THE ROLE OF INTERNATIONAL ARBITRATORS

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With the advent of the global economy, arbitration has become the preferred mechanism for resolving international disputes. Today international arbitrators resolve billions of dollars worth of disputes.1 Arbitration has taken

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1. Billions of dollars are at stake in international commercial arbitration. See Michael D Goldhaber, Big Arbitrations, AMERICAN LAWYER, Summer 2003, at 22 (focusing on only 40 arbitrations with a European connection that were worth over $200 million and describing a single arbitration related to a merger worth up to US$26 billion and another claim related to a Kuwaiti project worth up to US$7 billion); see also Joseph M. Matthews, Consumer Arbitration: Is It Working Now and Will It Work in the Future, 79-APR. FLA. B.J. 22, 24 (2005) (referring to significant amounts of money usually involved" in international arbitration); INTERNATIONAL CHAMBER OF COMMERCE, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 16:1, at 12 (2005) (indicating the amount in dispute in arbitration cases pending before the International Chamber of Commerce and noting that the proportion of cases where the amount in dispute was between US$1–50 million had increased to 52.4%). There are also significant amounts at stake in investment treaty arbitration. Susan D. Franck, The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521 (2005) [hereinafter Franck, Inconsistent Decisions] (noting that there are “billions and billions” of dollars of claims at stake in investment arbitration); see also Michael D. Goldhaber, Arbitration Scorecard: Treaty Disputes, AMERICAN LAWYER,
on such prominence in the international context that commentators express “little doubt that arbitration is now the first-choice method of binding dispute resolution” and has “largely taken over litigation.”

Arbitration has historically been extolled as a confidential, quick, and cost-efficient method for resolving disputes, which creates an internationally enforceable award. Those virtues, however, have eroded with the expansion in the number of parties using arbitration, the increasingly adjudicative nature of the process and the shift in the group serving as arbitrators, which has grown beyond the “grand old men” to a younger generation of arbitration technocrats.

Instead, arbitration may now take just as long and be just as costly as litigation before national courts. Confidentiality has eroded as institutions such as the American Arbitration Association (hereinafter “AAA”) and International Centre for Settlement of Investment Disputes (hereinafter

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4. See CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 140-48 (1996) (noting the mixed evidence as to the decreased cost and efficiency of international arbitration and suggesting that generally arbitration is not less expensive but it may be quicker); see also Jack J. Coe, Jr., Toward A Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch, 12 U.C. DAVIS INT’L L. & POL’Y 7, 11 (2005) (observing that arbitration “has come to resemble in many respects common law style commercial litigation, albeit without the procedural predictability engendered by codes of civil procedure and established rules of court” and arbitrators may do little to expedite a complicated proceeding). This may, however, depend upon the type of the speed of the particular national court. For example, in one case, the courts of India would allegedly take twenty-five years to resolve a dispute. Bhatnagar v. Surrenda Overseas Ltd., 52 F.3d 1220, 1227 (3d Cir. 1995) (referring to expert evidence that the “Indian legal system has a tremendous backlog of cases—so great that it could take up to a quarter of a century to resolve this litigation if it were filed in India.”). In these circumstances, arbitration is likely to be faster than court litigation. In contrast, Australian courts can be much more efficient. See Andy O’Donaghoe, Small Claims Division Established: Fast, Cheap, Informal Arena for Dispute Resolution, 30 N. WALES LAW SOC’Y J. 61 (1992) (describing Australia’s small claims court system, its utilization of various ADR techniques and noting the the speedy resolution of disputes); Fiona Tito Wheatland, Medical Indemnity Reform In Australia: “First Do No Harm”, 33 J.L. MED. & ETHICS 429, 437 (2005) (referring to Australia’s various “litigation streamlining processes to reduce the time and cost of litigation . . . implemented under the court management reforms that have been continuing at different speeds through most Australian jurisdictions over the past decade.”). In such an instance, the national courts of Australia may be more likely to resolve disputes quickly and cheaply. During her remarks on the panel for which this paper was prepared, Sherry Williams, a senior counsel at Halliburton, explained that in her experience arbitrations take less time and cost half as less as litigation before U.S. national courts.
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"ICSID") draft rules with presumptions in favor of the public disclosure of arbitral awards. Perhaps more significantly, the recent signing of the Hague Convention on Choice of Courts means arbitration awards do not have the same monopoly on streamlined enforcement mechanisms.

Given these shifts in arbitration's paradigm, what is left to make arbitration preferable to national court litigation? It is neutrality, but neutrality in two different senses. First, there is neutrality of forum, where the place of dispute resolution does not unfairly benefit either party or create a "home court" advantage. One might call this international arbitration's function as a geographical half-way house. Second, there is the neutrality of the decision-making process. In other words, having arbitrators who are bound to and selected by the parties, but are nevertheless required to render decisions in an "independent" or "impartial" manner, offers adjudicative neutrality.

These remarks consider this second aspect of neutrality and the appropriate role of arbitrators in the context of international arbitration. This issue is neither new nor unique to international commercial dispute resolution. As long ago as the 1930s and the 1940s, domestic U.S. labor arbitrators asked similar questions about the appropriate role of arbitrators. Thirty-seven years

5. AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 27(8), available at http://www.adr.org/sp.asp?id=22090 (last visited Dec. 8, 2005) [hereinafter AAA International Rules] (stating that unless the parties agree, the AAA "may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise"); International Centre for Settlement of Investment Disputes, Suggested Changes to the ICSID Rules and Regulations 9 (May 12, 2005) (Working Paper of the ICSID Secretariat), available at http://www.worldbank.org/icsid/052405-sgmanual.pdf (last visited Mar. 10, 2006) (introducing a presumption for the publication of redacted arbitration awards) [hereinafter Working Paper].

