra* Part I.B.

inadequacies of the current situation in which the most valuable information is available only anecdotally and is not cost effective to obtain.[182]

Moreover, there are existing precedents that testify to the feasibility of these proposals. References by former parties are generally part of mediation practice,[183] and party feedback and public critique is widely available for judges.[184] These resources are arguably much more important for arbitrators than either for mediators, who cannot impose binding decisions, or for judges, who cannot be avoided if they have an undesirable track record. Providing this source of feedback would necessarily require some degree of editing to ensure the confidentiality of parties and to protect arbitrators against malicious or unfounded accusations, but such efforts would likely find ready compensation from parties who are otherwise unable to access the information.

Perhaps even more significant than the benefit to individual parties, this kind of "truth in advertising" could provoke a significant shift in the market for international arbitrator services. To the extent that a "clean record" and good references or reviews become meaningful professional credentials, the primary criteria for ascendance in the international arbitration community may cease to be reputation among members of "the club," and instead become reputation among the actual consumers of international arbitration. This shift in valuation criteria is unlikely to unseat the eminent arbitrators, but it is more likely to create a more competitive market for arbitrator services that would allow new entrants to rise up and compete with already established arbitrators.

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182. *See supra* notes 33-39 and accompanying text.

183. *See* Richard Silverberg et al., *Best Practices in Large, Complex Cases: A Practitioner's Guide*, DISP. RESOL. J., May-June 2004, at 63, 73 (noting that mediator resumes include references, while arbitrators' do not).

184. For example, see ALMANAC OF THE FEDERAL JUDICIARY (Aspen Publishers 1984), which provides a directory of all federal judges in the United States. For each judge, they present a lawyer's evaluation, which provides specific critiques of the judge's conduct, strengths and weaknesses, as well as basic biographical information such as past and current positions, education, noteworthy rulings, and media coverage. *Id.* If such a resource is useful to parties after they find out which judge they must appear before, imagine how much more useful such information would be to parties in their process of selecting an arbitrator.

B. AN INCREASED ROLE FOR ARBITRAL INSTITUTIONS

Improvements in market-based mechanisms cannot entirely preclude the need for more direct oversight. Even with improvements, some arbitrator misconduct will inevitably persist. Meanwhile, vague standards of conduct and secretive decisions regarding challenges continue to prevail even among the most esteemed arbitral institutions; but these practices seem out of sync with the justice-providing function of international arbitration and the ever-increasing public realm in international arbitration. Instead of secret and insulated decisions, as I have argued in my preceding article, institutions should take on a more active role.[185] The relative permanence and visibility of arbitral institutions, as compared to individual arbitrators, and their intimate knowledge of, and direct involvement in, arbitration practices and procedures gives them an unrivaled institutional competence to regulate arbitrators.[186] Given their institutional competence, they are poised to become to international arbitrators what bar associations are to lawyers. Arbitral institutions, in other words, should formalize arbitrator qualifications and entry requirements, improve mechanisms for reviewing claims of alleged arbitrator misconduct, and impose real sanctions on transgressing arbitrators.[187] These changes necessarily imply a need to intentionally separate the administrative functions of institutions from the decision-making services provided by individual arbitrators.

There are some institutions that have already made important steps in this direction. For example, the Chartered Institute for Arbitrators ("CIA") does not administer international arbitrations, but provides various arbitration support services such as the nomination of arbitrators. Even more explicitly than the directories described in Part I, this institution borrows explicitly from the rhetoric of professional licensing, and replicates its processes much more definitively than either arbitral institutions or the arbitrator locator sources described above. The CIA refers to itself as a "Professional

185. Rogers, *Developing Standards of Conduct*, *supra* note 6, at 110-12.

186. *Cf.* Wilkins, *supra* note 53, at 884-85 (proposing in the attorney context that regulators with the greatest institutional competence should be assigned primary regulatory authority).

187. Currently, even if an arbitrator's award is later invalidated on grounds of misconduct, they are likely to still receive their full fees.

