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Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration

CATHERINE A. ROGERS*

The continued success of the modern international arbitration system depends on the willingness of nation-states to cede control over the substantive outcomes of international economic disputes while lending their support to the enforcement of arbitral agreements and awards.1 States are willing to relinquish control in the international arbitration arena because they have an economic interest in facilitating effective resolution of transnational economic disputes,2 and because international arbitration has proven far more effective

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An earlier version of this Article was presented to various faculties during the AALS recruitment process and at the 2001 Stanford-Yale Junior Faculty Forum (under the title Between Cultural Boundaries and Legal Traditions: Ethics in International Arbitration) and at the 2002 SEAALS Conference, where it received helpful comments, particularly those from Kristen Carpenter, Thomas Heller, Michael Trebilecek, Keith Hylton, Judith Resnik and Kent Syverud. My work was supported by a generous research grant from LSU, and the excellent assistance of Christina Hood and George Jacobson. This Article, together with its companion article Fit and Function, was awarded the 20th Annual CPR Professional Article Award for 2002.

1 The focus of this Article is international commercial arbitration. Arbitration of what are considered traditionally “public international law” issues (e.g., border disputes) may require a different approach because the nature of representation in those disputes and the mechanisms for enforcing awards differ in important ways from international commercial arbitration. For a description of the particulars of legal representation of states before the International Court of Justice (“ICJ”) and the emphasis on nationality as a professional criterion in representation of nation-states in international adjudication, see Kurt Taylor Gaubatz & Matthew MacArthur, How International Is ‘International’ Law?, 22 MICh. J. INT’L L. 239, 248-49, 264-66 (2001).

than national courts at resolving those disputes. The question that looms large over the future of international arbitration is: How much should states yield to the international arbitration system? This Article attempts to answer the question as it applies to the specific context of regulating attorney conduct.

In a companion article, I exposed the complete absence of ethical guidance and regulation in international arbitration and attendant problems. Because international arbitration is intentionally disassociated from sovereigns, there is no obvious source for regulating participating attorneys. The host state, in which the arbitration takes place, is assigned a relatively passive role that does not include the ethical regulation of attorneys. Additionally, it is doubtful that the ethical regulations of an attorney's home state apply in an international arbitration. Even if such regulations do apply, each counsel is bound by different home state regulations that are likely to impose different ethical obligations. Therefore, attorneys in an international arbitration are either each abiding by different and often conflicting national ethical rules, or are engaging in a completely unregulated ethical free-for-all.

Historically, this absence of formal regulation was not problematic, and even went unnoticed. The international arbitration community was comprised of a small, intimate group of practitioners who enjoyed a tacit understanding of what constituted appropriate conduct in that context. However, as the field of international lawyers has expanded in both number and in the variety of cultural backgrounds, informal social norms can no longer provide either adequate guidance or control in the face of increasing conflicts.

Even if international arbitration is a resilient institution, the absence of ethical consensus or regulation is increasingly disrupting arbitral proceedings. For example, a party may discover halfway through proceedings that, contrary to its own practices, the other party has been engaging in ex parte communication with its party-appointed arbitrator (even about such matters as case strategy) or in pretestimonial communications with witnesses (a practice
forbidden in most civil law jurisdictions). Compounding these problems, arbitrators who are unaware of parties' disparate ethical traditions may unfairly discredit one party's presentation of its case based on perceived misconduct.9 Alternatively, those arbitrators who might attempt to resolve the ethical collisions on an ad hoc basis risk disrupting the parties' settled expectations, if not their nationally established procedural rights. In response to these and other problems, I proposed in a companion article a methodology for developing the substantive content of ethical rules for international arbitration.10

Even with a methodological vehicle, however, important questions remain: Who is going to undertake the task of developing the specific content of the needed rules, and how are they going to be made binding and enforceable on attorneys in international arbitration? There are no obvious answers. No supranational bar association exists.11 Local bar associations have expressly disavowed authority to regulate attorney conduct in international arbitration, and they have generally proven inadequate when called to the task of

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8 In some civil law countries, pretestimonial communication with a witness would not only be unethical, but would also expose an attorney to criminal sanctions. In contrast, several U.S. sources opine that failure to engage in such communication constitutes an ethical breach for a U.S. attorney. Compare Mirjan Darnashka, Presentation of Evidence and Facilitating Precision, 123 U. PA. L. REV. 1083, 1088-89 (1975) (explaining that, under the civilian model, "the parties are not supposed to try to affect, let alone prepare, the witnesses' testimony at trial. 'Coaching' witnesses comes dangerously close to various criminal offenses of interfering with the administration of justice."), and John H. Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 834 (1985) (explaining that under German law, a lawyer almost never has any contact with witnesses outside of court), with In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998) (characterizing witness preparation as an "ethical" obligation incumbent on attorneys), and D.C. Bar Op. 79 (1979), reprinted in D.C. BAR, CODE OF PROFESSIONAL RESPONSIBILITY AND OPINIONS OF THE D.C. BAR LEGAL ETHICS COMM. 138, 139 (1991) (stating that an attorney who had the opportunity to prepare a witness, but failed to do so would not be properly fulfilling professional obligations). For an expanded discussion of these differences and their consequences in international arbitration, see Rogers, supra note 4, at 359-62, 376 & nn.172-73, and Vagts, supra note 5, at 260 (identifying differing rules regarding witness contact as a recurring problem in international arbitration).

9 For example, arbitrators from civil law systems in which pretestimonial witness communication is not permitted may discount or disregard testimony from witnesses who have discussed the facts of the case with an attorney from a common law system. Similarly, two arbitrators on a panel may ostracize a third arbitrator if they discover that the party was engaged in ex parte communications with her appointing party. See Rogers, supra note 4, at 376.

10 Rogers, supra note 4, at 379-388.

11 The only possible candidate is the International Bar Association ("IBA"), which is a federation of national bar associations and law societies. Despite its name, the IBA cannot accurately be understood as a supranational regulatory authority because it is not a licensing body that can impose any penalties for noncompliance. 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, 1158-59 (1999).

12 In the United States, only a few states have attempted to make their ethical rules directly applicable in arbitration. E.g., N.Y. JUDICIARY LAW (APPENDIX: CODE OF PROFESSIONAL RESPONSIBILITY) § 1200.1(f) (LEXIS through Nov. 2002 Sess.) (defining "tribunal" to include arbitrators). In addition, states have explicitly exempted international arbitration from otherwise applicable restrictions on practice. Ronald A. Brand, Professional Responsibility in a Transnational Transactions Practice, 17 J.L. & COM. 301, 334-35 (1998) (noting that notwithstanding the applicability of state ethical rules to state-licensed attorneys, several bar opinions permit parties to international arbitration to be represented by non-state-licensed attorneys). This hands-off approach to international arbitration is part of the larger deference of national bar associations to international practice. For a more detailed explanation of this phenomenon, see infra notes 131-137, 173-177 and accompanying text.
regulating attorneys in other international settings. National courts are intentionally cordoned off from arbitral decisionmaking and therefore also fail to regulate attorney conduct. Finally, it is unlikely that arbitrators currently have the authority to impose sanctions for attorney misconduct.

In the absence of any obvious candidates, and without the benefit of preexisting regulatory structures, the project must be one of construction. This Article provides a blueprint for an enforcement regime that would consign primary promulgation and enforcement functions to the international arbitration system itself. Under my proposal, arbitral decisionmakers and institutions will be allocated the most immediate regulatory tasks. The ultimate aim of my proposal, however, is to balance allocation of the various enforcement tasks among arbitral decisionmakers and institutions, national courts, and bar associations in a manner that supports and reinforces the structure of the international arbitration system while providing efficient and effective enforcement.

I begin in Part I by outlining a theoretical model based on a framework proposed by U.S. legal process scholars to analyze domestic attorney regulation. The model assigns regulatory responsibilities based on the relative competence of particular institutions in performing designated tasks, subject to the condition that such assignment is compatible with the normative structure of the system, which in this case is the international arbitration system. Since the model requires consideration both of the comparative institutional competencies of various components and the normative goals of the international arbitration system, I provide an overview of the constitutional structure of the international arbitration system. Although I ultimately propose in Part II that national institutions should not act as primary regulators, nations states retain an interest in regulation of the behavior of lawyers who are licensed in their jurisdictions and whose work affects the rights and obligations of their citizens. Because these residual interests must be taken into account in the proposed regime, I examine their nature and extent in the final section of Part I.

13 See, e.g., IVO G. CAYTAS, TRANSNATIONAL LEGAL PRACTICE: CONFLICTS IN PROFESSIONAL RESPONSIBILITY 3 (1992) ("[I]t is fairly rare that misconduct 'abroad' results in all too serious consequences 'at home' (examples notwithstanding) .... [S]anctions remain essentially local."); Brand, supra note 12, at 302–03 (noting that regulation of the profession "remains local in both scope and administration, often providing little guidance").

14 Extensive debate has centered on whether there is any such thing as an international legal system. Compare H.L.A. HART, THE CONCEPT OF LAW 79–99 (2d ed. 1994) (contending that international law lacks the secondary rules of recognition, adjudication, and change necessary to constitute a legal system), with Pierre-Marie Dupuy, The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, 31 N.Y.U. J. INT’L L. & POL. 791, 793–94 (1999) (challenging Hart’s analysis and concluding that there is an international legal system). See generally JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 1–2 (1970) (describing the problems of existence, identity, structure, and content that must be addressed in a complete theory of what constitutes a legal system). For the purpose of developing international ethical norms, it is not necessary to weigh in on this debate, or to contemplate whether international commercial arbitration might constitute a subsystem, its own legal system, or multiple legal systems. To avoid confusion, I use the term “system,” rather than “legal system,” to refer to the intricate network of governmental, intergovernmental, and private institutions, along with the national laws and international agreements, that facilitate the practice of international commercial arbitration. See W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 9–10 (1992) (noting that “national systems involve an interaction between international agreements expressing mandatory international control policies and national legislative instruments which operate in tandem with the international agreements”).
Based on the context, institutional structures, and limitations outlined in Part I, in Part II I undertake the constructive project of mapping a regime for integrating professional discipline mechanisms into the international commercial arbitration system. I propose integrating ethical norms into the existing bodies of arbitral rules, making arbitral institutions promulgators and implementers of ethical rules. This approach will make the application of ethical rules the product of party agreement and subject to party modification. Enforcement of these ethical rules would require empowering arbitrators to impose what I will call sanction awards, in which they would explain the nature of the violation. Attorneys would be personally subject to this new arbitrator power. To effectuate these new powers and liabilities, I propose that sanction awards be published and that national court review of such awards be enhanced.

Under this regime, the general ethical rules laid out in codes will be developed and amplified through a body of arbitral jurisprudence that is subject to partial review by national courts. National institutions will provide the power and safeguards necessary to ensure that the sanctioning of attorneys is both effective and fair. Moreover, these institutions will be able to protect their national interests in attorney regulation through enforcement of fundamental limitations on the power to modify arbitral ethical codes.

Because the proposed enforcement regime appears to privatize ethical rulemaking and contemplates significant new powers for arbitrators, it implicates deeper concerns about the limits of private adjudication and the government monopoly on rulemaking in the realm of professional legal ethics. While it is beyond the project of any single article to explore the full scope of these concerns, I respond in Part III to the most significant substantive objections. The inevitable future debate on these issues will determine how the remaining symbolic objections will be resolved and whether states will relinquish control in this area. Such cooperation from states is necessary to ensure the continued vitality of international commercial arbitration and to respond to the inescapable need for attorney regulation in this context.

I. A CONSTRUCTIVE MODEL FOR DEVELOPING A REGULATORY REGIME TAILORED TO THE STRUCTURE OF THE INTERNATIONAL ARBITRATION SYSTEM

Even within the confines of the U.S. legal system, there is extensive debate among legal ethicists about the appropriate mechanisms and sources of attorney discipline. As specialization in the legal profession has rendered the

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15 See infra Part II.A-B. The most prominent arbitral institutions are the International Chamber of Commerce ("ICC") in Paris, the American Arbitration Association ("AAA") in New York, the London Court of International Arbitration ("LCIA"), and the Stockholm Chamber of Commerce ("SCC"). REISMAN, supra note 14, at 107. In addition, there are a number of newer institutions worth noting, such as the Chamber of National and International Arbitration of Milan, the Venice Court of National and International Arbitration, and the Chinese International Economic and Trade Arbitration Center. As an alternative to institutional arbitration, the United Nations Commission on International Trade Law ("UNCITRAL") has published rules for use in noninstitutional or ad hoc arbitration.
traditional, monolithic model of legal ethics obsolete, no clear consensus has emerged about how the various facets of attorney functions should be regulated. A growing movement towards specificity and contextualization has been observed and advocated, but also resisted and protested against. In his path-breaking article with the deceptively simple title, Who Should Regulate Lawyers?, David Wilkins develops a framework for understanding and evaluating this debate. Although he developed this framework for the U.S. legal profession, Wilkins' analytic model can translate into a prescriptive model for developing a regime for enforcing attorney ethics in other contexts such as international arbitration. I undertake this translation in Part I.A, so that the definitional tools Wilkins provides can be used in later sections to evaluate the proposed enforcement regime in comparison to other possible alternatives. In Part I.B, I develop an account of the international arbitration system, describing the allocation of power among and the relative institutional competencies of the various institutions involved. Finally, in Part I.C, I provide a detailed examination of the national interests implicated in regulation of attorneys in international arbitration, which must be satisfied if nation-states are to be persuaded to relinquish control in this area.

A. A Model for Prescribing an Enforcement Regime

Before developing a prescriptive proposal for regulating attorneys in the international arbitration system, it is necessary to inventory the range of possible options and to develop a methodology for choosing among them. Wilkins identifies four paradigmatic models of enforcement mechanisms and the two types of arguments most often invoked to support or critique each model. This Part will provide a brief overview of Wilkins' theory and terminology and will explain how his conceptual model translates into the international context. Later, in Part II, I employ Wilkins' terms and insights to evaluate the proposed enforcement regime relative to potential alternatives.

Wilkins describes four types of enforcement mechanisms in the U.S. context: disciplinary controls, liability controls, institutional controls, and legislative controls. Disciplinary controls refer to traditional mechanisms

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16 David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye, Scholer, 66 S. CAL. L. REV. 1147, 1151 (1993) (rejecting as outdated the "nineteenth-century image of a homogenous collection of practitioners whose skills and circumstances are functionally interchangeable").

17 See, e.g., MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 8–12 (1994) (arguing that different professional environments develop distinct conceptions of "legal professionalism"); Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in LAWYERS' IDEALS/LAWYERS' PRACTICES 177, 179–180 (Robert L. Nelson et al. eds., 1992) (arguing that professional legal values are developed in the "arenas" in which they are produced); Geoffrey C. Hazard, Jr., My Station As a Lawyer, 6 GA. ST. U. L. REV. 1, 7–9 (1989) (arguing that a lawyer's ethical obligations derive from the unique requirements of his or her "station"); DAVID LUBAN, LAWYERS AND JUSTICE: AN EMPIRICAL STUDY 126–27 (1988) (critiquing contextualist claims from the perspective of moral agency); Martha Minow & Elizabeth Spelman, In Context, 63 S. CAL. L. REV. 1597, 1597–1601 (1990) (raising the problem of how to determine which contextual factors are relevant for which purposes).

18 David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 801 (1992) [hereinafter Wilkins, Who Should Regulate]. The influence of Wilkins' work can be appreciated not only for how often it is cited, but also for how many other scholars it has inspired. For an entire symposium dedicated to exploring its implications, see Symposium, Institutional Choices in the Regulation of Lawyers, 65 FORDHAM L. REV. 33 (1996).

19 Wilkins, Who Should Regulate, supra note 18, at 805–09.
imposed by local bar associations; liability controls refer to malpractice claims; institutional controls refer to mechanisms that exist within the institutions in which attorneys operate (i.e., judicial or administrative sanctions); and legislative controls refer to statutory obligations imposed on lawyers, which supplement but are separate from their bar-imposed ethical obligations. In translating these categories into the international setting, the number of options multiplies both horizontally and vertically. Horizontally, attorneys may be subject to multiple and overlapping national controls because multiple states have an interest in and jurisdiction over the same conduct of an individual attorney. Vertically, in addition to national mechanisms, there can be international enforcement mechanisms, which become attractive options in response to the multiplicity of potentially conflicting national sources of regulation.

To decide among the possible alternatives, Wilkins identifies two types of arguments invoked by supporters and critics: compliance arguments and independence arguments. Compliance arguments are "efficiency claims about the costs and benefits of a particular enforcement strategy . . . ." These arguments focus on evaluating the relative competence of various institutions in obtaining attorney compliance through substantive rules. Wilkins notes that, in recent years, compliance arguments have promoted a trend toward the contextualization of enforcement because proximate institutions have advantages in their ability to directly observe attorney conduct and to fashion appropriate remedies. This is the argument invoked by supporters of Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), which empowers trial judges to monitor and control attorney misconduct in litigation. In the international arbitration setting, contextualization means developing and introducing enforcement mechanisms that can operate within the arbitral proceedings, and in particular permitting arbitrators to perform a role similar to judges under Rule 11.