6. Instead, parties can now sign up to exclusive choice of court clauses, and when the Convention is ratified, parties will have an opportunity to have those foreign court judgments enforced in the same way as a sister state judgment. Hague Convention on Choice of Court Agreements, art. 3, June 30, 2005, 44 I.L.M. 1294 (2005); see also Jason Webb Yackee, Fifty Years Late to the Party? A New International Convention For Non-Arbitral Forum Selection Agreements, INT'L LIT. QUART. (forthcoming 2005). The Convention is not yet in force, however, and there are also a variety of reservations which countries could adopt to narrow the Convention's scope.

7. BÜHRING-UHLE, supra note 4, at 148 (describing international arbitration's "metamorphosis from a 'gentlemen's game,' where commercial disputes were resolved informally among peers, to a highly sophisticated judicial procedure with amounts at stake that are 10 to 100 times larger than they used to be 30 years ago").


10. Labor arbitration specialists have explored whether arbitrators act as independent adjudicators
ago, the U.S. Supreme Court in Commonwealth Coatings also grappled with the appropriate role of arbitrators. At that time, Justice White wrote that "the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from the marketplace, that they are effective in their adjudicatory function." Given the evolution of international arbitration, however, it is now useful to re-consider the appropriate role of international arbitrators.

Subject to the parties' clear agreement to opt for commercial determinations or partisan decision-making, arbitrators must provide independent, adjudicative services in order to both honor the parties' expectations and contribute to the legitimacy of international arbitration. This symposium piece first addresses the expectations of the parties and describes how these contribute to a conception of the proper role of international arbitrators. Second, it describes the adjudicatory functions of international arbitrators and discusses the importance of impartiality. Third, the piece considers potential mechanisms for regulating arbitrator conduct. Finally, it speculates on the future opportunities to promote the integrity of arbitrations and enhance the legitimacy of international arbitration.

I. PARTY EXPECTATIONS

Arbitration is a creature of contract. This means that parties can contract for what they want and expect from their dispute resolution process. Parties articulate minimal expectations about the proper role of arbitrators by picking a specific dispute resolution mechanism. This typically happens when parties choose particular institutional rules, under which arbitrators must exercise their discretion, or subjecting their agreement to national laws, which articulate standards of appropriate arbitrator behavior. Such articulation creates a set


of shared understandings and manages party expectations about the appropriate role of decision-makers.

If parties wish to have a decision-maker who is an expert in a particular industry who exercises commercial judgment but does not engage in legal analysis, they might avoid arbitration entirely and instead choose expert determination.\(^4\) Likewise, if parties do not want neutral adjudicators but instead want partisan arbitrators, they might adopt rules that do not require arbitrator impartiality and independence.\(^5\) In other words, parties who want a commercial decision or partisan decision-making can and should specifically contract do to so.

But these processes are not international arbitration as we know it. The modern reality is that parties do not generally want the open-textured discretion of international arbitration’s past or rampant partisanship of decision-making.\(^6\) Rather, they prefer the outcomes of their disputes to be warranted by a record of arbitration clauses, and specifying procedures to address dispute resolution); Volker Vietchbauer, *Arbitration in Russia*, 29 Stan. J. Int’l L. 355, 434–36 (1993) (discussing the choice between available arbitral institutions and *ad hoc* arbitration in Russia); Michael G. Weisberg, Note, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. Mich. J.L. Ref. 955, 995 (1992) (explaining that a “formal agreement to arbitrate requires a minimum standard of appropriate conduct from the arbitrators in order for the proceeding to be legally valid.”).


and independent legal analysis—with a fair process that justifies the expenditure of significant legal fees on dispute resolution in pursuit of broader commercial objectives.  

II. ARBITRATORS AS ADJUDICATORS

A. The Paradigm Shift

Historically, arbitration awards were not revered so much for their legal analysis, but more for their sense of fairness and industry knowledge. But with the proliferation of alternative dispute resolution, or ADR, mechanisms, international business has become more sophisticated resolution of disputes. Arbitrators are no longer prized for their capacity to reach compromise outcomes, particularly where other ADR mechanisms, such as mediation and negotiation, can achieve this objective more efficiently. Today, businesses use international arbitration to provide a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts, and this in turn promotes the legitimacy of international arbitration.

17. See Rogers, Vocation, supra note 16, at 991–92; see also Bühring-Uhle, supra note 4, at 204–07 (explaining that international businesses need to calculate risks and take decisions in order to reduce their risks and have effective conflict management and noting the concern parties express when arbitrators do not act upon the basis of the record and try to mediate disputes); Delissa A. Ridgway, International Arbitration: The Next Growth Industry, 54-FEB. DISP. RESOL. J. 50, 50–51 (1999) (suggesting that international commercial arbitration is a growth industry because of parties' perceived fairness in the process and the predictability and certainty of the result).


19. See Van Anderson & Biff Sowell, Staying Ahead of the ADR Curve in South Carolina, 16-JUL. S.C. LAW 37, 38 (2004) (observing that “the proliferation of ADR in our system of justice has dictated a more thoughtful approach to dispute resolution” and discussing the obligation of lawyers to counsel their clients on ADR options); see also Bühring-Uhle, supra note 4 at 392–94 (noting international businesses have a variety of dispute resolution options open which can be used dynamically to achieve the best result).


B. Arbitrators Adjudicatory Function

Adjudicators perform common core functions. Adjudication is a decision-making process that permits party participation by submitting evidence and offering reasoned arguments; it requires an adjudicator to render a final and binding decision that is supportable based upon the record and the adjudicator's independent judgment and legal analysis.\(^2\) When adjudication is infected with partiality, it is not based upon reasoned application of applicable legal rules or premised upon the parties' proofs—but rather on a decision-maker's personal relationships, preconceptions, objectives, and interests.\(^3\)

Modern international arbitration requires the objective application of rules to facts and the exercise of bounded discretion to ensure that the process and final outcome is warranted.\(^4\) While parties may pick arbitrators with particular

apply mandatory rules of applicable law as it supports the legitimacy of international arbitration).

22. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982) (referring to adjudicative functions); BLACK'S LAW DICTIONARY (8th ed. 2004) (referring to adjudication as the "legal process of resolving a dispute"); see also Rogers, Standards of Conduct, supra note 18, at 59–60 (describing the adjudicatory function of international arbitrators and the link between impartial adjudication and normative legitimacy); 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, 959–60 (2002) [hereinafter Menkel-Meadow, Ethics] (suggesting arbitrators share the desire to be fair and impartial but arguing that this requires adoption of a standard code of ethics); Rogers, Vocation, supra note 16, at 987 (arguing "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."); but see Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986) (suggesting that the arbitration system is an inferior system of justice "structured without due process, rules of evidence, accountability of judgment and rules of law"); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19–23 (1921) (describing the process of applying precedent to unique legal and factual situations).

23. Rogers, Standards of Conduct, supra note 18, at 69; see also Jules L. Coleman & Brian Leiter, Determinacy, Objectivity and Authority, 142 U. PA. L. REV. 549, 565 (1993) (suggesting 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)).

cultural and legal backgrounds and specific personal experiences, arbitrators also generally have an obligation to disclose those matters that would call into question their independence. Although all humans are inevitably influenced by their experiences, in international arbitration, parties ask arbitrators to put


26. UNCITRAL Arbitration Rules, supra note 24, art. 9 (requiring a “prospective arbitrator shall disclose to those who approach him in connexion [sic] with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence”; ICC RULES, supra note 24, art. 7.2 (requiring a prospective to “disclose in writing to the Secretariat 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”); LCIA RULES, supra note 24, art. 5.3 (requiring an arbitrator to “sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration”); see also U. N. Comm’n on Int’l Trade Law Report, Model Law on International Commercial Arbitration, Annex 1, art. 12, U.N. Doc. A/40/17 (June 21, 1985) [hereinafter UNCITRAL Model Law Report (requiring an arbitrator to “disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence”); English Arbitration Act § 24, 1996 (Eng.), available at, http://www.opsi.gov.uk/acts/acts1996/1996023.htm (last visited Mar. 27, 2006) (permitting courts to remove arbitrators where “circumstances exist that give rise to justifiable doubts as to [their] impartiality”) [hereinafter English Arbitration Act]; International Bar Association, Guidelines on Conflicts of Interest in Int’l Arbitration 7 (2004), available at http://www.ibanet.org/images/downloads/guidelines%20text.pdf (last visited Mar. 12, 2006) (offering a set of non-binding standards that require arbitrator an arbitrator to be objectively independent and impartial and requiring an arbitrator to disclose those matters which “may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence”) [hereinafter IBA GUIDELINES].

27. See generally CHOICES, VALUES AND FRAMES (Daniel Kaneman & Amos Tversky eds., 2000); see also CARDOZO, supra note 22, at 13 (suggesting that humans “may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.”); Rogers, Standards of Care, supra note 18, at 68 (noting that “absolute impartiality is impossible as a matter of cognitive psychology”); Carrie Menkel-Meadow, Taking the Mass out of Mass Torts: Reflections of a Dalkon Shield Arbitrator On Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process, 31 Loy. L.A. L. Rev. 513, 546 (1998) (suggesting “we hold some notion of neutrality, objectivity, or impartiality over our head, like an unreachable halo to remind us of what we need to aspire to, as we work on cases situated before us, where we are grounded in who we are”). But see John Rawls, A THEORY OF JUSTICE 136–50 (1971) (suggesting that it possible to ensure superhuman impartiality by insulating decision makers from their own selfish personal interests but acknowledging this still permits some common human emotions and attitudes to operate behind the veil).
aside biases in order to fairly and impartially exercise their independent judgment and apply their expertise to the facts on the record to render a decision based upon the law.\textsuperscript{28}

\textbf{C. Functional Distinctions Between Arbitrators and Judges}

While the current literature suggests that arbitrators' urge to render neutral and impartial decisions reflects the "judicialization" of arbitration,\textsuperscript{29} arbitrators differ from judges\textsuperscript{30} in fundamental ways.\textsuperscript{31} But these distinctions need not detract from an international arbitrator's obligation to engage in impartial decision-making. Irrespective of whether the decision-maker is a national court judge or an arbitrator, the neutral adjudicative function should be fostered to encourage impartial analysis and decision-making.\textsuperscript{32}

\begin{itemize}
  \item \textsuperscript{30} Judges in different countries differ dramatically. While some may adhere to the rule of law, there are other jurisdictions where this is less likely to be true. Kif Augustine-Adams, \textit{Considering the Rule of Law: A Step Back from Threats and Dangers}, 15-SPG EXPERIENCE 14, 16 (2005); see also Matthew J. Spence, \textit{American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts}, 114 YALE L.J. 1185, 1187–88 (2005) (discussing the lack of adherence to the rule of law in developing countries, such as the Ukraine); Frank K. Upham, \textit{Who Will Find the Defendant If He Stays With His Sheep? Justice In Rural China}, 114 YALE L.J. 1675, 1709 (2005) (noting that "basic court judges in rural China have little in common with the visions dancing in senators' heads when they condition aid on progress toward the rule of law"); Todd J. Zywicki, \textit{The Rule of Law, Freedom, and Prosperity}, 10 SUP. CT. ECON. REV. 1, 2 (2003) (describing how in Eastern Europe "societies have struggled to rediscover the rule of law" and how in "impoverished kleptocracies of Africa, the challenge is even greater and the lack of even embryonic rule of law institutions is stark").
  \item \textsuperscript{32} See Menkel-Meadow, \textit{Ethics}, supra note 22, at 959–60 (recognizing that judges and arbitrators are adjudicators and that "impartiality and neutrality, are a necessary part of maintaining the integrity and legitimacy" of the dispute resolution process); see generally, \textit{IBA GUIDELINES}, supra note 26; Dezalay & Garth, \textit{VIRTUE}, supra note 3.
Conducting a functional analysis of the common adjudicative goals of arbitration and litigation can offer insights about the appropriate role of arbitrators. Judges and arbitrators share certain functional similarities, which relate to the adjudicative nature of their decision-making obligations. Some similarities implicate the nature of the decision-maker's mandate, the independence of adjudication and internal checks on discretion. Other functions implicate their administrative obligations, including effective case-management and providing parties notice and an opportunity to be heard. Irrespective of the external distinctions, these two core functions require both arbitrators and judges to perform their role in a fair, efficient, and impartial manner.