Organization for Arbitrators, Mediators and Adjudicators"[188] and lists having a "prestigious secondary professional qualification" as among the benefits of membership.[189] Unlike the informational directories described above, however, the CIA has stringent, published entry requirements, which may include extensive training, passing an examination, and completing an interview.[190] It also has a relatively detailed code of ethics that pertains to arbitrator members, and most interesting of all, a grievance procedure for those who have complaints about the conduct of arbitrators.[191]

Similarly, the AAA has a stated policy of only nominating "qualified" arbitrators from its existing rosters, which it advertises as highly "select" and open only to a limited number of arbitrators. To qualify, a candidate must attend training sessions administered by the AAA, as well as possess certain minimum professional qualifications. Moreover, the AAA rigorously enforces its code of ethics through what has been referred to as a "one-strike-you're-out" policy. Under this policy, any arbitrator whose awards are challenged for improper non-disclosure goes on inactive status and will not be nominated to future arbitrations while the judicial challenge is pending.[192] Even after a final judicial decision, the AAA makes a

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188. Chartered Institute of Arbitrators, *Home*, *at* http://www.arbitrators.org/ (last visited June 15, 2005).

189. The CIA website describes that one of the benefits of membership is the "opportunity to network with professionals engaged in a wide range of disciplines." Chartered Institute of Arbitrators, *Membership Benefits*, *at* http://www.arbitrators.org/Joining/benefits.asp (last visited Aug. 28, 2005).

190. Chartered Institute of Arbitrators, *Special Member Assessment*, *at* http://www.arbitrators.org/Courses/SMA.asp (last visited Aug. 28, 2005).

191. It appears that the CIA tailored its grievance procedure to consumers involved in the CIA's domestic consumer arbitration, and it is unclear whether an adverse resolution of a complaint can affect an arbitrator's status as a member of the CIA. *See* Chartered Institute of Arbitrators, *DRS-CIArb*, *at* http://www.drs-ciarb.com/aboutus.asp (last visited Aug. 28, 2005). Since its initiation, complaints appear to have overwhelmed the grievance procedure (evidently in the domestic context). *See* Tony Bingham, *Guilty As Charged* (commenting that the grievance procedure has also drawn some stiff rebuke from arbitrators who are, predictably, resistant to being subjected to formal investigation of their conduct), *at* http://www.tonybingham.co.uk/column/2002/20020517.htm (last visited Aug. 28, 2005). People are registering loud protests against what he characterizes as the trial and "court-marshal" approach to arbitrator regulation. *Id.*

192. *See* AAA, *Failure to Disclose*, *supra* note 45.

separate determination of whether the arbitrator should ever be restored to active status on the roster.

The CIA, AAA, and a few other institutions that have taken on strong formal commitments to ensure quality and monitor arbitrators may reflect a developing regulatory competition among arbitral institutions. Adoption of formal mechanisms to regulate arbitrators may signal to the market their uniquely rigorous commitments to ethical conduct and quality assurance, echoing the signaling function that some scholars have argued exists in securities markets.

This competition among institutions will more likely result in a race-to-the-top as opposed to a race-to-the-bottom, as was produced by the nearly frantic competition among national arbitral sites.[193] While the market for national arbitral sites seems to have largely self-corrected, there are significant differences in the incentives for national sites and institutions, which suggest a race to the bottom is unlikely. In the context of choosing a situs, parties might prefer national contexts that promise minimal interference with the arbitration proceedings or award. That same preference for non-interference by situs courts, however, may provide an even stronger need for institutions that provide enhanced reliability and procedural protections.[194]

The historically important institutions, such as the ICC and the LCIA, apparently feel less pressed to seek a competitive advantage through increased and more transparent regulation of arbitrators.

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193. *See* Christopher R. Drahazol, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 104 (2000). In an effort to attract more international arbitration, however, many nations have declined this opportunity and have instead legislated to constrain court review of awards from arbitrations taking place within their boundaries. The most prominent examples are Belgium (which prohibits national courts completely from overturning any international arbitral award unless a Belgian citizen is a party, even in the instance of arbitrator fraud) and Switzerland (which permits non-Swiss parties to elect such prohibition by agreement). *See* Park, *supra* note 51, at 649. While it is also possible to imagine a race to the bottom with institutions competing to attract parties seeking to avoid mandatory law, those institutions would also be signaling to national regulatory authorities that arbitrations under the auspices of their rules are inherently suspect.

194. *See supra* note 121. Of course, the benefits of such regulatory competition can only be realized if parties become more savvy in selecting institutions and drafting their arbitration clauses.

Even if they have not as yet suffered setbacks in caseloads, however, they may still be risking the prospect of regulatory pre-emption if they fail to act.