Independence arguments are essentially a claim that regulations must fit with the institutional structures of the system in which they operate. In the domestic U.S. context, self-regulation by bar associations is defended as necessary for attorneys to maintain independence from the state, which presumably enables them to better protect the individual rights of clients.

20 As described in more detail below, under traditional theories of prescriptive jurisdiction, several nation-states may have jurisdiction over particular attorney conduct. See infra note 109 and accompanying text.

21 See Wilkins, Who Should Regulate, supra note 18, at 805–814. Wilkins also identifies a third set that he classifies as "content arguments," which he cabins off from his primary discussion of enforcement issues. Although Wilkins later acknowledged the potential costs and difficulties of cordoning off the debate about content that often underlies alternative enforcement mechanisms, separation avoids the more perilous problems that arise when content and compliance arguments are conflated. David B. Wilkins, How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation, 65 FORDHAM L. REV. 465, 468–69 (1996) [hereinafter Wilkins, How Should We Determine].

22 Wilkins, Who Should Regulate, supra note 18, at 804.

23 Id. at 819–820.

24 Id. at 812; see also FED. R. CIV. P. 11.

25 See infra Part II.
against state power. Judicial power to regulate attorneys, and reciprocal limitations on legislative or executive power, are defended on similar constitutional structure arguments tied to separation of powers principles. Thus, independence arguments are ultimately claims that enforcement mechanisms must be consistent with the constitutional structure of the U.S. system. As will be described in more detail in the following section, in the arbitration setting there is an analogous, if somewhat distinct, concern that lawyers be independent, not so much from particular branches of a particular government, but independent from all national governments.

The final area in which Wilkins’ framework provides a means for critiquing the proposed enforcement regime is in his classification of the types of attorney misconduct that regulation seeks to prevent. Identifying the nature of potential misconduct can aid in identifying the most effective mechanisms for regulating against such misconduct.

Wilkins divides potential misconduct into two general categories: agency problems, meaning conduct that injures clients, and externality problems, meaning conduct that imposes unjustified harms on third parties or the legal framework. As Wilkins explains, certain types of enforcement mechanisms are more effective at controlling certain types of misconduct. For example, systems that depend on voluntary client or lawyer reporting are unlikely to effectively control for externality problems because there are no tangible rewards for lawyers, and clients are unlikely to report strategic behavior taken on their behalf. On the other hand, what Wilkins refers to as “situational monitoring” by both adversaries and judges can be very effective at controlling strategic behavior in an adjudicatory context. This added effectiveness comes from the fact that they enjoy certain informational advantages (e.g., they

26 Cf. Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1482–84 (1966) (defending notion of attorney independence on the ground that it is necessary to individual liberty and other liberal democratic values). Notably, one of the objections to the contextualization of attorney regulation is based on what Wilkins refers to as “the traditional model’s facade of universality” in the lawyer’s role. Wilkins, How Should We Determine, supra note 21, at 483. While Wilkins has elsewhere effectively dismantled the assertion of universality within the U.S. legal profession, once outside the context of the U.S. legal culture, claims about the universality of attorneys’ roles become even more attenuated. Id. Although independence is often regarded as a universal feature of attorneys, it has a distinct meaning in various countries. In many European civil law countries, attorneys have semiofficial status. This implies that they are collaborators with, rather than independent from, the government. Rogers, supra note 4, at 365–66. This status is sometimes even made explicit, as in Germany, where attorneys are part of öffentliche Rechtsprech, a concept of administration of law, and in Greece, where the “Lawyers’ Code” characterizes lawyers as “unsalaried Public Servants.” Id. at 389.

27 As Professors Wolfram and Wilkins explain, there are essentially two types of separation of powers arguments: one arguing that, even in the absence of legislative authorization, courts have an inherent power to sanction attorneys; and the second arguing that courts should have the exclusive power to discipline lawyers. Wilkins, Who Should Regulate, supra note 18, at 855; Charles W. Wolfram, Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine, 12 U. Ark. Little Rock L. Rev. 1, 4, 6 (1989–90); see also Stephen L. Pepper, The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613, 617 (explaining that, for lawyers to uphold their moral responsibility to facilitate moral client conduct, they must submit to judicial restraint). At an even more basic level, some argue that the right of citizens in a democracy to access public institutions for their private purposes requires that attorneys who facilitate this access remain independent from those public institutions. Wilkins, Who Should Regulate, supra note 18, at 859–860.

28 Wilkins, Who Should Regulate, supra note 18, at 819–820.

29 Id. at 823–24.
witness the conduct at issue) and have a stake in the proper functioning of the process.\textsuperscript{30}

With respect to international arbitration, the clients are virtually all corporate clients who are less likely to be victimized\textsuperscript{31} and who are well-positioned to employ their own sanctions in the form of reduced future employment.\textsuperscript{32} Therefore, corporate clients are less likely to resort to formal disciplinary institutions. Moreover, because the international arbitration system is an adversarial, advocacy context, the types of misconduct that are most likely to occur are behaviors that are not effectively regulated by bar associations. As Wilkins points out, traditional disciplinary controls are not particularly effective for regulating conduct in an advocacy setting, even in the domestic context where bar associations are more proximate.\textsuperscript{33} Together, these observations diminish the appeal of invoking national bar associations to regulate attorney conduct in international arbitration and foreshadow the need for contextualized regulation within the international arbitration system.

While several scholars have presumed that professional regulation at a global level is inevitable,\textsuperscript{34} none have focused on the unique problems that arise in the context of international adjudication, let alone on the more particularized problems that arise in the context of international arbitration.\textsuperscript{35} Regulation at the international level raises the same questions that come up in debates over domestic regulation, but with complexities added by the presence of multiple national actors and the international layer on top of the competing national institutions. Wilkins' conceptual analysis provides a model for resolving these tensions. Under his model, regulatory power should be assigned to the institutions most likely to secure compliance and to lower the

\textsuperscript{30} Id. at 835-37.
\textsuperscript{31} Id. at 824-25.
\textsuperscript{32} Id. at 827-28.
\textsuperscript{33} Id. at 823-24.
\textsuperscript{35} Several scholars have noted the unique problems that arise in international adjudication. E.g., Daly, supra note 11, at 1154 n.184 (1999) (describing ethical conflicts in the International Criminal Tribunal for the Former Yugoslavia ("ICTY"); Vagts, supra note 5, at 250 (describing problems in the Iran Claims Tribunal caused by lack of ethical consensus among attorneys). Only one article to date has directly addressed the issue of ethics in international arbitration, but with more of an aim to raising questions than resolving them. Mark P. Zimmett, Ethics in International Commercial Litigation and Arbitration, 670 PLI/Lit. 475 (2000) (raising questions regarding the risks and challenges inherent in international litigation and arbitration); cf Peter C. Thomas, Disqualifying Lawyers in Arbitrations: Do the Arbitrators Play Any Proper Role?, 1 AM. REV. INT'L ARB. 562, 580-87 (1990) (addressing related procedural issues of attorney disqualification in arbitration proceedings, but disclaiming any attempt to encompass ethical regulation). Most work regarding ethics in international arbitration has addressed the ethical obligations of arbitrators. See, e.g., Chiara Giovannucci Orlandi, Ethics for International Arbitrators, 67 UMKC L. REV. 93 (1998) (discussing the impartiality of arbitrators within the larger context of arbitral deontology). While most often framed as a matter of ethics, the professional conduct of arbitrators raises related, but inherently distinct, questions about the nature of adjudication and the concept of an impartial adjudicator.
costs of enforcement for the types of misconduct encountered in that setting. This prescription is subject to the condition that such assignments are consistent with the normative limitations imposed on a lawyer's role by the larger legal structure.

**B. The International Arbitration System**

Because application of Wilkins' model requires that enforcement mechanisms fit within the institutional structure of the system that they regulate, it is necessary to provide an overview of the structure of international arbitration. To date, only limited work has been done to develop a comprehensive theory of international arbitration as a distinct adjudicatory system. While developing such a comprehensive theory is beyond the scope of this Article, a basic theory of the international arbitration system will both provide background for later discussion of the various institutions and establish the normative goals that should guide and constrain efforts to choose from various regulatory options.

The goals of an international arbitration system can be summarized in three critical and interrelated principles: neutrality, effectiveness, and party autonomy. In this Part, I address each of these goals in turn and describe how they form the cornerstones of the international arbitration system. Evaluation of the enforcement regime proposed in Part II will entail evaluating how well the proposed regime advances the general goals of the international arbitration system, and how well the proposed regime fits with the institutional structure developed to serve those goals.

1. **Neutrality**

The primary accomplishment of international commercial arbitration is that it ensures neutrality. International arbitration allows parties to insulate themselves from the potentially biased national courts of their business-partners-turned-adversaries. For example, the New York Convention requires

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36 Although some important works have approached international arbitration from a theoretical perspective, they have focused on particular problems instead of on providing a more general theory of the international arbitration system. E.g., W. Michael Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards 129–130 (1991) (examining the problem of how to control the authority of the arbitral tribunal); McConnaughay, supra note 2, at 477 & nn.96–98 (noting scholarly debate over source of arbitral power). But see Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 354–56 (1978) (acknowledging international arbitration as a form of adjudication, but focusing theory on traditional adjudication). See generally Richard Reuben, Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice, 47 UCLA L. Rev. 949 (2000) (focusing on the constitutional procedural protections available and required in various forms of alternative dispute resolution, including international arbitration).

37 In addition to its neutrality and effectiveness, international arbitration has been extolled for a host of other reasons, including reduced cost, speed, and confidentiality. James T. Peter, Med-Arb in International Arbitration, 8 Am. Rev. Int’l Arb. 83, 86 (1997). Experience has taught, however, that international arbitration is often unable to satisfy expectations of cost savings and increased efficiency. Id.; John R. Allison, Arbitration of Private Antitrust Claims in International Trade: A World Study in the Subordination of National Interests to the Demands of a World Market, 18 N.Y.U. J. Int’l L. & Pol. 361, 378–380 (1986).

38 It is generally presumed that judges (or juries) will be more sympathetic to the interests of parties who share their nationality and may in fact be hostile toward or biased against foreign parties. See, e.g., Gerald Aksen, Arbitration and Other Means of Dispute Settlement, in International Joint Ventures: A Practical Approach to Working with Foreign Investors in the U.S. and
national courts to refer parties to arbitration\textsuperscript{39} and limits the role of national courts in reviewing final awards to detecting egregious procedural defects or violations of important national interests.\textsuperscript{40} By limiting the role of courts, the New York Convention precludes national courts from second-guessing the substantive decisions of arbitrators and thus preserves the neutrality of arbitral decisionmaking.

International commercial arbitration also assures neutrality by blunting what parties perceive to be the sharp edges of foreign national procedural arrangements.\textsuperscript{41} Parties from different cultures and legal traditions often have radically different conceptions about what a legal dispute is, what the resolution process should entail, and what the role of lawyers should be.\textsuperscript{42} For example, Continental parties are jarred by the prospect of being compelled by U.S. courts to give opposing parties documents containing secret research and development information or being subjected to the seeming barbarism of cross-examination.\textsuperscript{43} Meanwhile, U.S. parties are dismayed that under most Continental rules they cannot call on opposing parties to testify, even about basic matters such as the parties’ intent at the time of contracting.\textsuperscript{44} U.S. parties also find it remarkable that under Continental procedures they cannot ultimately control which witnesses will testify in support of their cases, cannot


\textsuperscript{40} For a more in-depth discussion of the limited role of national courts in the arbitral process, see infra Part I.B.4.


\textsuperscript{42} Thomas E. Carboneau, \textit{The Remaking of Arbitration: Design and Destiny, in LEX MERCATORIA AND ARBITRATION} 23, 27 (Thomas E. Carboneau ed., 1998) (“Contrastive procedural traditions provide for different concepts of justice and, as a result, are difficult to reconcile. Arbitration’s legitimacy as a mechanism for transnational adjudication depends upon how fair the governing procedures are or are perceived to be by the constituent parties.”).

\textsuperscript{43} Patrick Thieffry, \textit{European Integration in Transnational Litigation, 13 B.C. INT’L & COMP. L. REV.} 339, 356 (1990) (“U.S.-style procedural rules, the absence of which U.S. litigants tend to criticize in European courts, are precisely those considered to be the most outrageous by European litigants in U.S. courts.”).

conduct private investigations into facts of a case, and are powerless to prevent what U.S. attorneys consider “inadmissible hearsay” from being relied on by Continental judges.

Modern international arbitration has developed a set of hybridized procedures that accommodates the basic expectations of these various legal traditions, while constraining those procedures that are particularly objectionable. These hybridized procedures have recently been codified by the International Bar Association (“IBA”) so that they can be easily incorporated into the parties’ agreement or adopted when arbitration commences. The inescapable link between ethical norms and the interrelational roles established by procedural rules suggests that mechanisms for promulgating and enforcing ethical rules should track those that have been employed in the procedural context. Therefore, in addition to illustrating international arbitration’s strides toward neutrality, the IBA procedural rules foreshadow how a regime that enforces attorney ethics might be implemented in the international arbitration system.

2. Effectiveness

Another central goal of international commercial arbitration is effectiveness. Like the concept of neutrality, effectiveness has distinctive connotations in the context of international arbitration. At a procedural level,
effectiveness refers to the ability of parties to determine where their dispute will be resolved and to ensure that the final award will be enforceable.\textsuperscript{51} Almost by definition, international disputes can be subject to the jurisdiction of courts in multiple countries. Forum-selection clauses\textsuperscript{52} and abstention doctrines\textsuperscript{53} may reduce the likelihood that multiple suits will be brought all the way to judgment, but the range of possible venues creates tremendous uncertainty about where the dispute will ultimately be resolved. By contrast, international arbitration is predictable because the parties choose the place and manner of adjudication, and national courts are required to defer to that choice.

In addition to reducing uncertainty, arbitration addresses many complications that arise when an international dispute is adjudicated in national courts. Adding a foreign party to an otherwise ordinary contract dispute transforms seemingly inconsequential aspects of domestic procedure into complex operations involving multiple international conventions and treaties. One particularly illustrative example is the procedure for serving process.\textsuperscript{54} In cases involving foreign defendants, this otherwise routine requirement usually has to be effectuated through the coordinated participation of both governments, often pursuant to international agreement.\textsuperscript{55} In many countries, failure to abide by these requirements is treated as an intrusion on national sovereignty, and in some countries as criminal misconduct.\textsuperscript{56} Complicated as they can be, the machinations required to effectuate service of process are relatively simple when compared to the even greater challenges

\textsuperscript{51} See REISMAN ET AL., supra note 3, at 1215 ("[A]rbitral awards as a whole enjoy a higher degree of transnational currency than judgments of national courts."); see also Perloff, supra note 3, at 325 n.11 (describing the lack of a "broad-based international norm assur[ing] that judgments rendered in one country will receive 'full faith and credit' in another").

\textsuperscript{52} Forum selection clauses can mitigate uncertainties about where a dispute will be resolved. Michael E. Solimine, Forum-Selection Clauses and the Privatization of Procedure, 25 CORNELL INT'L L.J. 51, 51-52 (1992) (addressing the prospects for and problems related to forum selection clauses). However, the clause has little or no effect if it is not honored by both the designated forum, which must agree to accept jurisdiction, and the other forum, which must decline the otherwise legitimate exercise of jurisdiction.

\textsuperscript{53} REISMAN ET AL., supra note 3, at 91-107 (citing British and U.S. cases that take contrasting approaches on whether to dismiss or stay cases based on pending foreign litigation). U.S. courts have inherent power to dismiss or stay an action in favor of foreign litigation presenting the same claims and issues. In re Houbigant, Inc., 914 F. Supp. 997, 1003 (S.D.N.Y. 1996). In determining whether or not to do so, courts consider the adequacy of relief in the alternative forum, concerns of judicial efficiency, the convenience of the parties and witnesses, the possibility of prejudice, and the temporal sequence of the actions. Cont'l Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408, 410 (S.D.N.Y. 1982). However, federal courts are reluctant to decline jurisdiction solely on the basis of concurrent proceedings in another jurisdiction. Instead, the default rule is that "[p]arallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously." China Trade & Dev. Corp. v. M.V. Chooong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (quoting Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984)) (internal quotation marks omitted); see also Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (federal court will abstain only in "exceptional" circumstances).

\textsuperscript{54} Rule 4(e)(1) of the Federal Rules of Civil Procedure allows personal delivery of the summons and the complaint to the defendant or to the defendant's residence, or delivery of a copy of the summons and the complaint to the defendant's agent. FED. R. CIV. P. 4(e)(1).


\textsuperscript{56} See, e.g., GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 775–76 & n.123 (3d ed. 1996) (citing Article 271 of the Swiss Penal Code and a January 10, 1989, note from the French Embassy to the U.S. Department of State).
that await litigants engaged in more elaborate and intrusive procedures, such as discovery.\(^{57}\) By putting the substantive decisionmaking in the hands of private adjudicators, international arbitration avoids intrusions on national sovereignty and the indeterminacy of international comity that have led to the complicated mechanisms for domestic adjudication of international disputes.\(^{58}\) The result is that international arbitration provides greater effectiveness in resolving disputes.