1. Adjudicatory Role

The mandate of arbitrators and judges relates to their jurisdiction and the entities to which they are responsible. There are subtle differences in the mandate of arbitrators and judges. Judges derive their jurisdiction and authority from the state, whereas arbitrators derive their jurisdiction from parties. Nevertheless, the state indirectly sanctions arbitration to the extent national legislation or judicial decisions permit arbitration. These differences are

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33. Such an analysis can create an independent basis of arbitrator impartiality, which in turn "reinforces the normative legitimacy of the international arbitration system." Rogers, Standards of Conduct, supra note 18, at 59-60. This legitimacy encourages states to permit private resolution of important public issues, which might otherwise be resolved by courts and not permitted to be the subject of arbitration. See generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) [hereinafter Franck, POWER OF LEGITIMACY] (referring to various indicators of legitimacy); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) [hereinafter, Franck, FAIRNESS]; Deseree A. Kennedy, Predisposed With Integrity: The Elusive Quest for Justice in Tripartite Arbitrations, 8 GEO. J. LEGAL ETHICS 749, 768 (1995) (suggesting that if adjudication ignores "fundamental judicial precepts of neutrality and impartiality . . . [then] the integrity of the entire process is undermined."); see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633-34 (1985) (holding that anti-trust claims are arbitral and commenting favorably on the independence, impartiality and experience of the international arbitrators involved in the case); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 21 (1991) (permitting the arbitration of RICO claims and declining "to indulge [the] speculation that the parties and the arbitral body will not retain competent, conscientious, and impartial arbitrators, especially when both the [institutional] rules and the FAA protect against biased panels."); see also Commonwealth Coatings Corp. v. Cont'l Cas. Corp., 393 U.S. 145, 151 (commenting favorably on the impartiality and fairness of modern arbitrators) (White, J. concurring).


36. Kennedy, supra note 33, at 768-69; see generally, Richard C. Reuben, Constitutional Gravity:
minor and should not affect an adjudicator's capacity and willingness to render impartial decisions.

Arbitrators and judges also differ as to whom they are ultimately responsible. This distinction implicates both how decision-makers are remunerated and how they are selected. The government collects taxes to pay judges from parties who may or may not be litigants, whereas parties are directly responsible for the remuneration of arbitrators. On its face, a more direct financial relationship might appear to affect the outcome; nevertheless, this need not be the case, particularly where the parties have contracted for decision-makers who are independent and impartial. There are also distinctions related to the appointment process. Judges tend to be randomly assigned to cases, whereas parties have a hand in selecting their decision-makers. Presumably this means that parties using arbitration have a greater control in selecting a decision-maker whose professional, legal, and cultural experiences may predispose them to understanding evidence and arguments in a particular way. It does not, however, necessarily predispose the outcome, particularly where there may be the effect of balancing of such inherent biases by a three-member tribunal.


37. Franck, Liability, supra note 31, at 23.


40. To the extent that parties believe that they have greater control over the process, they are more likely to buy-in psychologically to the dispute resolution process; this in turn is likely to decrease the parties' dissatisfaction with the process and lead to an award that a party is less likely to contest. See Tom R. Tyler, Procedural Fairness and Compliance with the Law, 133 SWISS J. ECON. & STATISTICS 219, 222-27 (1997) (suggesting that compliance with the law is linked to the legitimacy of the authorities and the procedural fairness of administering the law); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 27 (2nd ed. 1981) (observing that if parties "are not involved in the process, they are hardly likely to approve the product" and instead arguing that parties should be given a stake in the process).

41. Judges, just like arbitrators, are human beings with a concomitant set of experiences and predispositions. See supra note 27, and accompanying text (referring to Justice Cardozo's observations about the partiality of judges and human beings).

42. 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, 929 (1998) (suggesting "arbitrators rule on the facts and legal or equitable principles before them, not
There are also distinctions in the checks placed upon judges' and arbitrators' exercise of discretion. Irrespective of the variances in how discretion is restricted, there is a common theme. The discretion of both arbitrators and judges has limitations, and such limitations do not prevent them from impartially and fairly adjudicating disputes.

One way to check the unfettered discretion of decision-makers is through adherence to the rule of law. For example, common law judges are bound by precedent. While arbitrators are not necessarily bound by precedent—nor do they create de jure precedent—adherence to precedent is not an indispensable element in the adherence to the rule of law. Judges in civil and Islamic law countries, for instance, are constrained by rules articulated in the civil code and rely less infrequently on precedent.