One sign of increased interest in formalizing institutions' regulatory role is demonstrated by the Principles for ADR Service Providers ("Principles"), which are the product of an innovative project jointly undertaken by the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR chaired by Carrie Menkel-Meadow.[195] Significantly, the Principles call on institutions to establish formal procedures for pursuing grievances against arbitrators as part of a larger effort to guide service providers in meeting the expectations not only of parties, but also of "policy makers and the public generally for fair, impartial and quality dispute resolution." While not binding on institutions, the Principles may be establishing background expectations that will be used to evaluate institutions.

A failure of effective regulation by institutions could provoke state intervention in the form of legislative efforts either to relax standards for arbitrator immunity, as some scholars have proposed,[196] or to assume more direct regulatory authority over international arbitrators, as the SEC did in the context of lawyer regulation after the Enron scandal.[197] In domestic contexts, in response to concerns over inadequate existing controls, the Florida Supreme Court and the Northern District of California have established review procedures for complaints involving court-annexed ADR providers,[198] while the

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195. *See* CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2002) [hereinafter PRINCIPLES], *available at* http://www.cpradr.org/pdfs/finalProvider.pdf (last visited Aug. 28, 2005). Carrie Menkel-Meadow is one of the most steadfast and active proponents of increasing transparent ethical regulation in the provision of dispute resolution services. *E.g.*, Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 950-51 (2002) (stressing that in the absence of mechanisms for enforcement, "transparency, disclosure, rules, sanctions and consequences [are] necessary for arbitration to maintain any semblance of legal legitimacy and justice").

196. *See* Guzman, *supra* note 113, at 1279-80.

197. *See* Sullivan, *supra* note 180, at 1701.

198. *See* PRINCIPLES, *supra* note 195, at 12, n.30.

California legislature has adopted aggressive new rules regulating arbitrators more generally.[199] There is also an interesting proposal, again under the tutelage of Professor Menkel-Meadow under the auspices of the CPR-Georgetown cooperative, for a proposed new Model Rule for Lawyers Acting as Third Party Neutrals, which would be incorporated into the Model Rules of Professional Conduct.[200] While this proposal has a lot of merit in the domestic context, it could pose some real problems in the international context. If various national courts and national bar associations begin devising and applying their own arbitral ethical rules to international arbitrators who are also locally licensed lawyers, those institutions will become venues for interpreting and enforcing those rules.[201] As a consequence, the conduct of international arbitrators would become subject to the very national institutions from which arbitral decision-making is supposed to be insulated.

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199. The legislation was adopted after a local paper ran "a series of articles featuring horror stories about the inequities of arbitration." *See* Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 U.S.F. L. REV. 119, 120 (2003). The rules were legislatively enacted to apply to all contractual arbitration in California. In substance, the new rules substantially expand arbitrator disclosure requirements and provide mechanisms for regulating arbitrator action. More controversially, the new law increases the bases for disqualifying arbitrators, and some speculate may increase the bases for vacating awards. *Id.* at 121-22. Notably, the new ethical rules do not apply to international arbitrators. *Id.* at 123 n.26; *see also* Ruth V. Glick, *Should California's Ethics Rules Be Adopted Nationwide?: No! They Are Overbroad and Likely to Discourage Use of Arbitration*, DISP. RESOL. MAG., Fall 2002, at 13, 13-14; *Judicial Council of California Adopts Ethics Standards for Private Arbitrators*, 13 WORLD ARB. & MEDIATION REP. 176 (2002) (noting that notwithstanding adoption of new standards, several members suspect that the volume of information that must be disclosed under California's new standards "may be too burdensome" and could "be used too readily" to disqualify arbitrators).

200. *See* CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002), *available at* http://www.cpradr.org/pdfs/CPRGeorge-ModelRule.pdf (last visited Aug. 28, 2005).

201. *See* Wilkins, *supra* note 53, at 810-11.

C. MAKING THE JUSTICE AND PUBLIC FUNCTIONS EXPLICIT FEATURES OF ARBITRATORS' ROLE

As explored in Part II, arbitrators often take cognizance of international public policy or national mandatory law, even sometimes when not part of the parties' express choice of law.[202] This behavior seems to be generated by a sense of commitment to larger public concerns, and is consistent with observed strategies of successful professionals in other sectors, who have been drawn to public-oriented activities that bring them more in line with the transcendent values of their profession.[203] The commitment to these more public goals seems widely accepted, as illustrated in the numerous articles,[204] books,[205] and conferences[206] dedicated to the issues of public importance in the international arbitration system.[207]

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202. *See supra* notes 132-143 and accompanying text.