3. Party Autonomy

The third pillar that undergirds the international arbitration system is party autonomy. Whereas litigants go to national courts as penitents to the clergy, parties to arbitration are at once the anointing pontiff, the benefactors who build the church, and the penitents seeking absolution. The parties create arbitral jurisdiction, choose the governing arbitral rules,\(^{59}\) select the arbitral tribunal,\(^{60}\) determine the powers and limitations of the tribunal,\(^{61}\) and have the power to set the specific procedures (both by selecting particular arbitral institutions and by expanding or modifying the arbitral rules provided by those


\(^{58}\) See BORN & WESTIN, supra note 57, at 14–18 (defining and discussing the relevance of international comity), 432–488 (analyzing exceptions to the Act of State Doctrine, including intrusions on national sovereignty), 547–452 (illustrating the complicated mechanisms for resolving international disputes).

\(^{59}\) Although they are usually silent with regard to the specific course of arbitral proceedings (the form and procedures for submitting evidence, whether there will be hearings, etc.), every set of arbitral rules includes some basic procedural rules, such as the submission of initial pleadings and appointment of arbitrators. However, these fundamental procedural rules are generally default rules. As such, they are presumed to be the rules that would have been negotiated if the costs of negotiating at arm's length for every contingency had been sufficiently low and could have been changed through party agreement. See, e.g., Alan Scott Rau, Contracting Out of the Arbitration Act, 8 AM. REV. INT'L ARB. 225, 231 (1997) (arguing that the Federal Arbitration Act is merely a "set of 'default rules' intended to reflect the traditional historical understanding concerning the binding effect of arbitral awards"); Rau & Sherman, supra note 47, at 113 (arguing that silence in arbitral rules and national arbitration legislation set certain default rules). For further discussion on the nature of default rules in contract, see generally Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87, 97–100 (1989) (discussing allocation of contractual default rules).

\(^{60}\) Most arbitral rules permit each party to select a "party arbitrator," subject to objections by the opposing party based on conflicts of interest. Once selected, the two party arbitrators then select a third arbitrator who will act as the chairperson of the tribunal. The power to select the arbiter of the dispute is one of the most distinguishing features of arbitration and arguably the one that provides comfort enough for parties to relinquish their right to bring claims in their own courts. V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 26 (1980) (describing control over the composition of the tribunal as the "royal road" that has lured sovereign nations into international adjudication); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 193–94 (1991) (indicating that parties' ability to choose the tribunal increases their confidence in the tribunal's decisions); Alan Scott Rau, Integrity in Private Judging, 38 S. TEX. L. REV. 485, 527 (1997) (noting the "widely-shared conviction that the ability to participate in the selection of arbitrators is critical to fairness in dispute resolution").

\(^{61}\) Because the power of arbitrators derives from the arbitration agreement, arbitrators can only perform those powers delegated to them in the arbitration agreement. REISMAN ET AL., supra note 3, at 1174.
This ex ante control over the process is widely regarded as a necessary inducement for parties to forsake their right to appeal arbitral awards. Party autonomy is as essential a premise to the system as neutrality and effectiveness.

4. The Structure of the International Arbitration System

To accommodate the need for neutrality, effectiveness, and party control, the international arbitration system delicately calibrates the allocation of power among national legal systems and courts, parties, arbitral institutions, and arbitral tribunals. What makes arbitration so effective is that nation-states provide support for the system in terms of enforcing party-drafted arbitral agreements and awards rendered pursuant to those agreements. Meanwhile, arbitration provides neutrality because it restrains national courts from interfering with the arbitrators' substantive decisionmaking process or products. This balance is reflected in various aspects of arbitral procedures.

In the initial stages of a dispute that is subject to arbitration, national courts are required to enforce arbitration agreements by referring the parties to arbitration with minimal or no consideration of the parties' arguments if they should attempt to bring the dispute to a litigation forum. During arbitral proceedings, arbitrators and courts are generally recognized as having concurrent jurisdiction to order provisional remedies or protective relief. Since arbitral awards are not self-executing, national courts in the situs jurisdiction
provide an essential resource for enforcing provisional remedies, and parties
often seek injunctions, attachments, and other provisional remedies directly
from local courts in the situs jurisdiction.

When an award has been rendered after completion of the arbitral
proceedings, courts in the situs jurisdiction, which parties likely selected
specifically because of its disconnectedness from the parties and the dispute,66
are permitted to review awards on the grounds provided in their national
arbitration laws.67 Courts in the enforcement jurisdiction will then enforce
arbitral awards without inquiring into the merits of the decision. The only
exceptions to the broad presumption of enforceability occur if the award
violates one of five narrowly defined grounds, which exclude even clear errors
of law,68 or if it violates one of two provisions that protect important national
interests.69 This structure is designed to insulate the decisionmaking process
from national courts, while invoking the coercive power of national courts to
give binding effect to the arbitral process, which was consensually created by
the parties.

While national courts have generally been willing to assume the
supportive, but limited, role envisioned by this structure, the limitations on
their role are sometimes in tension with certain national interests and
prerogatives. Most recently, those areas that implicate national law imbued
with public policy, such as antitrust or securities regulation, have been the
focus of attention regarding allocation of power. The fear is that arbitrators
who are unfamiliar with these important and complex national laws may not
apply them correctly, or may even intentionally avoid applying them to
appease parties who are anxious to avoid regulatory obligations.70 Critics
claim that the balance of power between national courts and the international
arbitration system does not provide meaningful protection against such abusive
avoidance of national mandatory law.71 Since legal ethics can be considered a

66 "In most international arbitrations, the situs for arbitration is chosen either by happenstance, for
reasons of logistics and convenience, or because of its neutrality in relation to the dispute and to the
parties." Carbonneau, supra note 42, at 28; see also Vagts & Park, supra note 41, at 628 (describing how
the "arbitral seat . . . rarely coincides with the parties' citizenship or residence").

67 The New York Convention grants the courts of the nation in which an arbitration takes place
great discretion in their review of international arbitration awards. See Park, supra note 62, at 680
(noting that the Convention "entrusts the place of arbitration with power to enhance or to impair the
international effectiveness of an award rendered within its territory by the way it exercises, or fails to
exercise, its power to set the award aside"). This flexibility stands in contrast to the precisely delimited
role of courts in enforcement jurisdictions, which is carefully proscribed by the provisions of Article V.
68 These grounds for review are limited to what might be considered the "most basic notions of
morality and justice." Id. at 701. For a detailed discussion of the meaning and effect of these provisions,
see REISMAN, supra note 14, at 110–13.

69 Article V(2) of the New York Convention permits courts to refuse enforcement of an award if
the underlying dispute is not capable of settlement by arbitration in the enforcement jurisdiction or if it
offends the public policy of the enforcement jurisdiction. New York Convention, supra note 39, art.
V(2).

70 Ware, supra note 64, at 745; Andrew T. Guzman, Arbitrator Liability: Reconciling Arbitration
and Mandatory Rules, 49 DUKE L.J. 1279, 1292 (2000).

71 Guzman, supra note 70, at 1301–07 (arguing that, under a law and economics analysis, parties
agree to arbitrate for the specific purpose of avoiding mandatory national laws and that arbitrators have
incentives to disregard national law in favor of the parties' agreement). But 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
form of mandatory law, or at least an important analogue, these concerns about
the balance of power will likely be implicated by my proposal, which would
entrust primary enforcement of ethical rules to actors within the international
arbitration system. For this reason, a brief detour to consider the treatment of
mandatory or "public" law in international arbitration is warranted.

5. Mandatory Law and Punitive Damages in International Arbitration

Mandatory law and punitive powers in arbitration challenge the traditional
allocation of power, which is based on assumptions of extreme deference to an
autonomous arbitral tribunal. In the United States, the Supreme Court has
essentially swept aside concerns that arbitrators will not effectively apply
mandatory law, such as securities or antitrust law, in arbitration. Although
not articulated as such in the Supreme Court opinions, this flexibility may
reflect an implicit acknowledgement that the nature of so-called mandatory law
is inherently different in the international context than it is in the domestic
setting. In a national context, mandatory law, as its name implies, is
inescapable. In the international setting, however, there are multiple and
competing claims to prescriptive and adjudicatory jurisdiction over particular
conduct. As a consequence, one nation's assertion that particular law is
mandatory does not necessarily make it inescapable if another nation
adjudicates the case.

There are also inherent limitations in applying and enforcing mandatory law regarding extraterritorial and international conduct. By contrast, arbitral awards enjoy a much higher degree of international enforceability than U.S. judgments, particularly judgments involving mandatory law claims. Permitting arbitrators to apply mandatory law is

about their reputation for respecting mandatory rules.

For the purposes of this Article, I borrow from
Phillip McConnaughay the term "mandatory law" to refer to:

those laws from which parties to international transactions traditionally are not free to derogate
by contract. In this sense, those phrases are roughly equivalent to the traditional category of
"public law," which generally is regarded as including mandatory regulatory laws such as
antitrust law, securities law, and most other economic regulation. I do not intend the phrases
mandatory national law and mandatory law to include those laws traditionally within the
category of "private law," such as contract law, tort law, property law and family law, even
though certain elements of private law can be "mandatory," for example statutes of frauds,
restrictions on covenants not to compete, and usury restrictions. Traditionally, mandatory
elements of private law are mandatory in domestic transactions only; they typically are subject
derogation by contract, or by conflict of laws principles, in international transactions.

McConnaughay, supra note 2, at n.2. Although national ethical rules are generally regarded as
mandatory, as discussed later, some are subject to contractual modification. See discussion infra Part
III.A.1. Other national ethical rules may be displaced by conflict of laws analysis. See, e.g., infra note
113 (discussing U.S. Model Rule 8.5).

See infra Part II.A--C.

(permitting arbitration of antitrust claims); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52,
52 (1995) (permitting arbitration of securities claims); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1,
9 (1972); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (stating that the United States cannot
insist on international trade on its own provincial terms).

Hannah L. Buxbaum, The Private Attorney General in a Global Age: Public Interests in Private

In fact, existing and proposed judgment conventions generally exclude judgments involving
foreign mandatory law, such as antitrust judgments. William S. Dodge, Breaking the Public Law Taboo,
43 HARV. INT'L L.J. 161, 201 (2002). This reluctance to adjudicate U.S. mandatory law claims is only
part of the problem, since the enforcing jurisdiction must also consider whether and to what extent a
judgment that does not implicate U.S. mandatory law nevertheless implicates and offends the enforcing
important not just to ensure the functioning of the international arbitration system, but also to ensure the effective enforcement of national mandatory laws in the international context.

Most European civil law countries have been less willing to permit arbitration of mandatory or public law issues and, in fact, have delineated broad categories of claims that cannot be arbitrated. For example, Italian law limits arbitration by reference to negotiable rights (diritti disponibili). Under these provisions, disputes cannot be arbitrated if they implicate public order, mandatory norms, and notions of bona mores, if they interact with administrative jurisdiction, or if they require participation of the Pubblico Ministero (a corps of prosecuting magistrates with power to intervene in civil proceedings that raise public concerns). Similarly, French arbitration law precludes arbitration of claims affecting public policy, as well as claims over which national courts are deemed to have exclusive jurisdiction, such as labor and employment. While these rules generally preclude an arbitrator from adjudicating such issues, they do not ensure that Italian or French mandatory law will be applied, for example, in the adjudication of a case by a U.S. court.

In addition to protecting areas of substantive law imbued with national interests, many systems, particularly those with a civil law tradition, prohibit arbitrators from performing what are considered to be public functions, such as swearing in witnesses or ordering provisional remedies. Some countries have expressly prohibited arbitrators from imposing sanctions. For example, the arbitration law of Sweden prohibits arbitrators from imposing conditional fines or otherwise using “compulsory measures” to obtain evidence. A justification for prohibitions against these activities is that they are public functions and are therefore only properly administered by government agents.

juxtaposition of national mandatory laws. Joachim Zekoll, The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice, 30 COLUM. J. TRANSNAT’L L. 641, 644 (1992) (reporting on the Bundesgerichtshof’s decision to enforce a tort judgment that included the pain and suffering portion, but not the punitive damages).

76 A complete exploration of the relative effectiveness of international arbitration in enforcing mandatory law claims is beyond the scope of this Article and is best evaluated after much needed empirical research on the issue has been undertaken and completed. Inevitably, the answer to this empirical question will strongly be influenced by matters unrelated to the substance of the claims, such as where the losing party’s assets are located.

77 CODICE DI PROCEDURA CIVILE [C.P.C.] art. 806 (Italy).

78 Yves Derains & Rosabel E. Goodman-Everard, France, in 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION Fr.-14 to Fr.-15 (Pieter Sanders & Albert Jan van den Berg eds., 2002). Despite the fact that Paris is the headquarters of the ICC—the most important international arbitration institution—domestic French law is particularly hostile toward arbitration. As a matter of public policy, arbitration agreements between merchants or professionals and consumers are invalid. Id. at Fr.-7.

79 Notably, arbitrators are permitted some leeway under French law in adjudicating “private law consequences” of alleged violations of European Economic Community competition law. Id. at Fr.-15.

80 McConnaughay, supra note 2, at 482-494 & 483 n.122 (noting that mandatory national law can be displaced by foreign courts, as well as by arbitral tribunals).

81 In Europe, arbitrators generally do not administer oaths to testifying witnesses because it is considered a usurpation of judicial prerogatives and potentially exposes arbitrators to sanctions. CRAIG ET AL., supra note 62, § 25.01.

82 Id. § 8.07 (noting that “some countries’ laws expressly reserve the judge’s prerogatives of granting provisional relief even when the dispute is subject to arbitration”).

Perhaps because U.S. law does not draw the Continent's sharper distinction between the private and public spheres, the shift from early judicial reticence to modern accommodation of arbitration has been smoother. Continued debate and disagreement over the advisability of entrusting arbitrators with mandatory claims or public law functions may have important consequences for my proposal, however, which would entrust many aspects of ethical rule development and primary enforcement to actors within the international arbitration system, with national courts performing control and monitoring functions.

Another public function about which there are significant divisions is the limit of arbitrator power to award punitive damages. Even within the United States, there has been significant judicial disagreement about whether arbitrators have the power to impose punitive damages. The highest court in New York rejects the idea that arbitrators can award punitive damages, while other courts permit such power. The U.S. Supreme Court has held that arbitrators have the authority to award punitive damages if an arbitration clause explicitly or implicitly gives an arbitrator that authority, or if the clause is otherwise ambiguous on the issue.

Meanwhile, most civil law countries, such as France, Germany, and Switzerland, do not allow any recovery of punitive damages in civil cases at all, whether adjudicated by judge or arbitrator. Sanctions that are punitive in nature can be awarded only by judges presiding over criminal proceedings, which exclude judges presiding in civil cases and therefore, by extension, arbitrators in civil cases. The basis for, wisdom of, and limits on arbitrators'...
power to impose punitive damages continue to inspire great scholarly debate all around the world.\textsuperscript{91} This debate is important for international arbitration because, under U.S. law, punitive damages are viewed as a justification for relegating primary enforcement of certain mandatory law claims, such as claims based on securities and antitrust regulations, to national courts.\textsuperscript{92} Because these concerns about arbitrators awarding punitive damages may affect implementation of my proposal, which contemplates empowering arbitrators to sanction attorneys for misconduct, I will respond to them more specifically in Part III.

\textbf{C. National Interests in Regulating Attorneys in International Arbitration}

Any attempt to construct mechanisms for regulating attorneys in international arbitration must justify its allocation of the various enforcement powers. As discussed above, many of these justifications will be tied to the relative institutional competence of the actors and structural needs of the system. Based on the foregoing examination of analogous areas of mandatory law and punitive damages, it is probable that efforts to locate regulatory functions in the arbitration system will also encounter reluctance from national legal systems. This Part identifies the state’s interests in regulating attorneys and examines how those interests play out in the international arbitration context.

In national legal systems, the goals of ethical regulation are to guide, punish, and deter attorney conduct in an effort to protect clients and third parties, and to ensure the proper functioning of the state adjudicatory apparatus.\textsuperscript{93} While these are the direct objects of attorney regulation, regulation also serves several ancillary functions. Regulation contributes to public debate about the proper role and conduct of attorneys and enhances the image of regulators, the legal profession, and the legal system.\textsuperscript{94} The
construction of a regulatory regime for international arbitration must take into account these interests if it is to receive necessary support from national systems. National interests in the international arbitration context, however, are different in nature and decidedly narrower in range than they are in domestic contexts.