Arbitrators are subject to a slightly different check on their discretion; the parties' agreement. More specifically, arbitrators are not only bound by the parties' agreement about the extent of their discretion but they are also bound by the express or implied rules of law the parties have chosen. Where parties bring controlling law and persuasive authority to a tribunal's attention—bound as they are by the parties' agreement as to the scope of their authority—arbitrators can and should neutrally evaluate the relevant case law to render a fair and impartial decision. Adhering to traditional concepts of fair and impartial decision.

on party affiliation" and that the most lawyers "can do is make an educated guess, based on each candidate's professional background, as to who might be more inclined toward a particular perspective.”)


consistent treatment\(^4\) both honors the parties’ agreement and promotes the integrity of an adjudicative system.\(^4\)

Another way to check the discretion of decision-makers is to create a process which reviews their decision. While arbitrators and judges are subject to different review processes, both processes provide an opportunity to evaluate their conduct. Typically, judges’ determinations are judicially reviewable for substantive and procedural errors.\(^4\) In contrast, while some jurisdictions do permit a limited evaluation of the legal merits of a tribunal’s award,\(^4\) the international trend is to review the procedural aspects of an arbitrator’s award.\(^4\)

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47. See Franck, *FAIRNESS*, *supra* note 33 at 41–46 (suggesting that adherence to traditionally accepted norms and approaches is likely to increase the legitimacy of a methodology). Investment treaty arbitration, for example, is struggling with the proper application of law to fact this issue as tribunals are creating a body of *de facto* precedent upon which parties rely in planning their conduct and to which tribunals refer when articulating the bases of their decisions. See Franck, *Inconsistent Decisions*, *supra* note 1, at 1612; Franck, *Bright Future*, *supra* note 46, at 57; see generally Franck, *POWER OF LEGITIMACY*, *supra* note 33.


49. In the United States, for example, courts can vacate arbitral awards where a tribunal “manifestly disregards” the law, specifically where a tribunal correctly states the law and subsequently ignores it. See Wilko v. Swann, 346 U.S. 427, 436–37 (1953) (articulating the “manifest disregard” dictum followed by subsequent courts) overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); see also Howard M. Holtzmann & Donald Francis Donovan, *National Report on the United States, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* 53, 58 (Pieter Sanders & Albert Jan van den Berg eds., 1998) (describing the “non-statutory ground of ‘manifest disregard’ as a basis for vacating an award in the United States”)](#internationalhandbook) [hereinafter INTERNATIONAL HANDBOOK]; see generally Noah Rubins, *Manifest Disregard of the Law* and Vacatur of Arbitral Awards in the United States, 12 AM. REV. INT’L ARB. 363 (2001) (describing the application of “manifest disregard” in various circuits). England also provides for limited review of arbitral awards. English Arbitration Act, *supra* note 26, § 69 (permitting, for example, appeal on a point of law where the appellate court agrees to hear the case, “determination of the question will substantially affect the rights of one or more of the parties” and “the decision of the tribunal on the question is obviously wrong”). But see Robert Briner, *National Report on Switzerland, in INTERNATIONAL HANDBOOK*, infra at 33–35 (noting that “even a clear violation of the law or a manifestly wrong finding of facts are as such not sufficient to constitute” a grounds for setting aside awards); UNCITRAL Model Law, *supra* note 26, arts. 35, 36 (failing to provide appeal on a point of law as a ground for vacatur or denying recognition and enforcement).

50. See Park, *supra* note 20, at 815 (explaining “most legal systems do not impose merits review”).
Procedural review does not prevent a meaningful review of awards, however. Arguably, the various procedural mechanisms can be used as a substitute gauge of the appropriateness of the award. Moreover, arbitrators, like judges, do not like to have their awards annulled, set aside or denied enforcement, and arbitrators tend to exhibit a great deal of care to retain the integrity of the process. Ultimately, this suggests that the review process makes arbitrators and judges functionally similar, and such similarity suggests that arbitrator's should strive to apply the applicable law in a neutrally and fair manner.

2. The Administrative Function

Both judges and arbitrators are being increasingly called upon to manage the dispute resolution process fairly and efficiently. The administration of the dispute resolution processes are different. Judges must adhere to rigid rules of civil procedure and evidence; whereas, subject to party agreement, arbitrators have discretion to articulate the applicable procedures. Nevertheless, both judges and arbitrators should manage the adjudicative process efficiently and fairly. Judges in the United States, for example, often have a great deal of discretion to engage in case management, and typically these decisions are only reversed upon a showing of an abuse of discretion. Arbitrators are held to a

51. Id. at 817.
52. See Guzman, supra note 45, at 1282 (observing arbitrators have an incentive to act properly "in order to develop a reputation as a desirable arbitrator"); Steven Walt, Decision By Division: The Contractarian Structure Of Commercial Arbitration, 51 Rutgers L. Rev. 369, 411-13 (1999) (observing international arbitrators have an incentive to behave impartially and properly in the resolution of disputes lest there be an adverse effect upon their reputation); but see Menkel-Meadow, Ethics, supra note 22, at 956 (suggesting that arbitrators may experience a conflict of interest where they may be repeatedly appointed by one parties and that they "must 'satisfy' or please the choosing parties sufficiently to be chosen again, particularly if the arbitrator is more or less a full time arbitrator who depends exclusively on arbitration for income").
54. Alan Scott Rau & Edward F. Sherman, Tradition and Innovation in International Arbitration Procedure, 30 Tex. Int'l L.J. 89, 90 (1995); see LCIA Rules, supra note 24, art. 22; ICC rules, supra note 24, art. 15; UNCITRAL Rules, supra note 24, art. 15; see also Kennedy, supra note 33 (suggesting that, unlike in arbitration, rules of evidence and procedure in court litigation result in consistent judicial processes and noting the flexibility inherent in arbitration).
55. See generally Garcia, supra note 53.
56. See Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1268-1269 (11th Cir. 2001) (noting a "court is entitled to establish proper pre-trial procedures and set an appropriate pre-trial schedule" and holding "the district court did not ... abuse its discretion" in this case.); State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300, 305 (W. Va. 1996) (holding that the trial court did not abuse its discretion by formulating a trial-management plan to consolidate all pending asbestos premises-liability cases, and
different standard but with a similar objective of facilitating a fair process. Should arbitrators fail to abide by the parties' agreement in conducting the proceedings or exceed their discretion, the award can be set aside or denied enforcement.\textsuperscript{57} While there are critical distinctions between arbitrators and judges,\textsuperscript{58} the differences are not so broad as to prevent either type of adjudicator from evaluating the merits in a neutral manner and managing the process impartially.