203. Bryant Garth also argues this point with respect to lawyers. *See* Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 934-35 (1993).

204. *See, e.g.*, Bernardo M. Cremades & David J. A. Cairns, *Corruption, International Public Policy and the Duties of Arbitrators*, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 76, 84 (calling it "the greatest mistake" for a tribunal to ignore suspicions of corruption); *see also* A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*, TRANSNAT'L DISP. MGMT., May 2004, *available at* http://www.transnational-dispute-management.com/samples/freearticles/tv1-2-article45a.htm (last visited Aug. 28, 2005). Some years earlier, in 1986, the Eighth International Arbitration Congress in New York dedicated half the conference to issues of public policy international arbitration, including bribery and corruption, and the results of the Congress were published in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (Sanders ed., 1986).

205. *See generally* ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION, Ch. 9 (2004); Ahmed Sadek El-Kosheri, *Public Policy Under Egyptian Law*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (Sanders ed., 1986).

206. A recent conference on April 10, 2005 at Queen Mary College in London, which includes among its speakers many of the most celebrated international arbitrators, addressed the topic of "Contemporary Problems–Twenty-First Century Issues." The ranges of issues discussed included not only the impact of international public policy on corruption, but also a range of other issues with broader social implications, such as trade in stolen art, human trafficking, and illicit drugs, as well as other issues of a decidedly public nature, such as human rights conventions, the relevance of mandatory law and the impact of arbitration on third parties, and the teaching and training of international arbitrators. *See*

It is reasonable to imagine that these public conversations about the public realm of international arbitration, and established practices regarding application of mandatory law, could be transformed into prescribed rules to guide and evaluate arbitrators. Formal articulation of these obligations would transform these practices from individual discretion to professional obligation, and could have potentially salutary benefits in the internal competitive pressures within the market for arbitrator services. Some scholars hypothesize that *ex ante* parties prefer arbitrators who are willing to disregard mandatory rules, with the result that those arbitrators enjoy a competitive advantage over others who are unwilling to disregard applicable mandatory law.[208] There is some reason to doubt this hypothesis in its

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generally School of International Arbitration, *Conference Programme*, *at* http://www.arbitrationonline.org/20th%20Anniversary (last visited Aug. 28, 2005).

207. Similarly, in the context of the U.S. legal profession, pro bono work and public service used to be regarded as tied solely to a lawyer's sense of *noblesse oblige*, but are now considered part of recognized expectations and valuable professional opportunities. *See* Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance* Noblesse Oblige *to Stated Expectations*, 77 TUL. L. REV. 91, 134 (2002); David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 20-27 (2004) (explaining how public service can provide lawyers with experience, contacts and public recognition); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity is Good for Business": The Rules of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1607 (2004) ("Although activities such as government service, community and political participation, bar association activity, and pro bono work are often cast in the lofty terms of noblesse oblige professionalism, savvy lawyers have always realized that participating in these activities also enhances their careers."); Garth, *supra* note 203, at 934 (noting that those "successful lawyers who aspire to become 'great' lawyers . . . have been drawn to 'public-spirited' civil justice issues, whether their 'motives' were self-interested or to further the public interest"). Arbitral institutions have also been commendably active at this level. For example, the ICC has acted at a political level through committees and forums to affect national legislation and jurisprudence regarding issues such as bribery. *See* DEZALAY & GARTH, *supra* note 2, at 45-46 & n.24 (describing ICC involvement in resolving the question of the effect of contracts after the destruction of the Soviet bloc and the problem of international bribery). In addition, most institutions, including the iaiparis and the CIA, hold regular seminars and meetings to discuss past and future developments in international arbitration practice.

208. *See* Guzman, *supra* note 113, at 1282 (hypothesizing that by ignoring applicable mandatory rules, arbitrators can "develop a reputation as a desirable arbitrator" and thus increase their chances at future selection).

strongest form, since parties instead appear committed to having established rules justify arbitral outcomes,[209] and international arbitrators appear to be instead "deeply concerned" about their reputations *for respecting* mandatory rules.[210] Even if it does not tell the full story, however, international arbitrators may nevertheless be attentive to the negative repercussions of ruling against both parties' wishes.