There is less of a need for protection of clients in international commercial arbitration because the parties are almost without exception international business entities. There are no personal injury victims, no civil rights claimants, and no criminal defendants.95 As participants in the global marketplace, the consumers of international commercial arbitration presumably have significant financial resources96 and are sophisticated.97 They have the means to invest in evaluating lawyer conduct and can demand loyalty in exchange for future business.98 Thus, the primary forms of agency problems against which disciplinary regimes protect (such as overbilling, professional incompetence, and conflicts of interest)99 do not pose significant threats to the clients who employ lawyers to perform international arbitration services. Indeed, the concern is that large corporate clients can demand loyalty at a level that precludes or deters attorneys from maintaining obligations that benefit third parties.100

Third party interests, however, are also less threatened by potential abuse in international arbitration than they are in domestic litigation. International arbitration cases involve predominantly private, consensual, commercial disputes.101 Because of these features, third parties are much less vulnerable to potential misconduct by lawyers in arbitration. Consent creates arbitral jurisdiction, which means that arbitral decisions generally are not binding on entities that are not party to the arbitration agreement.102 As a consequence,
the risk that attorney misconduct during proceedings could adversely affect third parties is much lower in international arbitration than in traditional national litigation. Witnesses, another class of third parties often referred to as the targets of ethical protections,\textsuperscript {103} are also less vulnerable as a group in international arbitration. Proceedings are private, which limits potential embarrassment from abusive discovery tactics or cross-examination, and witnesses cannot normally be compelled to testify.\textsuperscript {104}

To the extent that arbitral proceedings implicate or affect third parties, states are not well positioned to regulate against potential attorney misconduct that might affect such parties. International arbitrations are most often conducted in states in which the attorneys for the parties are not licensed.\textsuperscript {105} The third parties most likely to be affected are also likely to be located outside of either the host jurisdiction or the jurisdiction in which the attorney is licensed. As some commentators have described in the context of other types of regulation aimed at protecting foreign "victims":

\begin{quote}
[N]ations should not generally be permitted to regulate on behalf of the welfare of people, or to protect the environment, in places outside their jurisdictions. Domestic authorities are not well positioned to assess the traditions and needs of foreign citizens, nor are they easily accountable for the effects of their decisions in foreign territory.\textsuperscript {106}
\end{quote}

Under this reasoning, bar associations or legislatures in the United States, for example, would not be well suited to the task of promulgating ethical rules designed to protect the interests of Cambodian or Peruvian parties affected by the conduct of U.S. attorneys.

Finally, national legal systems are also less vulnerable to institutional damage from attorney misconduct in international arbitration. Under the New York Convention, the role of domestic courts is to enforce awards with only minimal consideration given to the substance of the award and how it was

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\footnotesize\textsuperscript{103} A. Darby Dickerson, The Law and Ethics of Civil Depositions, 57 Md. L. Rev. 273, 297–99 (1998) (discussing Model Rule provisions that provide protection for witnesses).
\footnotesize\textsuperscript{104} Marianne Roth, False Testimony in International Commercial Arbitration: A Comparative View, 7 N.Y. Int'l L. Rev. 147, 151 (1994) (noting that witness participation in international arbitration is usually voluntary and no legal obligation to testify exists unless compelled by a public court). National courts do not ordinarily compel testimony in arbitrations occurring in foreign jurisdictions. For example, U.S. district courts have the power to compel testimony or document production by a person within their jurisdictions for use "in a proceeding in a foreign or international tribunal," but this power does not extend to arbitrations. National Broadcasting Co., Inc. v. Bear Stearns & Co., 165 F.3d 184, 191 (2d Cir. 1999). Witnesses present in the jurisdiction where an arbitration occurs can, however, sometimes be compelled by national courts to testify in arbitrations. See, e.g., Thomas Carbonneau, A Comment on the 1996 United Kingdom Arbitration Act, 22 Tul. Mar. J. 131, 135 (1998) (noting that § 43 of the English Arbitration Act provides that courts can compel witnesses to attend international arbitrations).
\footnotesize\textsuperscript{105} Rogers, supra note 4, at 342 & n.1. It is not uncommon, however, for parties to retain local counsel, particularly if they may eventually need to resort to national courts for provisional remedies.
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Explicit constraints on national courts' powers inevitably deflect criticism against national courts for particular arbitral outcomes.

Even if diminished, however, nation-states retain some interest in protecting clients, third parties, and domestic legal order from attorney misconduct in international arbitration. The threat that corporate clients will replace irresponsible attorneys may deter misconduct prospectively, but it is neither a complete deterrent nor an adequate remedy once misconduct has occurred. Third parties may be less exposed to harm in international commercial arbitration, but they are not completely insulated, particularly with respect to opposing parties. Finally, even if domestic courts are not responsible for direct administration of the proceedings, they can be debased by ratifying an award produced by a corrupt and unfair process.

The construction of any regime for regulating attorneys in international arbitration must take into account the interests of clients, third parties, and nation-states. The limited nature of these interests has already been implicitly acknowledged by national systems, which have been reluctant to regulate extraterritorially. Instead, national systems support efforts to develop international ethical regulation. A brief review of the current state of international regulation of attorneys will demonstrate this implicit abdication.

D. The Limits of Current International Ethical Regulation

The problems caused by the absence of regulation of cross-border and international legal practice have become something of an obsession for scholars and regulators. Problems arise in cross-border practice because two sovereigns (one in the attorney's home jurisdiction and the other in the host jurisdiction) compete to regulate attorneys. States have the power to regulate all activities occurring within their borders, including professional legal activities, consistent with the principle of territoriality. With respect to their ethical rules, states can also assert prescriptive jurisdiction over a nationally licensed attorney acting outside of its boundaries based on principles of nationality. When multiple states have legitimate power to, and an interest in, regulating the same conduct, there is a risk that an attorney will be subject
to conflicting obligations. The problem is exacerbated in the international context where "[w]hat is appropriate, even mandatory, under one regime may not be, and may indeed be even reprehensible under another."\(^\text{112}\)

U.S. and European regulators have attempted to address some of the problems that arise in cross-border and international practice. With the most difficult and intractable problems, they have often resorted to choice-of-law rules, although not always successfully.\(^\text{113}\) When they turned their attention to the context of adjudication, regulators agreed that the choice-of-law rule should require attorneys to abide by the rules of any tribunal before which they are appearing.\(^\text{114}\) This solution is necessarily premised on assumptions that adjudicatory tribunals have (or should have) their own ethical norms, that attorneys appearing before them should be bound by those rules, and that those tribunals have the power to enforce their rules.\(^\text{115}\) These assumptions reveal the implicit acknowledgement that to be fully operational, adjudicatory systems must have the tools and the accompanying power to regulate participating attorneys.\(^\text{116}\) The fact that international arbitration is a private system does nothing to diminish this inherent need.

The implicit acknowledgement that national ethical rules should not be stretched to apply extraterritorially to foreign or international tribunals is consistent with bar associations' demonstrated disinterest in enforcing their substantive ethical rules in international arbitration. Under traditional international law doctrines, enforcement jurisdiction is expressly premised not only on the existence of prescriptive jurisdiction, but also on the assertion of

\(^\text{112}\) Karl Carstens, Preface to Ivo G. CAYTAS, TRANSNATIONAL LEGAL PRACTICE: CONFLICTS IN PROFESSIONAL RESPONSIBILITY (1992) (page numbers not provided in preface); see also Vagts, supra note 109, at 677 (noting the increasing problems because attorneys are subject to the rule of "different bar authorities [that] lay down quite different rules within their jurisdictions").

\(^\text{113}\) See, e.g., Louise L. Hill, Lawyer Publicity in the European Union: Bans Are Removed But Barriers Remain, 29 GEO. WASH. J. INT'L L. & ECON. 381, 443 (1995) (noting that the CCBE's general principle on personal publicity does not designate which jurisdictional rule applies when inconsistencies arise between the rules of the host state and the home state); see also Jarvis, supra note 108, at 59; Mary C. Daly, Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer or No Answer at All?, 36 S. TEX. L. REV. 715, 720 (1995). Notably, U.S. Model Rule 8.5 regulates cross-border practice, but expressly disavows any application in the international context: "The choice of law provision [in Rule 8.5] is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law." \textit{Id.} at 757 n.171. The problem is that there does not appear to be any such international law or agreements. Vagts, \textit{supra} note 7, at 378.


\(^\text{115}\) For example, CCBE Rule 4.1, which requires that lawyers who appear before a court or tribunal in a member state comply with the rules of conduct applied in that court, is analogous to Model Rule 3.4(c), which prohibits knowing disobedience of rules of a tribunal, except for an open refusal based on an assertion that no rated obligation exists. Terry, \textit{supra} note 34, at 386-87. Similarly, the CCBE Code permits the tribunal exercising jurisdiction to determine the level of ex parte communications that are permissible, which implies the expectation that tribunals can and do regulate such aspects of attorney conduct. For further discussion of these issues, see Rogers, \textit{supra} note 4, at 392.

\(^\text{116}\) In the United States, only a few states have attempted to make their ethical rules directly applicable in arbitration. \textit{See, e.g.}, Disciplinary Rules of the Code of Prof. Responsibility, N.Y. Jud. LAW, app. (McKinney Supp. 1991) (containing a single statement in the appendix to the effect that rules apply in alternative dispute resolution settings as well). For extended discussion, see Rogers, \textit{supra} note 4, at 392.
that jurisdiction.\footnote{RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401(3) (1987) (defining enforcement jurisdiction as a state’s power to “induce or compel compliance... with its laws or regulations”).} On an intuitive level, common sense tells us that the plenary power to enforce presumes that the object of enforcement is the nation’s own laws.\footnote{118 The international law argument regarding the dependence of enforcement jurisdiction on prescriptive jurisdiction should not be confused with domestic legal ethics debates about whether the enforcement authority of an institution naturally follows from its legislative authority. Wilkins, How Should We Determine, supra note 21, at 470 (arguing that, in the domestic context, authority to promulgate ethical rules does not necessarily imply that the power to enforce those rules should be vested in the same institution).} It remains theoretically possible that national institutions could be entrusted with enforcement of international legal ethics; but, for the reasons described below\footnote{See infra notes 178–189 and accompanying text.} and as a practical matter, national institutions are less well-suited to the task. In fact, national bar associations rarely, if ever, venture into the international enforcement realm.\footnote{See generally W. Michael Reisman, Looking, Staring and Glaring: Microlegal Systems and the Public Order, 12 DENY. J. INT’L L. & POL’Y 165 (1983) [hereinafter Reisman, Looking, Staring] (discussing how informal norms can govern behavior).} Thus, while it is clear that national legal systems will continue to have some interest in monitoring the conduct of attorneys licensed by them and participating in arbitrations that occur on their soil or whose awards they must enforce, those interests need not be accommodated by relying on national institutions for primary enforcement.

II. MAKING ETHICS BINDING AND ENFORCEABLE IN INTERNATIONAL ARBITRATION

Having described a model for developing an enforcement regime and the competing interests that must be accommodated in applying that model, this Part undertakes the constructive process. Although I have been referring to this undertaking as a singular task, enforcement of professional ethics is composed of many necessary subtasks, including making ethical norms binding on the parties and their counsel, interpreting the rules, detecting violations, determining guilt for violations, fashioning remedies and sanctions, and enforcing those sanctions.\footnote{Ted Schneyer, Legal Process Scholarship and the Regulation of Lawyers, 65 FORDHAM L. REV. 33, 38 (1996). At a national level, these subtasks are performed not only by ethical codes enforced by local bar associations, but also by a range of other institutions, including courts (which work with bar associations and enforce rules of procedure, civil malpractice claims, and criminal statutes), insurance companies, market pressures, and influence from peers. Id. at 35–36. For example, in the United States, much of the conduct regulated in ethical codes is also regulated by statute. See, e.g., CAL. BUS. & PROF. CODE § 6068(e) (West 1990) (prohibiting an attorney from disclosing client confidences after representation has ended). For analysis of how norms that are not reflected in formal jurisprudence can still effectively regulate behavior, see W. Michael Reisman, Lining Up: The Microlegal System of Queues, 54 U. CIN. L. REV. 417, 432 (1985). See also ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4–6, 137–55 (1991). See generally W. Michael Reisman, Looking, Staring and Glaring: Microlegal Systems and the Public Order, 12 DENY. J. INT’L L. & POL’Y 165 (1983) [hereinafter Reisman, Looking, Staring] (discussing how informal norms can govern behavior).} I propose a regime that assigns these subtasks to various actors based on their relative institutional competence and fit within the institutional structure of the international arbitration system. In Part III, I address some of the most significant arguments that may be raised if
a struggle emerges for control over attorney regulation in the international arbitration context.

A. Arbitral Institutions as Promulgators

As I established in a separate article, the ethical rules that bind lawyers in adjudicatory contexts are inextricably linked with procedural rules that order those contexts. As a consequence, the contents of any ethical code for international commercial arbitration must be tailored to the procedural arrangements that govern the conduct of arbitrations. The difficulty caused by this prescription, however, is that the procedures used in any particular arbitration depend on which arbitral rules and institutions are selected by the parties, on individually negotiated supplemental rules agreed to by the parties (such as the IBA hybridized rules), and on any "gap-fillers" adopted by the arbitrators. Consequently, what is needed is not a single code applied uniformly to all international arbitrations, but multiple codes that can be calibrated to the specific rules, traditions, and features of particular arbitration proceedings.

Given the complexity of such a task, arbitral institutions enjoy the superior institutional competence to formulate those rules. Institutions such as the ICC, LCIA, ICSID, SCC, and the Venice Court of National and International Arbitration draft and administer the arbitral rules that regulate the initiation and general conduct of arbitration. Accordingly, they have specialized knowledge of the rules and their functions, as well as the most direct experience in dealing with ethical issues that arise in arbitration. Given their direct financial interest in attracting parties and increasing competition among arbitral institutions to attract those parties, arbitral institutions have a strong incentive to select rules that will ensure the integrity of the arbitrations conducted under the auspices of their institution. Together, these factors

122 Rogers, supra note 4, at 385-86.
123 For examples of how trade arbitration, International Centre for Settlement of Investment Disputes ("ICSID") arbitration, and more standard arbitration differ, see Rogers, supra note 4, at 419-22.
124 The effect of parties' ability to modify institutional rules in individual disputes will be taken up in Part II.C, infra.
125 While not all international arbitrations are conducted under the auspices of arbitral institutions, the overwhelming majority are. Detlev Vagts & W. Michael Reisman, International Chamber of Commerce Arbitration, 80 AM. J. INT'L L. 268, 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).
127 See discussion of procedural rules contained in arbitral rules, supra note 59.
129 Helfer & Dinwoodie, supra note 63, at 210.
130 This reasoning admittedly conflates party preference and institutional reputation, which some might argue is an artificial identity of interests since parties may prefer the flexibility that comes with less
signal arbitral institutions’ superior institutional competence in the task of formulating specific ethical norms to comport with their proceedings.

In addition to ensuring a coherent fit with arbitral rules, vesting rulemaking authority in arbitral institutions is preferable to potential alternatives because it is consistent with the structural priorities of the international arbitration system. Promulgating rules through a treaty, the most obvious alternative, would engrave a single set of inflexible ethical norms into the international arbitration system. Aside from the potentially insurmountable difficulties in drafting such a treaty, it would be impossible to adjust treaty-based ethical rules to respond to the varied needs of parties, as evidenced by the various traditions and procedural arrangements within arbitral institutions and the parties’ individualized procedural choices.

Examination of a concrete example highlights this problem. Suppose that, in an effort to reconcile conflicting national rules regarding the permissibility of pretestimonial communication with a witness, the drafters of the treaty adopt an international ethical norm that permits some forms of witness communication. This rule would be appropriate in most arbitrations because, under the typical hybridized procedures, parties have significant control over the presentation of evidence, including the selection and cross-examination of witnesses. Under these procedural rules, a rule that permits some pretestimonial communication is not only reasonable, but also necessary to enable litigants to prepare their cases. On the other hand, suppose that

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131 A treaty-based solution might also be considered inconsistent with U.S. goals in regulating the legal profession. In Europe, for example, the recently enacted treaty-based CCBE Code became effective by adoption into local law by the legislatures of individual European states. Terry, supra note 34, at 383. If ethical rules were enacted in treaty form like the CCBE Code, they would be a product of legislative and executive drafting decisions under the U.S. constitutional process. In addition to injecting national interests into the inner workings of the international arbitration system, a treaty-based solution would have the U.S. executive and legislative branches promulgating attorney ethics, which, at least according to some, would undermine attorney independence and ethical decisionmaking. Wilkins, Who Should Regulate, supra note 18, at 853.

132 For a discussion of the shortcomings of other attempts to draft treaties governing international ethical rules and standards, and of the inherent limitations of negotiated compromise as a means for determining appropriate ethical rules, see Rogers, supra note 4, at 395–98.

133 For a discussion on the importance of flexibility and party autonomy in arbitration, see supra Subpart 1.B.3. Theoretically, it is possible to promulgate in treaty form a set of ethical rules that is general enough to avoid a violent collision with procedural choices (e.g., by including multiple options) and that can be contractually modified. The question becomes, however, whether a document so general and so flexible is really a treaty and whether there are any advantages of putting such a document into treaty form.

134 Numerous other examples that demonstrate the relationship between procedural choices and ethical rules are discussed in depth in Rogers, supra note 4, at 419–22.