III. OPPORTUNITIES TO ADDRESS MISCONDUCT

The formalization of the legal process is a function of international arbitration's impulse to promote the rule of law, recognize their vital role as neutral adjudicators and foster the internal integrity of the process.\textsuperscript{59} Nevertheless, human beings are not perfect. There are a variety of opportunities to address perceived misconduct and offer incentives to ensure that arbitrators maintain an independent and impartial role. These opportunities can occur during the proceedings, after the proceedings and through other informal mechanisms, or "market forces."

A. During the Proceedings

During an arbitration, there are opportunities to challenge arbitrators for inappropriate conduct based upon information—either disclosed or undisclosed stating that "this case is probably the best example of why a trial court should be given broad authority to manage its docket . . .".


\textsuperscript{58} Arbitrators, for example, only have jurisdiction over the parties to an arbitration agreement; they have limited or no authority over non-parties. See, e.g., Jason F. Darnall & Richard Bales, Arbitral Discovery of Non-Parties, 2001 J. DISP. RESOL. 305 (2001) (discussing the split of opinion in U.S. courts over whether arbitrators should be able to order pretrial discovery from non-parties and advocating a broad-power approach). Judges, in contrast, have the authority over parties and non-parties subject to its general jurisdiction.

\textsuperscript{59} Although in the past the flexibility and lack of adherence to precedent has been a strength of arbitration, there is a growing literature to suggest this presumption may no longer be correct—particularly in the international context where users of international arbitration demand more certain and reasoned outcomes. Rogers, Fit and Function, supra note 16, at 366–67; Rogers, Vocation, supra note 16, at 976–80.
—which indicates arbitrators are not acting impartially or independently. Typically, these challenges can either be brought before an arbitral institution and/or a national court. The general trend is to challenge and remove arbitrators where there are circumstances that give rise to justifiable doubts about an arbitrator’s independence or impartiality.

Defining the meaning of “independence” and “impartiality” can be challenging. Arbitral institutions tend not to particularize these standards. The workings of the ICC Court, which evaluates arbitrator challenges, are confidential. National courts also give mixed guidance about the meaning of the phrase. For example, in the United Kingdom, the AT&T v. Saudi Cable case suggested that Yves Fortier’s inadvertent non-disclosure of his role as a non-executive director with one of AT&T’s primary competitors was insufficient to lead to “real danger of bias.” In contrast, the U.S. Supreme Court in Commonwealth Coatings held that inadvertent non-disclosure of a business relationship with a party did create an appearance of bias and partiality.

Some extreme cases do offer some guidance. The infamous case of Challenge to Arbitrators Kashani and Shafeiei involved a physical attack in the Peace Palace against a Swedish arbitrator at the U.S.

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60. See Yu & Shore, supra note 34, at 963; see also ICC RULES, supra note 24, art. 11; LCIA RULES, supra note 24, art. 10; UNCITRAL Arbitration Rules, supra note 24, arts. 10–11; English Arbitration Act, supra note 26, § 24; Swiss Arbitration Law, supra note 57, arts. 179–80; UNCITRAL Model Law, supra note 26, arts. 12–13.

61. ICC RULES, supra note 24, art. 11 (permitting the ICC Court to rule on challenges to arbitrators); LCIA RULES, supra note 24, art. 10 (permitting the ICC Court to remove arbitrators if an arbitrator “dies, falls seriously ill, refuses, or becomes unable or unfit to act” or “if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”); UNCITRAL Arbitration Rules, supra note 24, art. 12 (providing that challenges can be made by appointing authorities); English Arbitration Act, supra note 26, § 24 (providing that a court can remove an arbitrator if where “circumstances exist that give rise to justifiable doubts as to his impartiality”); Swiss Arbitration Law, supra note 57, art. 180(1)(c) (permitting party to challenge of an arbitrator in court where “circumstances exist that give rise to justifiable doubts as to his independence”); UNCITRAL Model Law Report, supra note 26, art. 13 (permitting courts to hear challenges to arbitrators).

62. For a discussion of the arbitrator independence and neutrality and comparison of the U.S. justifiable doubt standard with British real danger standard see generally Yu and Shore supra note 34; Orlandi, supra note 28, at 96–103 (comparing a variety of civil law and common law countries’ conceptions of arbitrator independence and impartiality).

63. See ICC RULES, supra note 24, arts. 7.2–7.3; LCIA RULES, supra note 24, arts. 5.2–5.3; UNCITRAL Arbitration Rules, supra note 24, arts. 6.4, 9.

64. ICC RULES, supra note 24, app. 1, art. 6.


global check for punctuations in abbreviations of US and UK]-Iran Claims Tribunal by two Iranian arbitrators who claimed the neutral arbitrator was "already a corpse" because he had sided with the U.S.67 The removal of the Iranian arbitrators in this case suggests that where conduct "shocks the conscience" and undermines confidence in the integrity of the dispute resolution system, arbitrators will be dismissed.68 But perhaps what shocks the conscience of one legal culture with a strong tradition of the rule of law may be less likely to shock the conscience of someone from a different legal or cultural tradition.