Formal articulation would transform disregard of mandatory law or international public policy from its supposed status as a competitive advantage into an aberrant behavior. This transformation would not guarantee that arbitrators who continue to disregard mandatory law and public policy will be rejected by future parties, but it may lead to stigmatization in the arbitration community, a sanction that is less plausible when the nature of the obligation remains ambiguous and presumptively optional. It may also become a basis for evaluating arbitrators' competence and qualifications to serve in future arbitrations, as well as a basis for the international arbitration system to reassure concerned States that national mandatory laws are receiving appropriate deference.

Obviously, there are significant obstacles to articulating such rules, particularly given the complexities involved in determining applicable mandatory law in any given case (let alone across the spectrum of all cases),[211] and in articulating the content of international public policy.[212] Overcoming these obstacles is not entirely inconceivable, however, as illustrated by a similar proposal

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209. *See supra* notes 119-120 and accompanying text.

210. *See* Posner, *supra* note 137, at 668 ("The evidence suggests that international arbitrators are deeply concerned about their reputation for respecting mandatory rules."). Building a reputation for refusing to apply mandatory law through particular cases, the awards for which may or may not be published and readily accessible, would be far inferior to publishing articles arguing against application of mandatory law. But most prominent arbitrators who have taken a public stand on the issue have expressed a commitment to apply mandatory law. *See supra* notes 137-139 and accompanying text.

211. *See generally* Carlo Croff, *The Applicable Law in International Commercial Arbitration: Is it Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613 (1982); Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235 (1986).

212. *See supra* notes 175-178 and accompanying text.

in 1980 by the Commission on Law and Commercial Practices of the International Chamber of Commerce. The proposal would have expressly authorized (not required) arbitrators to disregard or supplement parties choice of law to take cognizance of otherwise applicable mandatory law, and to take account of the purposes and effects of such law in making the decision to do so.[213] Ultimately, these provisions were not adopted, but the general commitment to mandatory law or public policy may be better established today and the need to manifest that commitment may be more important today.

The international arbitration system relies on national legal systems both to enforce awards and to remain unobtrusive in the arbitral process.[214] Abuse of national mandatory law may well be something that erodes that support or provokes more exacting review of awards,[215] as the U.S. Supreme Court threatened was possible if U.S. antitrust laws were disregarded in international arbitration. A single highly controversial ruling can also prompt legislative reaction, as some have predicted will be part of the political fallout to some recent, acutely unpopular NAFTA arbitration decisions.[216]

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213. One of the draft proposals provided:

> [E]ven when the arbitrator does not apply the law of a certain country as the law governing the contract he may nevertheless give effect to mandatory rules of the law of that country if the contract or the parties have a close contact to that country and if and in so far as under its law those rules must be applied whatever be the law applicable to the contract. On considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration*, 10 INT'L TAX & BUS. LAW. 59, 63-64 (1992).

214. *See* Park, *supra* note 51, at 649 (noting that national courts may be required to intervene at several points to assist the arbitral process).

215. Many scholars have argued for enhanced award review to correct arbitrator misapplication or non-application of mandatory law. *See, e.g.*, Thomas Carbonneau, Le Tournoi *of Academic Commentary on Kaplan: A Reply to Professor Rau*, Mealey's INT'L ARB. REP., Apr. 1997, at 13 (arguing that courts should be more willing to "police" awards by "reinvigorating the grounds of . . . the public policy exception to enforcement might provide some semblance of a corrective procedure against the exercise of excessive or misguided arbitral authority on public law issues").

216. *See* Carbonneau, *supra* note 17, at 827.

CONCLUSION

In this Essay, I have tried to articulate clearer vision of the vocation of the international arbitrator, based not on hyperbole, but on conceptual analysis of their role, an accounting of actual practices, and an appreciation of the market forces that affect their practice.

International arbitrator's justice function and participation in a system that includes an active public realm are firmer normative foundations for the arbitrator's vocation than the hypothetical assumptions about altruism were for the U.S. lawyer. These foundations, and arbitrators' espousals of professional ideals, are all the more likely, however, to create expectations about how international arbitrators will perform their duties. Against the backdrop of these expectations, international arbitration practice continues to operate in a market largely characterized by information asymmetries and barriers to entry. In the short term, the incentives for seriously improving the transparency and fortitude of self-regulation may not seem obvious. But if the contrast between expectations and the market realities becomes too great, external forces will inevitably move in to fill the gap. Given that the strength of the international arbitration system depends largely on its ability to operate independently of nation-states, while still enjoying their support at critical junctures, the prospect of State interference poses a threat not simply to the "professional autonomy" of international arbitrators, but to the health of the entire system.