135 Andreas F. Lowenfeld, The Elements of Procedure: Are They Separately Portable?, 45 AM. J. COMP. L. 649, 654 (1997) (“By now, cross-examination by counsel is pretty well accepted in international arbitrations, and for the most part the continental lawyers have learned how to do it. Moreover, and almost as important, arbitrators have learned how to administer cross-examination . . . .”).

instead of opting for the hybridized procedures, the parties adopt procedures based on an inquisitorial model,\textsuperscript{137} under which the arbitral tribunal controls the presentation of evidence and conducts all of the questioning of witnesses. Party communication with witnesses in this context would interfere with the arbitrator’s role,\textsuperscript{138} and the ethical rule adopted by the treaty would be awkward, if not counterproductive.\textsuperscript{139}

As this example demonstrates, a treaty-based solution would not offer the same variability and flexibility as permitting arbitral institutions to calibrate the rules to their unique procedural settings.\textsuperscript{140} A treaty-based solution would also leave the development of the international structure to the “lawyer-bureaucrat” who is “attached to the policy-making machinery,” producing results that are “no longer mediated through the development of a conceptual framework [that] is in tune with the changes of international reality.”\textsuperscript{141} The risk is that the solution will be a compromise designed to accommodate various national interests, but in a way that cumulatively undermines the rationality of the whole and leaves its suitability to the international arbitration system in doubt.\textsuperscript{142}

\textbf{B. Arbitral Rules as Implementers}

The determination of who will promulgate the new code of ethics for international commercial arbitration portends answers to how the rules will be promulgated and enforced. If arbitral institutions are developing the ethical norms, the obvious method for putting those norms into practice is to incorporate them into existing arbitral rules. When parties agree to submit disputes to a particular arbitral institution or to adhere to the rules of a

\textsuperscript{137} This outcome could also occur if the situs jurisdiction were Germany or Austria, since arbitrators often look to the procedures of the local jurisdiction to “fill gaps” where parties cannot agree to procedural rules. William W. Park, \textit{National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration}, 63 TUL. L. REV. 647, 653–54 (1989).

\textsuperscript{138} Cf. John C. Reitz, \textit{Why We Probably Cannot Adopt the German Advantage in Civil Procedure}, 75 IOWA L. REV. 987, 994 (1990) (arguing that U.S. procedure, in which parties control presentation of evidence, is incompatible with a German-style rule prohibiting pretrial contact with witnesses).

\textsuperscript{139} For an analysis of other examples of conflicts between particular procedural and ethical rules, see Rogers, \textit{supra} note 4, at 402–05.

\textsuperscript{140} Of course, it is theoretically possible to enact a treaty delegating, as proposed in this Article, rulemaking and rule enforcement powers to arbitral institutions and arbitrators, but the question then becomes what the value of such a treaty would be. One advantage might be that, while in most respects an empty vessel, a treaty reifying the proposals of this Article could provide an opportunity to address and overcome the potential reluctance of some states to consign to the international arbitration system authority over a traditionally public function. For further discussion of this reluctance, see \textit{infra} Part III.B.


particular institution, the arbitral rules, and by extension the new ethical rules, would become incorporated into the parties’ contract by reference.

Incorporating ethical rules into the parties’ contract has two important consequences. First, like other contract terms (including arbitral rules), arbitral ethics would be default settings modifiable by the parties, at least within certain limitations that will be taken up later. Parties would have an opportunity to modify the default ethical norms either at the time the underlying contract is drafted or, as is more likely, early in the arbitral proceedings. The ability to modify rules, even if they are already calibrated to the procedures of specific arbitral institutions, is necessary because procedural rules are not entirely fixed by the arbitral institutions and are subject to modification by the parties. To provide meaningful guidance when parties can contractually modify the procedural arrangements, ethical rules must be similarly modifiable.

The other important consequence of making ethical rules part of the parties’ contract is that, like the terms of the arbitration agreement, ethical rules would become separate contractual obligations, the breach of which could give rise to separate claims for liability. As described in more detail below, the contractual nature of arbitral ethical rules will suggest mechanisms for enforcement that are integral to the international arbitration system.

C. Arbitrators as Primary Enforcers

If ethical rules are adopted by parties and incorporated into their agreements along with arbitral rules, then arbitrators become the most obvious mechanism for primary enforcement. International arbitrators must be empowered to impose sanctions for misconduct that occurs during proceedings in violation of adopted ethical rules. This Part will address the relative power to impose sanctions.

143 For a discussion of the limitations on the parties’ power to modify, see infra Subpart III.A.2.
144 In drafting arbitration clauses, parties rarely address procedural issues. Howard M. Holtzmann, Balancing the Need for Certainty and Flexibility in International Arbitration Procedures, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY? 3, 10–11 (Richard B. Lillich & Charles N. Brower eds., 1993) (citing study by Stephen Bond, former Secretary-General of the ICC International Court of Arbitration, in which only one of 452 arbitration clauses submitted to the ICC referred to specific procedures).
145 Virtually all arbitral rules and most modern national arbitration statutes give parties broad powers to determine procedural rules jointly. If the parties fail to agree, arbitrators have the power to determine procedure. PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1257 (Emmanuel Gaillard & John Savage eds., 1999).
146 There is no claim or cause of action for failure to “comply” with an arbitrator’s award, and in fact parties contest the awards with some degree of regularity. The parties’ agreement to abide by an arbitral award is more akin to a “confession of judgment” than to an arbitration agreement. See BLACK’S LAW DICTIONARY 293 (7th ed. 1999) (defining “confession of judgment” as an agreement to “the entry of judgment upon the occurrence or nonoccurrence of an event”). Parties are, however, through an arbitration agreement, bound to submit disputes to arbitration. The remedy for breach of that obligation is most often specific performance (a court will refer a matter to arbitration). E.g., 9 U.S.C. § 4 (2002). It is also possible that damages might arise out of a claim for breach, the value of which being the added cost of enforcing the agreement. Julius Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 VA. L. REV. 265, 276 (1926) (“[F]rom earliest times it was held that for a breach of an arbitration agreement the aggrieved party was entitled to damages.”), quoted in Margaret M. Harding, The Redefinition of Arbitration by Those with Superior Bargaining Power, 1999 UTAH L. REV. 857, 858 n.12.
institutional competence of arbitrators over national alternatives, leaving for Part III a discussion of the potential opposition to such a power.

I. The Comparative Institutional Advantages of Arbitrator-Enforcers

In comparison to national bar associations, arbitrators have superior institutional competence to act as the first line of attorney ethical regulation. Like their judicial counterparts in domestic litigation, arbitrators enjoy certain "information advantages" because of their direct role in the arbitral process. During the ordinary course of proceedings, arbitrators have an opportunity to observe and evaluate an attorney's conduct in context. Moreover, arbitrators have a stake in the integrity of the process. Arbitrators develop reputations in part based on their ability to control proceedings and render fair and expedient results. These reputations will affect whether arbitrators are selected to serve on future panels, which means arbitrators have a strong incentive to protect the integrity of proceedings against attorney misconduct. As will be discussed later, arbitrators are so well-positioned to perform a control function, it is likely that they are already doing so at an informal level through their procedural decisions in regulating the proceedings, in making their substantive decisions in favor of or against certain parties, and in awarding costs and fees.

As noted above, national bar associations, which usually have primary and plenary power to discipline lawyers in national settings, have essentially abdicated responsibility for regulating attorneys in the context of international arbitration. While the motivations for this hands-off approach are not clear, and probably vary, it may be that local bar associations recognize that they would not be particularly effective at disciplining extraterritorial conduct of international advocates. Although national bar associations are a viable

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147 See Wilkins, Who Should Regulate, supra note 18, at 835 (describing the benefits of having disciplinary mechanisms integrated into the areas in which lawyers work).

148 See id.


150 It must be acknowledged that the incentives may also, as some have argued, have the opposite effect if arbitrators avoid sanctioning counsel who they think are likely to bring future business their way. Robert D. Cooter, The Objectives of Private and Public Judges, 41 Pub. Choice 107, 107 (1983). See generally, McConnaughay, supra note 2 (discussing the inherent lawlessness of the international arbitration system and the problem of arbitrators being beholden to private parties). Because international arbitrations most often match two large international companies, this potential counterincentive is less likely to be a problem in the international setting than it might be in domestic arbitration, where individual plaintiffs are often pitted against large companies. Indeed, in domestic arbitration, the need for a sanction power for arbitrators is less compelling (given the proximity of national bar associations) and it may only enhance the already perverted incentive structure encountered by plaintiffs arbitrating against repeat players.

151 For a discussion of arbitrators' exercise of these powers, and the problems caused by the fact that this de facto sanction power is not explicit, see infra notes 265–270 and accompanying text.

152 See supra notes 131–137 and accompanying text.
recourse for clients of a misbehaving attorney, the most probable victims of misconduct in the adjudicatory context are the opposing party and its counsel. As Wilkins explains, bar associations are less effective than institutional controls in regulating the externality problems generated in advocacy settings. Even in domestic settings, it is rare that opposing parties lodge complaints with bar authorities, in part because of the virtually nonexistent possibility of recovering compensation for their efforts. When the burden on the opposing party involves the added difficulty and expense of lodging a complaint with a foreign bar association, the potential for viable regulation is dramatically less. On the other hand, because the threat of penalties from an arbitral tribunal would be meaningful, instead of remote and improbable, it may have a deterrent effect on the behavior of attorneys.

2. Structural Preference for Arbitrator-Enforcers

In addition to the superior institutional competence that arbitrators enjoy over national alternatives, vesting them with primary enforcement authority also serves the structural goals of the international arbitration system. As described below, if national institutions were to apply ethical rules in individual cases, several interrelated problems would arise.

The first type of problem, which I will refer to as the fragmentation problem, regards the substantive integrity of the international rules. Primary enforcement authority over international ethical rules necessarily includes the power to interpret the meaning and scope of those rules. If this power is vested in national institutions, there is a substantial if not inevitable risk that they will distort the rules by assigning to them their own national "substantive tilt." This type of distortion has been noted in cases in which national courts have applied international norms, as well as in analogous cases in which national courts have applied international norms, as well as in analogous cases in which national institutions have imposed fines that compensate complainants. Deborah L. Rhode, Institutionalizing Ethics, 44 CASE W. RES. L. REV. 665, 705 (1994).

But see Richard L. Abel, The Future of the Legal Profession: Transnational Law Practice, 44 CASE W. RES. L. REV. 737, 762-63 (1994), for a respectable dissenting opinion arguing that victims of misconduct are capable of seeking out bar review boards even in foreign countries. In this way, ethical duties in international commercial arbitration are like other duties in international law. See Myres S. McDougal & W. Michael Reisman, The Prescribing Function in the World Constitutive Process: How International Law is Made, in INTERNATIONAL LAW ESSAYS 355, 377 (Myres S. McDougal & W. Michael Reisman eds., 1981) (opining that a prescription of duty "is viewed as authoritative by those [to whom it is addressed and... its audience concludes that the prescriber... intends to and, indeed, can make it controlling").

For a discussion of the role of structural limitations on development of enforcement mechanisms, see supra Part I.B.

Cf. Wilkins, Who Should Regulate, supra note 18, at 811.
regulatory authorities have applied domestic ethical rules. The fragmentation that would occur as national institutions leave their imprimatur on international ethical rules would undercut the uniformity and neutrality that inspired the development of international substantive ethical rules in the first place.

Another problem that would undermine both the neutrality and the effectiveness of international arbitration is what I will refer to as the problem of disruption. National courts could become involved in the ethical regulation of attorneys in international arbitration at one of two junctures: the national courts in the situs jurisdiction could be called on to intervene during the proceedings, or the courts of the enforcement jurisdiction could consider misconduct during enforcement proceedings. Both of these potential choices would leave the arbitral process less insulated from national courts and more vulnerable to disruption and delay.

Even putting aside the issue of possible bad faith abuse, the potential for delay and disruption in courts in the situs jurisdiction could be significant. An instructive corollary for such a proposal is the role of national courts in the context of provisional remedies. Provisional remedies can be sought through expedited procedures while arbitral proceedings continue. In contrast, national court review of ethical misconduct could not be as easily severed from proceedings, and currently there are no procedural mechanisms in place to provide expedited review of ethical issues. In addition, many questions of misconduct in the adversarial context are bound up with proceedings on the merits. Did the attorney improperly withhold information that was required to be produced? Did the attorney make a false statement to the tribunal?

While it could also be said that provisional remedies are also bound up with the merits, as their name suggests, provisional remedies are inherently temporary. They dissolve if the arbitral tribunal reaches a conclusion on the merits that is inconsistent with a court's provisional determination. National court decisions regarding alleged attorney misconduct, however, would

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160 Wilkins, *Who Should Regulate*, supra note 18, at 810–11 (noting that, since enforcement officials invariably exercise a certain amount of discretionary authority over the content of professional norms when they apply ethical rules in particular cases, "conferring enforcement authority is tantamount to empowering a particular set of actors to place their own interpretation on these ambiguous professional norms").

161 See Rogers, supra note 4, at 373–78.

162 See supra Subpart I.B.1 (discussing the benefits of neutrality in international arbitration).


164 It is possible that national legislatures could provide for expedited review of misconduct hearings in an effort to attract international arbitration. The obstacles to such widespread national reform are significant, however, particularly given widely divergent national approaches to attorney regulation.

165 Although nations have different standards under which provisional remedies will be granted, they normally require some showing that the party applying for relief has a likelihood of prevailing on the merits and that the remedies sought will be endangered or unavailable without provisional relief. See Horning, supra note 163, at 156.
necessarily remain binding. Referring back to the earlier example, a decision that an attorney had misrepresented a fact to the tribunal would be based on whether the fact represented by the attorney was "true." To avoid a potential conflict with this finding, arbitrators would need to hold their proceedings in abeyance until the result from the national court ethical proceeding was known. Otherwise, arbitrators would risk either having to revise their findings based on contrary judicial determinations or to render an award inconsistent with the court's determination.

Resorting to national courts at the enforcement stage would be an even more problematic choice. Such review would be partial at best and, when available, would reduce ethical enforcement to a zero-sum game. Under the New York Convention, which severely limits the grounds upon which an award can be denied enforcement, aggrieved parties are only able to raise challenges to those most egregious types of misconduct that call into question the very integrity of the tribunal's decision. When faced with proof of such egregious misconduct, the only remedy that national courts could offer would be refusal to enforce the award.

In addition to the fact that misconduct can be disruptive and unfair and still not rise to a level that can be redressed under the New York Convention, an enforcement-based remedy imposed by national courts would only be able to redress misconduct by the winning party. If the remedy is nonenforcement, then a losing party could attempt to resist enforcement by making allegations of misconduct. A winning party, however, would have no opportunity to raise allegations of misconduct unless it was assessed costs and fees that would be offset against its award. As will be discussed in more detail below, arbitrators do use the costs and fees as a de facto sanctioning mechanism. However, the objection here is to national courts assuming the role of primary enforcers when they cannot directly redress misconduct committed by either party.

In sum, national courts are neither well-suited to the task of evaluating and regulating behavior that occurred in an international arbitration, nor well-positioned to be effective in sanctioning misconduct. Requiring them to assume the role of primary enforcers would undermine the arbitration system's neutrality and effectiveness and would lead to fragmentation of the

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166 If national court determinations on ethical matters were treated the same as provisional remedies, a contrary later decision by the arbitral tribunal would trump the court decision. The question would then become: Why have judicial review at all?

167 There is no provision under the New York Convention for refusing to enforce or setting aside an award on the basis of attorney misconduct. However, if misconduct rose to the level of fraud that affected the tribunal's decision on the merits, arguably a challenge would render the award unenforceable under Article V(1)(b) (precluding a party from presenting its case) or Article V(2)(b) (containing the public policy exception). CRAIG ET AL., supra note 62, § 37, at 677-78. Clearly, though, some misconduct could interfere with a party's ability to present its case without wholly precluding it.

168 Most national courts have no power to revise awards, even if procured by fraud, and arbitral tribunals have only limited powers to do so. See FOUCHARD, GAILLARD & GOLDMAN, supra note 145, ¶1599 (discussing French law on the subject and recent developments in other states).

169 See infra Part III.B.2 (discussing national courts' roles in reviewing sanction awards).

170 See infra Part III.B.3.
international code of arbitral ethics. Arbitrators, meanwhile, enjoy a superior institutional competence and have self-interested incentives to exercise it.

D. International Attorneys as Adherents and "Moral Entrepreneurs" 172

Incorporating ethical norms into arbitral rules will make the ethical norms contractually binding on the parties, but it will not make them binding on the attorneys representing the parties. The consensual jurisdiction of arbitration applies only to parties to the arbitration agreement, not to their legally autonomous representatives. As a consequence, attorneys in international arbitration are neither bound by the ethical rules that are incorporated into the arbitral agreement, nor personally subject to any inherent sanction power of the arbitral tribunal. This escape hatch must be closed.

The best way to achieve this goal is to require that attorneys who participate in arbitral proceedings be bound personally by arbitral rules, including the ethical requirements. Like the underlying arbitral agreement, this commitment would be contractual in nature and could be secured either as part of the procedures for commencing arbitration (i.e., as an appendix to the Statement of Claim and Response) or during the initial meetings provided for under most arbitral rules. Arbitral rules could be amended to require that parties ensure that their attorneys follow this procedure—even if that means parties must replace counsel who are unwilling to accept these obligations.

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171 For a discussion of the importance of neutrality and effectiveness in the institutional structure of the international arbitration system, see supra Part I.B.1–2.

172 The term "moral entrepreneur" is borrowed from Dezalay and Garth's groundbreaking research into the social context of the arbitration industry. DEZALAY & GARTH, supra note 149, at 33. Richard Posner has also adopted the term more generally to refer to genuine agents of social change who "spot [a] discrepancy between the existing code and the changing environment and persuade the society to adopt a new, more adaptive code." RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 44 (1999).