B. After the Proceedings

Immediately after the tribunal renders an award, there are also opportunities to address inappropriate conduct. First, parties can seek to vacate the award at the seat for procedural irregularities.69 But some countries, such as England, provide limited opportunities to review awards for errors of law.70 Second, during enforcement proceedings, parties might use New York Convention grounds to argue arbitrator misconduct should result in the denial of recognition of the award.71

While arbitrators—similar to trial courts—do not like to have their awards vacated or denied enforcement,72 there is also a lack of clarity as to what arbitrator conduct is sufficient to affect the integrity of the award adversely.73

67. Memorandum Re: Challenge to Arbitrators Kashani and Shafeifei by the Government of the United States of America, 7 IRAN U.S.-CL. TRIB. REP. 281, 292 (1986) [hereinafter Memorandum]. One Iranian judge was quoted as saying: "If Mangard ever dares to enter the tribunal chamber again, either his corpse or my corpse will leave it rolling down the stairs." Iranian Judge Threatens A Swede at The Hague, N.Y. TIMES, Sept. 7, 1984, at A5. Subsequently, the Tribunal’s President suspended all tribunal proceedings. U.S.-Iran Arbitration Suspended at The Hague, N.Y. TIMES, Sept. 20, 1984, at A9.

68. See Memorandum, supra note 67, at 296-98.


70. English Arbitration Act, supra note 26, § 69.


72. See David E. Robbins, Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You, 60 APR. DISP. RESOL. J. 99 (2005) (suggesting that “arbitrators are fearful that the courts, when reviewing their conduct, will vacate their awards”); Jack J. Coe, Jr., Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods, 36 VAND. J. TRANSNAT’L L. 1381, 1437 (2003) (indicating that “[w]hen vacatur occurs, the award’s flaws—and by extension, the arbitrators’ missteps—are typically made public, further discouraging ill-considered awards.”).

73. The FAA does articulate general standards as to what conduct is sufficient to lead to vacatur
While it might be useful to have a clearer set of guidelines as to what type of arbitrator misconduct will result in non-recognition or vacatur [you might want to run a global on the term vacatur—it's a term of art and is typically in italics], this will depend on the national law of the courts evaluating the award.74

C. Market Forces

There are three different types of market forces that offer an opportunity to remedy arbitrator misconduct and provide guidance as to the appropriate role of international arbitrators. First, professional reputation and word of mouth in the arbitration marketplace can impact arbitrator conduct. Second, other market-based incentives can create incentives for appropriate behavior. Third, institutional incentives can provide guidance for arbitrator conduct and provide incentives for appropriate conduct and adverse consequences for improper conduct.

1. The Arbitrator Marketplace

The internal arbitrator marketplace, where professional credibility and word-of-mouth recommendations affect appointment and re-appointment of arbitrators, plays a significant role.75 Arbitrators can earn hundreds of
thousands of dollars from a single arbitration and gain personal prestige from having been involved in a significant case. For those "repeat-players," reputation and credibility as a fair, independent, and reasoned decision maker is vital. In multi-million and multi-billion dollar disputes, parties are likely to be unwilling to appoint an arbitrator who is likely to be challenged, who cannot fully consider fully the facts and laws at issue and who may be incapable of rendering an enforceable award.

Newcomers or "one-shot-arbitrators," who may not appreciate or be cognizant of these informal market mechanisms, present a greater challenge. There may also be "toxic" arbitrators who leak confidential tribunal deliberations to parties; and such disclosures may put a party, who may be dissatisfied with the application of the law to the facts, in a position to disrupt proceedings or challenge the award. Incentives beyond mere reputation and word of mouth are therefore necessary to deter inappropriate conduct.

2. Market-based Incentives

Second, market based incentives related to compensation play a role in shaping arbitrator conduct. For example, legislators might pass laws, such as those in Canada or South Africa, which prevent arbitrators from receiving remuneration where the have been removed for improper conduct. Likewise, arbitrators might be held personally liable for damages related to a failure to adjudicate disputes impartially and independently.

Particularly for toxic arbitrators, such financial incentives may be necessary to encourage proper execution of their arbitral mandate. Whether the

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76. See generally John Y. Gotanda, Setting Arbitrators' Fees: An International Survey, 33 Vand. J. TRANSNAT'L L. 779 (2000); see also Garcia, supra note 53, at 352–53 (describing the compensation of arbitrators as "generous" and noting, in the context of investment arbitration, that arbitrators can be paid US $2,400 per day and referring to the prestige that accrues from sitting on an international arbitration panel); Guzman, supra note 45, at 1302–03 (noting that "arbitrators perform their function for private gain [can be] solely financial or a combination of financial compensation, prestige, and influence over events . . . ").

77. In one case, an arbitrator "unleashed his own wave of vituperative in what can only be described as a scathing dissent. In it, he broadly accuses the other two arbitrators—including a former President of the International Court of Justice, Judge Stephen M. Schwebel—of unethical conduct, including bias, and secretly colluding with one another and discriminating against him in a manner which deprived him of his opportunity to duly participate in the deliberations and preparation of the award." Garcia, supra note 53, at 351. This lead to a challenge of the award in the Svea Appellate Court in Stockholm where Judge Schwebel and the other two arbitrators provided testimony in court about the deliberations and the allegations of arbitrator misconduct; the challenge was dismissed. Id.; see also Czech Republic v. CME Czech Republic B.V., 42 I.L.M. 919 (Svea Ct. App. 2003) (Swed.).


79. See generally Id.; Guzman, supra note 45.
remedy is either in tort or contract, personal liability in appropriate circumstances can provide an incentive for arbitrators to perform their adjudicatory function independently and not take steps to disrupt the proceedings or make it impracticable to carry out their own mandate.

3. Institutional Incentives

Finally, institutions can play a role in creating incentives for appropriate conduct. For example, arbitral institutions can also play a market-based role in by removing arbitrators from their lists—or refusing to confirm arbitrators—who have violated specific ethical obligations. The AAA already takes this type of measure. Likewise, professional organizations might consider imposing sanctions against arbitrators who, in the past, have engaged in inappropriate conduct. In Ex Parte Armstrong, where an arbitrator had engaged in inappropriate conduct that did not rise to the level of “professional misconduct,” an English court permitted the Chartered Institute of Arbitrators to require the arbitrator to submit all his decisions to the Chartered Institute in advance. Actions from institutions can therefore provide significant guidance as to the appropriate role for arbitrators and sanctions for non-compliance.