173 See REISMAN ET AL., supra note 3, at 484.

174 Notably, in the Bidermann case, the court never determined whether the parties had agreed to submit the issue of attorney disqualification to arbitration, but decided instead on the grounds of public policy that such issues could not be submitted to arbitration. Bidermann Indus. Licensing Inc. v. Avmar N.V., 570 N.Y.S.2d 33 (1991), discussed in Thomas, supra note 35, at 565.

175 This lacuna is particularly problematic in light of the fact that arbitrators routinely award costs and fees, payable by the parties, on the basis of real or perceived misconduct that may entirely be the responsibility of the parties' counsel. For further discussion of the problems raised by de facto sanctioning mechanisms, see infra notes 2911–2977 and accompanying text. For a discussion of the unfairness that may result from arbitrators applying their culturally determined ethical norms to behavior deemed proper under a home jurisdiction's ethical rules, see Rogers, supra note 4, at 376–78.

176 The estimable fees to be earned in arbitration would provide sufficient pressure to ensure that attorneys would agree to be governed by arbitral ethical norms and the sanctioning power of arbitrators.

177 For example, under the ICC Rules, after the arbitral tribunal is chosen, one of the first events prescribed by the rules is a hearing at which the parties and the arbitrators draw up a document called the "Terms of Reference." This document spells out the issues in dispute and the procedures for adjudicating those issues. CRAIG ET AL., supra note 62, § 15.01, at 251.

178 Accountability to the arbitral tribunal should not be objectionable, since it is comparable to other adjudicatory settings in which attorneys are subject to the power of judges and bound by the forum jurisdiction's ethical norms. For example, a U.S. attorney licensed in California who appears in a Nevada court must, after obtaining permission to appear pro hac vice, abide by Nevada ethical rules and is liable to Nevada and California bar authorities for transgressions. Marcia L. Proctor, Ethics in Adversarial
Subjecting attorneys to ethical regulation will have the further effect of drafting them into service as co-sponsors of the development of the ethical regime for international arbitration. Traditionally, the anticipated risk associated with the creation of "global attorneys" has been that, with the moorings of national legal systems removed, the world will be left with a generation of stateless lawyers instead of a disciplined and integrated global legal profession. My proposal avoids this potential hazard by requiring practicing attorneys to actively contribute to the development of ethics when they draft arbitral agreements, make arguments for adopting or enforcing particular norms, and decide whether to observe prevailing ethical norms in their professional conduct. Forcing them to accept a stake in the outcome of these developments will enhance the quality of their participation by formalizing their role as moral entrepreneurs in this realm.

E. Published Sanction Awards as Explicators

Arbitrators' new sanction power should be implemented through what I will call sanction awards. When allegations of misconduct are brought, arbitrators should conduct a factual investigation and provide the accused attorney with an opportunity to be heard. If the arbitral tribunal determines that a violation has occurred, the tribunal would publish the relevant findings in a reasoned sanction award that imposes a fine and, if appropriate, refers the matter to the attorney's local bar association. In the event that no misconduct is found, the tribunal would nevertheless prepare an advisory opinion articulating the basis for that finding. This enforcement mechanism is

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Practice, 69 AM. JUR. 2D Trials § 12 (1999). Likewise, a French attorney appearing in a German court may have to abide by German ethical rules and be liable to German authorities for transgressions. See Terry, supra note 34, at 362-63.

179 "By collectively engaging in the process of enacting and enforcing rules of professional conduct, lawyers develop and reinforce the disposition for moral decisionmaking." Wilkins, Who Should Regulate, supra note 18, at 863.

180 "While it is sound from a business perspective, the concept [of the global lawyer] carries with it the danger of professional statelessness, a condition in which lawyers over time become disassociated from the legal profession's fundamental values, such as lawyer independence." Mary C. Daly, The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel, 46 EMORY L.J. 1057, 1111 (1997).


182 In the analogous context of Rule 11 of the U.S. Federal Rules of Civil Procedure, the Advisory Committee's notes suggest that the judge has considerable discretion in formulating the process to be followed, including deciding the matter on the basis of the record and the judge's own observation of the litigation conduct. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1337 (2d ed. Supp. 2002).

183 In many international arbitrations, substantive awards are issued with reasons. See Alan Scott Rau, Integrity in Private Judging, 38 S. TEX. L. REV. 485, 537-38 nn.183 & 188. In fact, some civil law systems treat unreasoned awards as unenforceable violations of public policy. James T. Peter, Med-Arb in International Arbitration, 8 AM. REV. INT'L ARB. 83, 86 & n.21 (1997).

184 While the national bar associations have abdicated responsibility for enforcing ethics in international arbitration, it does not necessarily follow that they would be unwilling to provide support to international enforcement efforts. See supra notes 131-137 and accompanying text.
consistent with treating arbitral ethical rules as contractual obligations that are enforceable through the existing mechanisms of international arbitration, but will also require some modifications designed to accommodate the particular needs of ethical regulation.

Unlike conventional arbitration awards, which are generally maintained as confidential,185 sanction awards must be published, although the names of the parties and the attorneys could be expunged. The institutional standards and procedures for evaluating and sanctioning alleged misconduct could include the obligation to publish the awards. This requirement would serve a number of functions.186 Foremost, it would aid in the interpretation and refinement of ethical norms. Codes can only address attorney obligations in the broadest and most general terms.187 As in all systems, the specific content of ethical norms in international arbitration must be developed through application in specific cases.188 Written arbitrator opinions, in the form of sanction awards, would form a body of nonbinding and persuasive authority to guide future arbitrations, provide notice to attorneys about how to conduct themselves, and alert parties to the consequences of breaking particular ethical rules.189

On a more practical level, publication is necessary for national courts to provide an oversight and review function.190 Although many international arbitration institutions and some states require arbitral awards with articulated analyses of decisions, there is in fact some resistance to articulating the reasoning of the tribunal.191 This situation tempts national courts to second-
guess the articulated reasoning of substantive awards. While resistance does not usually take the form of an outright rejection of articulated reasons, explanations of the tribunal's analysis tend to be more compressed and staccato than national judicial reasoning, leaving more room for interpretation. As explained in more detail below, national courts would have a vital role to play in reviewing sanction awards. Reasoned and well-articulated awards are necessary for national courts to accurately perform this review function.

Finally, publication guarantees "some form of continuous public surveillance." Particularly if the substantive rulemaking for and primary enforcement of attorney conduct in international arbitration were taken out of the hands of public bodies, informal public monitoring would become more important. In the context of professional ethics, as Professor Wilkins has noted, "[e]nforcement proceedings are an important arena for debating conflicting visions of the lawyer's role." Even within the international arbitration community, published sanction awards would generate dialogue about the appropriate conduct for lawyers that could then guide arbitral institutions and parties in future efforts to modulate and modify the ethical rules.

While publication is an essential feature of international arbitration's ethical regime, a number of issues remain to be resolved. Who would undertake the task of publishing? Should all sanction awards be published in their entirety? Would or should published sanction awards have any influence on future arbitration panels? What effect would publication have on the confidentiality of arbitral proceedings? These and other likely questions are potentially difficult to resolve and may in fact be resolved differently by the various arbitral institutions based on the unique needs of the clients they serve. Even with these difficulties, however, sanction awards will provide a vital link between the most competent primary regulator—arbitrators—and national legal systems, which have some continuing interest in how their attorneys are behaving and how they are regulated.

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192 See Carbonneau, supra note 186, at 602.
193 See Helfer & Dinwoodie, supra note 63, at 198 & n.197.
194 See infra Part II.G.
195 REISMAN, supra note 36, at 124 (discussing the desirability of publishing substantive arbitral awards).
197 See Carbonneau, supra note 186, at 600 (posing similar questions with respect to publication of substantive arbitral awards).
198 Arbitration awards do not purport to have any value as precedent in the sense that they are not binding on future panels, nor could they be since arbitrators' decisions are not subject to substantive review. Moreover, in the context of sanction awards, any persuasive authority they may have must be discounted by the degree of party modification of default ethical norms. This trend may signal a need for an appellate body for standard international commercial arbitration similar to that available for ICSID arbitration. For a description of the appellate function in ICSID arbitration, see REISMAN, supra note 14, at 46–106.
F. National Legal Systems as Legitimators

Unlike substantive awards on the merits, sanction awards should be subject to more probing oversight and review by national courts. The justification for limiting judicial review of substantive awards is that parties in a business dispute require resolution by a neutral adjudicator and intrusive oversight by national courts "will transfer real decision power from the arbitral tribunal... to a national court..."199 In the context of sanction awards, however, the inquiry is into an arbitrator's assessment of attorney conduct, not the arbitrator's assessment of the merits of the case.200 Consequently, the need to insulate arbitrator decisionmaking from national court review at the enforcement stage is weaker.201

Conversely, in the context of sanction awards, the need for procedural safeguards is higher. Sanctions for alleged misconduct may affect not only the pocketbook, but also an attorney's employment and status in the professional community. National courts are therefore needed as procedural safeguards and to ensure protection of national interests in the ongoing development and refinement of ethical rules for international arbitration.202 Through monitoring the creation, interpretation, and application of ethical norms, national courts would also play a vital role in legitimizing arbitral ethical norms203 and in providing guidance about the ultimate limits of the power to modify ethical rules.204

G. The Role of the New York Convention

Sanction awards would have to be made enforceable under the New York Convention. However, since the Convention was not written with sanction awards in mind there are questions about how easily its terms could be extended to this new type of award. Specifically, there are questions about

199 See REISMAN, supra note 14, at 113.

200 This is not to deny the interrelationship between allegations of misconduct and the merits of the case. It is easy to imagine that an allegation that one counsel induced a witness to lie would implicate the factual findings on which the arbitral tribunal rested its award. This potential for abuse does not weigh against a more active role for national courts. A finding of attorney misconduct of such magnitude would likely also trigger national court inquiry under Article V of the New York Convention. See, e.g., Waterside Ocean Navigation Co. v. Int'l Navigation Ltd., 737 F.2d 150, 153 (2d Cir. 1984) (confirming award notwithstanding evidence of perjured testimony based on reasoning that falsity of testimony was raised during proceedings and evaluated by arbitrators).

201 The temptation, of course, will be for reviewing courts to color the analysis of misconduct at issue in sanction awards with their own culturally determined notions of what is proper for an attorney. For example, a jurisdiction such as the United States might be reluctant to enforce a sanction award against a U.S. attorney who sought to prepare a witness for upcoming testimony, even if all participants to the arbitration had agreed that such practice was impermissible. Similarly, a French court may be reluctant to enforce sanctions against a French attorney who intentionally withheld documents that would not be discoverable in a French proceeding. For an explanation of the repulsion of other nations, including France, to U.S.-style discovery, see BORN & WESTIN, supra note 57, at 849–852.

202 This role raises the possibility of the fragmentation problem, but much less so than if national institutions were called upon to be primary enforcers. Supra Subpart II.C.2

203 See Carbonneau, supra note 186, at 601.

204 For further discussion about limitations on parties' power to modify ethical norms, see infra Part III.A.2.
whether two of the jurisdictional requirements that bring an award under the purview of the New York Convention would be satisfied by sanction awards. These two jurisdictional requirements are that the dispute arise out of a commercial relationship, and that it concern a subject matter that is capable of settlement by arbitration in the country where enforcement is sought.205

With regard to the issue of whether sanction awards could be said to arise out of a commercial relationship, the arguments about interpretation must be appreciated within the larger framework of those systems that insist on the commercial relationship prerequisite. As a matter of pure interpretation, it could be argued that a commercial relationship exists since the underlying professional relationship between an attorney and client involves a contract for compensation, even if not traditionally viewed through the lens of commerce. Moreover, the proposal to make attorneys subject to the new arbitral code of ethics requires that attorneys agree to be bound by it.206 By so agreeing, attorneys would undertake an essentially contractual obligation to abide by the procedural and ethical provisions of the parties’ arbitration agreement. In the same way that claims asserting contractual breaches of the arbitration agreement could be considered arbitrable and consistent with the New York Convention’s definition of commercial, sanction awards could be treated as falling within the definition.

Notwithstanding possible arguments in favor of capturing sanction awards within the definition of commercial, those countries that have opted within their domestic law for the commercial relationship requirement usually have rather rigid definitions of what constitutes a commercial relationship. As a consequence, if those same countries are reluctant to permit arbitrators to impose sanctions, they could easily accomplish this end by maintaining their more narrow interpretation of the term “commercial”207 or—under the other relevant jurisdictional prerequisite—finding that ethical conduct is not arbitrable. Traditionally, holding that certain subject areas or types of claims were nonarbitrable was a way for nations to prevent such claims from being decided by arbitrators. As the range of potential claims that could arise between private business entities has expanded over the years, so too has states’ willingness to be more flexible in their approach to arbitrability. Since its accession to the Convention, the United States has increasingly entrusted regulatory issues to the enforcement of private litigants.208 While this trend is only beginning to take hold in Europe,209 it seems clear that if international

205 See BORN, supra note 63, at 569.
206 See supra Part II.D.
207 For an older example of such reluctance despite the existence of a contract for exchange between two commercial entities, see India Organic Chems., Ltd. v. Chemtex Fibres Inc., A.I.R. 1978 S.C. 106 (Bombay H.C. 1977), cited in BORN, supra note 63, at 288 n. 189 (concluding that a technology transfer was not “commercial” under law of India).
208 In fact, even though the Securities Act and the Exchange Act were adopted in the 1930s, modern enforcement through a private attorney general evolved later. See Mark H. Van De Voorde, The Fraud on the Market Theory and the Efficient Markets Hypothesis: Applying a Consistent Standard, 14 J. CORP. L. 443, 450–51 (1989).
209 The most immediate examples of this transition in the European Union are the recent reforms to European antitrust law, which rely more heavily on private attorney general mechanisms for enforcement. Lucio Lanucara, The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses, 9 IND. J. GLOBAL LEGAL STUD. 433, 454 n. 75 (2002).
arbitration is to offer full adjudication of claims arising out of a particular transaction, its reach must permit the arbitration of statutory and tort claims relating to the underlying commercial claims. Permitting arbitrators to issue sanction awards must be part of this evolution.

Another issue regarding the application of the New York Convention to sanction awards is that a heightened standard for review of sanction awards cuts against existing standards in the New York Convention that permit inquiry only for excesses of power, abuses of process, and serious infringement on national policies. Arguably, since the expanded review is incorporated into the parties' arbitration agreement as part of the arbitral rules, it should be enforceable under the New York Convention. In other situations when parties have sought to contractually expand the basis for judicial review of arbitral awards, some courts have resisted because judicial review of arbitrators' substantive decisions seems inconsistent with fundamental conceptions of arbitral jurisdiction and the traditional allocation of power between courts and arbitrators. 210 Expanded review of sanction awards, on the other hand, would not be inviting courts to second-guess arbitrators' substantive decisions, but instead allow courts to oversee the development and application of arbitral ethical rules. Review of sanction awards would invite a more active partnership with national courts, but in a new area where there are no preconceived ideas about how limited judicial review should be.

All optimism aside, it may well be that the proposals of this Article would require amendment to the New York Convention because spontaneous and consistent national support cannot be presumed in interpretation of the commercial requirement or in acquiescence to the expanded review of sanction awards. Instead of representing an unnecessary burden, amendment of the New York Convention could be a welcome opportunity to update a document that, while brilliant and in many ways enduring, 211 was drafted in an era in which significantly different assumptions existed about the nature of business disputes and the role of arbitration in resolving those disputes. 212

210 See, e.g., Kenneth M. Curtin, Contractual Expansion & Limitation of Judicial Review of Arbitral Awards, 56 DISP. RESOL. J. 74, 78 (2001) (examining various court decisions permitting expansion under freedom of contract theory, prohibiting expansion on grounds that it disrupts arbitral process, and concluding that “parties should be allowed to contractually negotiate as to the scope and procedure of arbitration, but not as to the substantive enforcement of arbitral agreements or awards”).

211 See REISMAN, supra note 14, at 108-09.

212 In addition to the advent of new varieties of business claims based in statute and tort, changes in the international legal community are challenging certain implicit assumptions upon which the New York Convention was founded. One particularly interesting example is the absence of an express provision for refusing enforcement of an award tainted by arbitrator bias or misconduct. Viewed in historical context, this omission was probably an expression of the existing confidence among the drafters that arbitrators as well as the parties had an intuitive and reliable sense of honor and duty to conduct themselves properly. For example, the 1923 version of the ICC Arbitral Rules provided only that parties were honor-bound to comply with the award. See W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, TEX. INT’L L.J. 1, 7 (1995). Thus, the drafting of the Convention was itself a dramatic shift from the prevailing confidence that there was no real need for judicial enforcement of arbitral awards because businessmen’s sense of honor was sufficient to ensure voluntary compliance. While drafters of the New York Convention may have been willing to recognize that losing parties may falter in their commitment to behave honorably, it must have been unimaginable that one of the “grand old gentlemen” who formed the closed circle of potential arbitrators (and who were themselves drafting the New York Convention) could stray from their noble duties, DEZALAY & GARTH, supra note 149, at 34-36 (describing the “grand old men” who “played a central role in the emergence and recognition of arbitration”).
III. RESPONDING TO POTENTIAL OBJECTIONS TO THE PROPOSED REGIME TO REGULATE ATTORNEY CONDUCT IN INTERNATIONAL ARBITRATION

Having proposed an enforcement regime, the task now is to anticipate and answer some of the inevitable objections. Concerns over the proposals in this Article will likely arise because they appear to privatize ethical rulemaking and professional discipline in international arbitration. While this characterization is not entirely accurate, it raises concerns that are bound up with more profound questions about the nature of ethics, the function of arbitration, and the legal process more generally. These concerns are likely to be the forum in which power struggles take place over the control of attorneys in international arbitration. Not all objections can be answered here, but this final Part attempts to respond to the most pressing concerns.

A. Assumptions About the State Monopoly on Ethical Rulemaking Power

The concept of ethics is steeped in moral and normative symbolism. It is this feature that many would claim distinguishes ethical rules from contract rules. Terms such as price and time of delivery can be altered by the parties, but ethical rules by their nature are unalterable. They protect interests that are not captured in a contractual agreement and should therefore be treated as immutable. Under this objection, the need for a match between procedural arrangements and ethical rules (to the extent such a theory is compatible with this position) is subordinate to the need to maintain the integrity of legal ethics.

Another, equally forceful critique is that the power to modify would give the keys to the henhouse to the proverbial fox. Although international lawyers would be entrusted with negotiating changes to default norms, they are also the ones to be regulated and therefore have an incentive to negotiate out of any constraints on their conduct. In its most extreme form, this objection characterizes modifiable ethical norms as a means, if not a direct attempt, to circumvent and undermine national ethical norms. Both of these objections are

213 See Ware, supra note 64, at 733.
214 As noted above, the international arbitration system is an intricate network of governmental, intergovernmental, and private institutions operating within the national laws and private and international agreements that facilitate the practice of international commercial arbitration. See supra Part II.B.
215 This argument may be asserted with particular vigor when large corporate clients are involved. See Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. REV. 1, 23–31 (1988) (arguing in favor of strong and immutable professional norms as a means of protecting lawyers against the demands of powerful corporate clients). Although lay classifications tend to frame ethical issues in binary right/wrong terms, many U.S. ethical rules are not written as immutable. See infra notes 219–221 and accompanying text.
216 Under contractarian economic theories, immutable rules are distinguishable from default rules in that immutable rules cannot be changed by contractual agreement. See Richard W. Painter, Advance Waiver of Conflicts, 13 GEO. J. LEGAL ETHICS 289, 289 (2000).
217 For a description of the relationship between procedural arrangements and ethical norms, see Rogers, supra note 4, at 412. For an explanation of why this relationship indicates a need for modifiable norms in arbitration, see supra Part II.B.
218 The fox/henhouse argument has been raised in opposition to self-regulation through professional bar associations and to judicial participation in the process. See Schneyer, supra note 121, at 41.
grounded in assumptions about the appropriateness of state monopolies over rulemaking in the area of ethics. While understandable, they lose their bite when the context of, and limitations on, the proposed power to modify are understood.

1. Modifiability in Context

Despite the apparent anomaly of treating ethical rules as contract terms, it is actually common practice in the United States, where many ethical rules are already contractually modifiable default rules. Model Rule 1.7, for example, prohibits an attorney from representing a client if the representation would be "materially limited" by the lawyer's other interests and responsibilities, but permits the attorney and parties to contract around this default prohibition. The primary differences between the current U.S. practice and my proposal are that, under current U.S. practice, only a limited number of specified rules can be contractually modified in certain predefined situations, whereas I propose modifiability ex ante and en masse. Under my proposal, all ethical rules would be subject to contractual modification (although as explained later not modifiable in their entirety) at the commencement of an arbitration rather than as specific ethical issues arise. The unique features of the international arbitration system make these innovations possible as a matter of practice and justifiable as a matter of policy.

With respect to modifiability en masse, predicate to any consensual modification of ethical rules is the existence of a contractual relationship between the attorney and the beneficiary of the attorney's obligations. Litigation is a compulsory process in which the only formal contractual relationship that exists is between clients and their attorneys. Consequently, an attorney and a client can agree to change only those ethical rules designed to protect the interests of the client; they cannot modify rules designed to protect the integrity of the proceedings or third parties. In international arbitration, by contrast, it is possible to expand the realm of ethical norms that are subject to modification because the realm of formal contractual relationships is expanded. While the arbitration agreement is the central contract and is often the only one reduced to writing and typically discussed in the literature, it is not the only contract. Arbitration establishes a web of contracts between the

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219 The European CCBE Code does not appear to permit client waiver of conflicts of interest, but it has been suggested that such a consent provision is necessary and inevitable. Laurel S. Terry, An Introduction to the European Community's Legal Ethics Code, Part I: An Analysis of the CCBE Code of Conduct, 7 GEO. J. LEGAL ETHICS 1, 31-32 (1993).


221 MODEL RULES OF PROF'LT CONDUCT R. 1.7 (1983).

222 Limitations on the parties' ability to contractually modify the proposed ethical codes will be taken up infra Part III.A.2.

223 See, e.g., Richard W. Painter, Rules Lawyers Play By, 76 N.Y.U. L. REV. 665, 720 (2001) (advocating that the optional disclosure rule embraced by the Restatement, and now by the Ethics 2000 Commission, be changed "into a default rule by permitting, and perhaps encouraging, lawyers to contract around it by opting-up and committing themselves ex ante to disclose client fraud or illegal acts outside the organization").
parties, arbitral institutions, and, under the proposed regime, the parties’ attorneys. When parties pay money to arbitral institutions in exchange for their services in administering the arbitration, and when parties pay money (usually indirectly through an intermediary arbitral institution) to arbitrators in exchange for decisionmaking services, implied-in-fact contracts arise that supplement the original arbitration agreement between the parties. With all these players implicated in contractual arrangements, it is possible to expand the range of ethical rules that can be modified through contract to include those ethical obligations designed to protect interests other than the client’s.

Current U.S. arbitration practice affirms the viability of this proposal. The U.S. rule pertaining to ex parte communication with party-appointed arbitrators, while not normally described in such terms, can be understood as an example of ethical norms modified (or created) for arbitration by contractual agreement. Ethical rules that normally apply in U.S. litigation prohibit communication with judges and juries in order to preserve the impartiality of the decisionmaker. However, judicially ratified U.S. arbitration rules permit parties to communicate throughout arbitral proceedings with their party-appointed arbitrators—even about crucial issues involving strategy. The U.S. arbitration rule permitting ex parte contact can be

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224 An excellent description of the contractual arrangement between parties and arbitral institutions is provided in Fouchard, Gaillard & Goldman on International Commercial Arbitration:

By drafting and publishing its arbitration rules, the arbitral institution effectively puts out a permanent offer to contract, aimed at an indeterminate group of persons. By concluding their arbitration agreement, the parties accept that offer and agree to empower their chosen institution to organize and oversee the arbitration in the event that a dispute arises between them. When the request for arbitration is submitted to the institution and it begins to organize the proceedings, the contract is perfected.

FOUCHARD, GAILLARD & GOLDMAN, supra note 145, ¶ 1110.

225 “[A] contract does necessarily exist between the parties and the arbitrators.” Id. ¶ 1106, at 601. Parties essentially retain arbitrators to decide their dispute in exchange for a fee, and the contractual nature of this arrangement is recognized by various jurisdictions. Id. ¶ 1105, at 601. “There is also a contract between the arbitral institution and each of the arbitrators.” Id. ¶ 1111, at 604.


227 In the United States, ethical rules impose almost absolute restrictions against ex parte communications between attorneys and judges, except in certain rare procedural contexts. Exceptions to the rule against ex parte communications include special proceedings for extraordinary relief (such as temporary restraining orders), in camera inspections, and similarly unusual procedural settings. See WOLFRAM, supra note 220, § 11.3.3, at 604-05. It is highly unusual for an adjudicating judge to meet separately with the parties to extract confidential information about the case that might be relied on in making a decision but need not be disclosed to the opposing party. In a modern trend, many U.S. federal judges have departed from this strictly disinterested posture and adopted what Judith Resnik terms “managerial judging.” Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 390, 425-27 (1982) (demonstrating and criticizing this trend).

228 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 226 (2d ed. 1991) (noting that, “it is not unusual for there to be discussions with just one of the parties in respect to procedural matters such as availability for future hearings”); AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes Canons III(B)(1), VII (permitting ex parte communications with any member of the arbitral tribunal “concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings” and ex parte communications by party-appointed arbitrators as long as general disclosure is made); see also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759 (1993) (holding no misconduct despite
understood as essentially a creature of contract—it is permissible, even if inherently incompatible with U.S. ethical rules,229 because the actors in the arbitration (most particularly the opposing parties and the arbitrators) have agreed to it.230 As this example demonstrates, expanding the range of rules that can be contractually modified is not only a theoretical possibility, but an existing practice.

With respect to the other major innovation of my proposal—modifiability ex ante—there are also justifications based on unique features of the international arbitration system and support in existing precedents. Under the Model Rules, consensual waivers by clients must be particularized, meaning that a client can agree to waive specified rights after the facts of the particular situation are presented.231 Under my proposal, however, clients would already have undertaken a form of generalized ex ante waiver to the extent that they agree to be bound by a body of arbitral ethical rules that alters some of the national ethical rules otherwise governing the attorney-client relationship.232

This example highlights how client consent to modifications of established default rules is not substantively different from party consent to ethical rules specifically designed for international arbitration. The default rules that are developed and implemented by arbitral institutions will necessarily require that parties relinquish certain national ethical protections or interests in the same way that they relinquish certain national procedural rights otherwise guaranteed in compulsory litigation.233 For example, U.S. parties who agree to

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229 While compatibility with existing rules is an important benchmark, bar associations in the United States have taken the position that U.S. ethical rules do not apply in international arbitration. See supra text accompanying note 12.

230 Ex parte communication with party arbitrators makes for an interesting example of an existing practice of contractually modifying ethical rules, but I am not advocating here that it be adopted as a substantive rule for international arbitration. While most jurisdictions permit some level of ex parte communication in judicial proceedings beyond that permissible in U.S. litigation, virtually all national jurisdictions aside from the United States prohibit contact of the nature permitted between U.S. parties and their party-appointed arbitrators. See Rogers, supra note 4, at 363. As a consequence, European parties in international arbitrations may be unaware that U.S. parties are communicating with party-appointed arbitrators. For a description of the problems caused by these differences and a potential solution, see id. at 373.

231 For example, with respect to conflicts of interest, Model Rule 1.7 requires that, to be effective, a waiver of future conflicts “must contemplate that particular conflict with sufficient clarity so [that] the client's consent can reasonably be viewed as having been fully informed when it was given.” ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93–372 (1993). Recently, the American Bar Association has undertaken to permit general prospective conflict waivers. These efforts have been decried by some and applauded by others. Compare Lawrence J. Fox, All's OK Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics, 29 Hofstra L. Rev. 601, 708–719 (2001) (describing proposed generalized prospective waivers as a cause for “mischief” and an “unsavory” request), with Jonathan J. Lerner, Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox, 29 Hofstra L. Rev. 971, 998 (2001) (characterizing the same as “progressive changes”).

232 See supra Part II.B.

233 By agreeing to arbitrate, U.S. parties waive their right to a jury trial and, depending on how the arbitral procedures are structured, may also waive their rights to extensive discovery, cross-examination of witnesses, and other procedural guarantees of the U.S. system. See generally Sterlight, supra note 63 (reviewing the various procedural rights that are waived by an agreement to arbitrate). Because arbitration constitutes a waiver of these rights, in domestic contexts involving parties with unequal bargaining power there may be much less reason to recommend arbitration. See generally Jean R. Sterlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 Ohio St. J. On Disp. Resol. 669 (2001) (arguing that, because arbitration constitutes a waiver
submit disputes to an arbitration process that is based on hybridized procedural rules and derivative ethical rules might consent to a more European-style confidentiality rule, which would permit disclosure of categories of information that would be considered confidential under U.S. ethical rules.\textsuperscript{234} This consent would be given without the parties knowing precisely which communications would be subject to disclosure. What the parties would lose in protection of certain categories of confidential information would be gained in the coherence and overall fairness of proceedings in which all the parties are operating under the same definition of confidentiality.

The difference between party consent to individual modifications and party consent to an entire prefabricated ethical code is that the latter would have been carefully constructed and calibrated by the arbitral institution and would necessarily be the product of deliberative analysis. In the former situation, however, it is possible that rash or unwise decisions could be made if the decision was abstracted from specific situations in which the parties might better appreciate what interests and rights they were waiving. Indeed, this is precisely the concern underlying those Model Rules that require actual informed consent, such as Model Rules 1.7 and 1.2(c). Such rules serve an important function in standard litigation contexts by protecting clients who are vulnerable and relatively uninformed of their legal rights.\textsuperscript{235} In international arbitration, however, where parties are by definition sophisticated, well-funded, and well-represented,\textsuperscript{236} the need to protect clients is lessened and is outweighed by the need to ensure coherence and proper functioning of the system. These are precisely the arguments that are mustered in favor of permitting ex ante waiver of client prerogatives over settlement decisions, particularly when insurance carriers pay for representation.\textsuperscript{237}

While agreement of the interested actors would be a necessary requirement for modification of default ethical rules, it would not always be a sufficient one. Ethical rules are also needed to protect both the interests of the international arbitration system and various national interests that may be implicated in particular disputes, but which are not represented in the contractual arrangements that constitute a particular arbitration. By way of example, it is possible that a modified ethical rule, even if contractually agreed

\textsuperscript{234} As I have explained elsewhere, legal systems take rather different views about the extent of an attorney's confidentiality obligations. In civil law countries (except France), the concept of "professional secrets" protects only information communicated by a client to an attorney. Information communicated to clients or obtained through communications with other attorneys is not included as information that attorneys are obligated to maintain as secret. In common law systems, the notion of confidentiality, which is closely tied to the attorney-client privilege, is much broader and incorporates both communications from an attorney to a client and from a client to an attorney. Under Islamic law, the principles of shari'a arguably impose an even higher duty of confidentiality, requiring protection not only of communications between attorneys and clients, but also protection of all information relating to representation. Rogers, \textit{supra} note 4, at 371.


\textsuperscript{236} See \textit{supra} notes 95--97 and accompanying text. Asymmetry between parties is usually raised in opposition to ex ante contracting around legal protection. Cf. Painter, \textit{supra} note 2165, at 290--91 (noting that ex ante waiver of fiduciary duties is sometimes permitted in corporate law, but such waiver is limited based on informational asymmetry between managers and shareholders).

to, may do such violence to a fundamental principle of fairness that an award rendered in accordance with it is inherently unfair. Such a rule might, for example, permit the parties to offer financial incentives to the arbitrators in exchange for particular decisional outcomes or free them of any obligation not to misrepresent facts to the tribunal. An award rendered through proceedings premised on such a rule would degrade the international arbitration system, even if the parties in an individual arbitration were willing to accept the result. These concerns, which I will refer to as residual interests, are not enough to preclude the possibility of modifiable ethical norms, but they are sufficient to raise concerns about the limitations that would exist on the power to modify.

2. Constraints on the Power to Modify

Attorney power to modify the arbitral codes would be limited by a range of interdependent constraints. Before considering the constraints that are integrated into the international arbitration system, it should be noted that several external constraining forces also exist. For example, many national statutes criminalize and impose civil liability for conduct that also constitutes an ethical violation. National statutes will continue to prohibit such conduct, even if the correspondent ethical rule was modified. In addition to

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238 For an examination of the principle of fairness and its central importance to legal ethics and adjudication generally, see Rogers, supra note 4, at 362-64.

239 It is unlikely that parties would actually craft rules affirmatively permitting such conduct, but it is possible that they might agree to a standard that, for example, so dilutes obligations on counsel regarding representations to the tribunal that it permits what would be considered direct misrepresentations. Cf. Tumey v. Ohio, 273 U.S. 510, 523 (1927) (concluding that an arrangement compensating a judge based on number of convictions gave the judge a "direct, personal, substantial, pecuniary interest" in the outcome of the case and was therefore unconstitutional).

240 Some argue that permitting ex parte communication with party arbitrators is just such a rule. See, e.g., Desiree A. Kennedy, Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations, 8 GEO. J. LEGAL ETHICS 749, 764 (1995) (criticizing arbitration that permits party communication with arbitrators as incompatible with the objective of impartial adjudication).

241 Notably, conduct that is not addressed in a code of arbitral ethics, such as attorney handling of client funds or attorney advertising, will remain subject to national ethical rules or any international rules that may eventually be developed. Rogers, supra note 4, at 379-394, 406 (explaining that ethical rules for arbitration need only address those obligations that directly pertain to advocacy activities).

242 For example, some types of conflicts of interest may constitute a criminal offence. See, e.g., United States v. Bronston, 658 F.2d 920, 922 (2d Cir. 1981) (affirming conviction of lawyer for fraudulent use of mails for a conflicting and undisclosed purpose), cited in WOLFRAM, supra note 220, § 7.1.1, at 314 & n.6. Moreover, the Racketeer Influenced and Corrupt Organizations Act (RICO) can be applied if a lawyer assists a client in committing crimes. See id. at 698.