IV. THE FUTURE ROLE OF ARBITRATORS

Thomas Franck once wrote that having decision makers who are perceived to be legitimate enhances the legitimacy of the dispute resolution system. The
integrity and the legitimacy of international arbitration therefore depends, in large part, upon the perceived integrity of arbitrators as well as their independence and impartiality.

As the number of disputes continues to increase and the pool of arbitrators has continued to expand, the role of arbitrators has evolved. No longer are arbitrators a select pool of "grand old men" or a "gentlemen's club" made up of those individuals with a close connection to a particular area of laws, a relationship to the parties and perhaps with pre-existing knowledge of a dispute whose independence was founded upon the notion of a personal sense of duty and honor.\(^{85}\) The intimacy and limited size that are typical prerequisites for informal social controls in the international arbitration community has given way to a host of other pressures brought by its growth and expansion.\(^{86}\) Today, international commercial arbitrators have transformed themselves into a group of technocrats who are experts in arbitration procedure and theory.\(^{87}\)

As the constituency of international arbitration has grown, there have been shifts in what is expected of arbitrators; not just by the parties but perhaps by arbitrators themselves, who come from an increasingly diverse group who may have different assumptions of what constitutes proper conduct.\(^{88}\)

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86. Rogers, Standards of Conduct, supra note 18, at 61–62; Dezaly & Garth, Virtue, supra note 3, at 36–38.

87. Dezaly & Garth, Virtue, supra note 3, at 36 (describing the shift from "grand old men" to technocrats and referring to interviews where people said the grand old man are "probably just more full of themselves than other people and the new generation of arbitration specialists are "technically better equipped in procedure and substance"); Menkel-Meadow, Ethics, supra note 22, at 958–59 (describing the shift away from grand old men to a technocratic, litigation oriented and ethically trained generation).

International Business Association (the "IBA") Guidelines on Conflicts of Interest are a very useful starting place. Scholars, arbitrators, lawyers and parties should continue to evaluate their impact particularly as the IBA conducts its own analysis of the Guidelines' utility and courts throughout the world are beginning to use them to evaluate arbitrator behavior and misconduct.

As the international arbitration constituency continues to expand arbitrators should give into their impulse to professionalize the services they render. By seeking out opportunities to enhance their independence and impartiality, this will benefit the integrity of international arbitration by confirming the neutrality and fairness of the underlying process.

One might consider whether the time has come for parties to incorporate more particularized rules about independence directly into their arbitration agreements. This will permit the parties to set their common expectations and will put potential arbitrators on notice as to the manner in which the parties expect the arbitration process to be managed. This is precisely why the AAA and the Milan Chamber of Commerce have articulated ethical standards, which are incorporated in the arbitrator's mandate. By clarifying an arbitrator's role.

89. See generally, IBA GUIDELINES, supra note 26.

90. E-mail from Mark Kantor to Susan Franck, Dec. 14, 2005 (on file with author).


92. See supra notes 32, 33 (referring to the legitimacy gained by having neutral and independent adjudicators).

93. Rogers, Standards of Conduct, supra note 18, at 72–73, 111; see also See Hans Smit, A-National Arbitration, 63 TUL. L. REV. 629, 631 (1989) (proposing language by which ethical codes can be incorporated into the arbitration agreement via reference to some national body of law); Dr. lur. Oliver Dillenz, Drafting International Commercial Arbitration Clauses, 21 SUFFOLK TRANSNAT'L L. REV. 221, 250n.71 (proposing contract language for parties to incorporate the International Bar Association, Ethics for International Arbitrators in their agreements). In the absence of such party agreement, U.S. courts hesitate to impose arbitrator codes of conduct. See, e.g., ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493, 502 (4th Cir. 1999) (concluding that there was no basis for setting aside awards based on nondisclosure because there were no applicable rules requiring disclosure); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996) (concluding that there is no source for any such generalized duty in the absence of expressly applicable codes).

94. MILAN CHAMBER OF COMMERCE, INTERNATIONAL ARBITRATION RULES, CODE OF ETHICS OF ARBITRATORS arts. 1, 13 (2004), available at http://www.jus.uio.no/lm/milan.chamber.of.commerce.international.arbitration.rules.2004/toc (last visited Dec. 14, 2005) (requiring acceptance of the code as a condition of appointment and permitting dismissal of the arbitrator as a penalty for noncompliance with the code); see generally AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN
in this fashion, institutions decrease the need for arbitrators to negotiate their professional obligations directly with the parties, which might otherwise create an adversarial relationship with the potential to set up a basis for challenging the arbitrator or eradicate the parties' trust in the arbitrator(s).

While not as advanced as the approach of the AAA and Milan, the ICC and even recent proposals for ICSID\textsuperscript{95} suggest another way to manage—namely by having arbitrators sign confirmations that they have continuing obligations to remain impartial and independent. Particularly for parties who are engaging in international arbitration for the first time, expanding and clarifying the expected code of conduct for arbitrators will undoubtedly decrease misperceptions and misunderstandings amongst parties, lawyers, and arbitrators.

V. CONCLUSION

Fostering the legitimacy of arbitrators is critical.\textsuperscript{96} They are the guardians of a system that is imperative for the flourishing of international trade and investment. Setting clear and reliable expectations about arbitrators' proper role will help promote the legitimacy of a system with a critical impact on the global economy.

Parties, arbitrators, and institutions should appreciate the respect to be gained by engaging in independent decision-making. They should therefore articulate clearly what conduct is expected of international arbitrators and provide incentives to avoid inappropriate conduct. In this way we can further arbitration's ultimate justice-promoting objectives and promote the integrity of a dispute resolution mechanism with critical international implications.

\textsuperscript{95} Recent proposals at ICSID would require arbitrators to sign the following statement: Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.