243 See, e.g., CAL. BUS. & PROF. CODE § 6068(e) (West 1990) ("It is the duty of the attorney to... maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."). These constraints are not sufficient to obviate the need for the articulated and binding norms proposed in this Article, but they do provide substantial safeguards against attorney efforts to abolish ethical constraints altogether. Malpractice claims are the other obvious area of civil liability. In that context, ethical codes are standards used to evaluate whether client ratification should be treated as an affirmative defense to legal malpractice claims and more generally as a source of guidance in evaluating civil liability. WOLFRAM, supra note 220, at 206-226, 252.

244 Although most bar associations have not sought to have their rules applied in international arbitration, it is possible that such rules could be used as a secondary means of enforcement, for example in those states that permit private rights of action for violations of ethical rules. See supra note 12. The U.S. Model Rules prohibit attorneys from making any material misrepresentations of fact or law to third parties, which could arguably include the arbitral tribunal. Since, at least in the United States, attorneys do not enjoy the same immunity in arbitration that they do in litigation settings, it is possible that a
formal prohibitions, informal constraints such as professional reputation and peer pressure would deter overzealous truncating of ethical obligations. Even attorneys who might be willing to act unscrupulously are likely to hesitate before alerting their opponent to their indifference toward ethical rules, particularly in the delicate moments of precontractual and predispute negotiations.

Turning to the international arbitration system and the proposed regime, there are a range of constraints on the power to modify, which together provide protection for clients, opposing parties, and third parties. Clients are protected against injurious modifications because the power to modify ultimately rests in their hands. No alterations can be made without their consent, and, in the context of international commercial arbitration, that consent typically comes from a sophisticated international company. Opposing parties are similarly protected by a consent requirement. Any incentive a party may have to minimize the ethical constraints on its own attorney will be counterbalanced by the party's disincentive to bargain away constraints on opposing counsel. Consequently, the opposing party, the most likely victim of attorney misconduct in an advocacy setting, also enjoys some level of protection inherent in the modification process.

Even in light of these constraining forces, it is still possible that attorneys could exceed the limits of good sense and seek to eliminate essential ethical precepts from the rules that bind them. This is where systemic controls would come into play. Parties and counsel who tamper with fundamental essentials of legal ethics risk that an award produced under their modifications will not be enforceable. Under the New York Convention, national courts can refuse to enforce arbitral awards if basic notions of fairness and justice were not observed during the arbitral proceedings, as would be the case if fundamental ethical precepts were abrogated. Parties could not, for example, expect that an award would be enforceable if they had erased all prohibitions against misrepresenting facts to the tribunal or against bribing arbitrators. This threat of unenforceability will likely deter abusive modifications.

In addition to the specified grounds in Article V(a) of the New York Convention, national courts are also able to protect those aspects of ethics that are of particular importance to their national regulatory scheme. Article V(b) of the Convention contains a public policy exception that permits national misrepresentation to an arbitral tribunal could give rise to a claim for fraud. While interesting to contemplate, particularly since the res judicata effect of arbitral awards is dubious, such collateral claims could do serious damage to the arbitration system if they became a popular replacement for appeal. This example, and others like it, raises what Wilkins refers to as problems of duplication and conflicts. See Wilkins, How Should We Determine, supra note 21, at 487-89.

Cf. Reisman, Looking, Staring, supra note 121, at 172-76 (describing the role of social pressure and informal regimes in regulating behavior).

See supra notes 95-97 and accompanying text.

Cf. McConnaughay, supra note 2, at 490 (arguing that notwithstanding contrary predictions, "private contractual choice of law traditionally has not had the effect of displacing otherwise applicable mandatory law").

See Park, supra note 62, at 701.

For a discussion of uncompromisable, universally accepted ethical precepts, see Rogers, supra note 4, at 358.
courts to refuse enforcement of awards that offend their domestic public policy. This public policy exception has been defined very narrowly by courts and has rarely been successfully invoked.\textsuperscript{250} The narrowness of this review does not open an unduly broad chasm to avoid the finality of arbitral awards, but still ensures that states can insist on ethical protections that they consider fundamental, mandatory, and inalienable.

Model Rule 1.7 provides one potential example illustrating how nations might draw the dividing line between permissible and impermissible modifications. Under this rule, a party cannot consent to conflicting representation unless the lawyer reasonably believes that the party’s representation will not be adversely affected.\textsuperscript{251} This limitation has been interpreted to require an objective evaluation of whether there is a threat to the client’s representation\textsuperscript{252} that is not universally considered necessary to ensure the fundamental fairness of proceedings. Under prevailing European standards, for example, it appears that subjective belief by the attorney is sufficient to avoid a conflict of interest.\textsuperscript{253} If U.S. courts reviewing substantive awards were to decide that the objective standard was immutable, as suggested by the structure of the rule, they might refuse to enforce an award under the public policy exception when an attorney represented a client notwithstanding an objectively objectionable conflict of interest. In this way, the public policy exception could act as an escape hatch that permits national courts to police modification in order to ensure that they do not violate essential assumptions about attorney conduct.

While accommodating national policy interests, using the public policy exception as a tool for examining the external limits on modifiability also has potential perils. It is possible that national courts could, under the guise of policing these outer limits, seek to imprint their own “substantive tilt” or interpretation, thus resurrecting the fragmentation problem discussed earlier.\textsuperscript{254} However, given the historically overwhelming restraint with which national courts have applied the public policy exception\textsuperscript{255} and the asserted disavowal of national ethical regulation in this context, such national opportunism seems

\textsuperscript{250} See Carbonneau, supra note 42, at 32 (noting that the French Cour de cassation “has devised a special notion of ordre public for international [arbitral awards] . . . [P]ublic policy is confined to due process considerations and requirements of basic procedural fairness”).

\textsuperscript{251} Model Rule 1.7(b)(2) states that the “consultation” with clients regarding conflicting representation “shall include explanation of the implications of the common representation and the advantages and risks involved.” MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(2) (1999). These requirements will ordinarily be met in the course of negotiating modifications to default rules and memorializing the agreed-upon modifications. See WOLFRAM, supra note 220, § 7.2.4, at 343–48 (describing consultation and consent principles under the Model Rules).

\textsuperscript{252} See id. § 7.2.3, at 341.

\textsuperscript{253} It has yet to be determined how the standard for conflicts of interest under the CCBE Code will be interpreted. It is likely, however, that given how conflicts of interest were until recently left to the subjective decision of the attorney, European sensibilities will be satisfied with a less restrictive standard (e.g., as long as the attorney subjectively believes that representation will not be impaired). See Daly, supra note 11, at 1150 (noting that in some countries, professional ethics are handed down as oral tradition and only address the most obvious conflicts of interest, leaving the rest to personal relationships).

\textsuperscript{254} See supra text accompanying note 158.

\textsuperscript{255} COMM. ON INT’L COM. ARB., INTERIM REPORT ON PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS 35 (2000), http://www.ila-hq.org/pdfs/Int%20Commercial%20Arbitration/ComArbitration.pdf (noting that such claims are rarely successful).
unlikely. Instead, it is quite possible that national court review will stimulate a healthy and productive cross-cultural dialogue about national ethical regimes, which could prove useful when the international community turns, as it will inevitably,\textsuperscript{256} to the task of drafting generally applicable supranational ethical rules.\textsuperscript{257}

While national courts would be the ultimate bastions of protection against abusive modification, arbitrators would also exercise a control function. Because arbitrators are always (or should always be) concerned with the effectiveness of their awards,\textsuperscript{258} they could use their powers to ensure that ethical modifications do not imperil enforcement. Arbitrators generally have a great deal of discretion in managing proceedings, but this power usually yields if both parties have agreed to a particular set of procedural and ethical rules. It is unclear to what extent arbitrators have the power or obligation to disregard the will of the parties in order to ensure the fairness of the arbitral proceedings.\textsuperscript{259}

Even when the parties have agreed to a rule, arbitrators would still have the power of interpretation. Faced with a general rule that appeared to unacceptably undermine critical ethical precepts, arbitrators could interpret and apply the rule in a way that ensures the fundamental fairness of the proceedings.\textsuperscript{260} To the extent that modifications take place after proceedings

\begin{itemize}
\item \textsuperscript{257} Cf. Lowenfeld, supra note 135, at 654-55 (arguing that lessons learned in international arbitration can aid in refining national and international adjudicatory techniques and procedures).
\item \textsuperscript{258} Park, supra note 62, at 655-56; see Yves Derains, Public Policy and the Law Applicable to the Dispute in International Arbitration, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 227, 245-47 (Pieter Sanders ed., 1987) (suggesting that arbitrators must keep an eye toward the mandatory law of the likely enforcement jurisdiction or jurisdictions to ensure that their award is enforceable). Article 26 of the ICC Rules expressly states that arbitrators "shall make every effort to make sure that the award is enforceable at law." CRAIG ET AL., supra note 62, app. 2, at 10. Moreover, in ICC arbitration, the International Court of Arbitration (the administrative body of the ICC), is empowered under Article 21 to scrutinize awards and "draw attention" to points of substance that might interfere with enforcement of the award. Stephen Bond, Recent Developments in International Chamber of Commerce (ICC) Arbitration, 477 PLI/Comm. 55, 78-79 (1988).
\item \textsuperscript{259} The English 1996 Act provides a helpful example of this problem. The Act imposes on arbitrators a duty to "act fairly and impartially" and permit each party "a reasonable opportunity" both to put on its case and to respond to its opponent's case. Martin Hunter, The Procedural Powers of Arbitrators Under the English 1996 Act, 13 ARB. INT'L L. 345, 346 (1997) (citing section 33(1) of the Act). In addition, the Act imposes a duty on arbitrators to adopt procedures and exercise their powers generally in a way that "provide[s] a fair means for the resolution of the matter[.]" id. These obligations appear to be in conflict with the requirement in section 34, which states that the power of the tribunal to decide procedural and evidentiary matters is "subject to the right of the parties to agree [sic] any matter." id. Some scholars suggest that this apparent tension does not create an opportunity for arbitrators to disregard the will of the parties and is instead resolved by the ability of arbitrators to resign if an agreement of the parties conflicts with their obligations under section 33. Id. at 347.
\item \textsuperscript{260} In doing so, arbitrators would not be disregarding the parties' intentions so much as interpreting those intentions at a higher level of abstraction. Premier among the parties' intentions in selecting arbitration is to arrive at an effective means for resolving their dispute—choosing a means that will produce an enforceable award. This approach is not without its problems. At a theoretical level it may be seen as derogating party consent, while at a practical level it may not be likely, at least according to those who point to pressures on arbitrators to capitulate to parties' most immediate desires. See Andrew T. Guzman, Arbitrator Liability: Reconciling Arbitration and Mandatory Rules, 49 DUKE L.J. 1279, 1282 (2000) (arguing that arbitrators are unlikely to enforce mandatory rules when the parties seek to contract around them).\
\end{itemize}
have begun, arbitrators would be able to use their powers of persuasion to urge reason upon ethnically reckless parties.

In sum, as I have argued elsewhere, ethical rules can only effectively regulate attorneys if they coincide with the functional roles assigned to attorneys through the chosen procedures in particular arbitrations. Because procedural rules in international arbitration are subject to modification, the attendant ethical rules must also, with some limitations, be modifiable. The potential for abuse of this power to modify will be deterred and controlled by multiple and interrelated constraints.

B. Challenging the Distinction between Public and Private Functions

Currently, none of the major arbitral rules expressly confer on arbitrators the power to sanction for misconduct. Analogs in the public international law arena do not offer much guidance because international tribunals have only rarely addressed the issue of their own power to sanction attorney misconduct. Perhaps as a consequence of this silence, scholars have paid little attention to the issue of whether arbitrators have such power. A review of scholarship in this area reveals only a few stray conclusory remarks, with

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261 For an analysis of the relationship between the content of ethical rules and the procedural rules that shape and define the functional role of the lawyer in an advocacy setting, see Rogers, supra note 4, at 380–395.

262 The only partial exception appears to be the recently promulgated arbitral rules developed by the Center for Public Resources ("CPR"). Designed to provide an alternative to the popular UNCITRAL rules for ad hoc arbitration, an arbitrator is authorized under the CPR rules to “impose any remedy it deems just, including an award on default, wherever a party materially fails to comply with the rules.” Robert H. Smit & Nicholas J. Shaw, The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary, 8 AM. REV. INT’L ARB. 275, 310 (1997). Notably, the power contemplated by the CPR rules seems to extend only to the parties and not to their attorneys. Cf. id. (discussing the application of the CPR rules to parties and not to attorneys).

263 The sanctioning power of international tribunals has only recently been raised in the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). See Prosecutor v. Duško Tadic, Case No. IT-94-1-A-R77, Int’l Crim. Trib. for the Former Yugo., Appeals Chamber, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin (Jan. 31, 2000), http://www.un.org.icty/tadic/appeal/judgement/vuj-aj000131e.htm (finding counsel in contempt for inducing perjury by witnesses). Interestingly, the ICTY is one of the only international bodies to draft and implement a code of ethics. See, e.g., ICTY Code of Professional Conduct for Defence Counsel (IT/125), http://www.un.org/icty/basic/counsel/IT125.htm. The ICI has only criticized counsel on two occasions and has apparently never attempted to impose any sort of sanction on counsel. See Vagts, supra note 5, at 260.

264 Another likely source of this omission is the fact that courts are often understood to have certain inherent powers, which are only reluctantly attributed to international tribunals. Compare Wolfram, supra note 27, at 3–6 (discussing the history of the inherent sanctioning power of courts to regulate lawyers), with Michael Bohlander, International Criminal Defense Ethics: The Law of Professional Conduct for Defense Counsel Appearing Before International Criminal Tribunals, 1 SAN DIEGO INT’L L.J. 75, 82–90 (2000) (discussing the statutory basis for the International Criminal Tribunal’s sanction powers for conduct that interferes with the administration of justice). This dissidence is most likely a product of the fact that the concept of “inherent powers” is linked to traditional notions of sovereignty. See, e.g., Andrew W. Hayes, Note, The Boland Amendments and Foreign Affairs Deference, 88 COLUM. L. REV. 1534, 1544 (1988) (using the term “inherent power” to refer to plenary powers derived from the nature of sovereignty and the exigencies of conducting national policy independent of the constitutional text).

265 The lack of attention paid to the power of arbitrators to sanction is inevitably related to the larger reasons that little attention has been paid to the lack of ethical regulation in international arbitration. This neglect is likely attributable to the fact that until recently the conduct in arbitration was informally regulated by social controls. See supra note 5 and accompanying text.
little or no explanation or analysis of the origin of such power. Almost no authoritative scholarly work has been done to explore whether international arbitrators have the power to sanction parties and their counsel for misconduct.

There is no clear guidance from national precedents to fill this void. The few national courts that have addressed the subject have reached discordant conclusions. Only three jurisdictions in the United States have considered whether arbitrators have the power to sanction. Of those, courts in the District of Columbia and Rhode Island decided that arbitrators do have an inherent power to sanction, while New York courts adamantly refused to ratify any such power. Meanwhile—notwithstanding traditional hostility toward

266 Compare Thomas E. Carboneau, National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY? 115, 129 (Richard B. Lillich & Charles N. Brower eds., 1993) (suggesting that arbitrators possess “authority to sanction a party for refusing to cooperate in good faith with the arbitral proceeding”), with CRAIG ET AL., supra note 62, § 8.07, at 145 (stating bluntly that arbitrators do not have the power to hold parties in contempt). Some commentators have engaged in more reasoned consideration of the issue, but even their conclusions are tentative and incomplete. See, e.g., Thomas, supra note 35, at 576 (concluding, based on the New York Code of Professional Responsibility, that in the context of attorney disqualification, “it is clear that arbitrators are empowered, directly and indirectly, to regulate the conduct of lawyers”); C. Thomas Mason III, Lawyers’ Duties of Candor Toward the Arbitral Tribunal, 998 PLI/Corp. 59, 64 (1997) (“There are sanctions and remedies available to arbitrators who conclude that counsel has misrepresented the law or, through lack of due candor, has jeopardized the fairness of the proceedings.”); Vagts, supra note 5, at 255 (noting that although arbitral “[j]urisdiction over cases charging attorney misconduct in arbitration is in doubt . . . [i]t appears that while arbitrators have no authority to suspend or disbar attorneys, they could disqualify attorneys from appearing before them and could impose sanctions for attorney misbehavior when it came to assessing the costs of the arbitration”).


An appellate court in the District of Columbia held that arbitrators have authority to impose sanctions, including costs and fees, for misconduct such as discovery abuses. Pisciotta v. Shearson Lehman Bros., Inc., 629 A.2d 520, 525–26 (D.C. 1993). Following the District of Columbia’s lead and arguing by analogy to statutory judicial powers, a Rhode Island court found that arbitrators possess the power to award attorneys’ fees for discovery misconduct. Terrace Group v. Vermont Castings, Inc., 753 A.2d 350, 354 (R.I. 2000). This decision may have more limited application because it was based on a Vermont statute that expressly permits an award of attorneys’ fees for bad faith conduct.

268 Only two New York courts have decided the issue of arbitrator power to rule on ethical misconduct. See Bidermann Indus. Licensing, Inc. v. Avmar N.V., 173 A.D.2d 401, 402 (N.Y. App. Div. 1991) (finding that issue of attorney disqualification involves interpretation and application of attorney ethical codes as well as a client’s right to counsel, and therefore cannot be left to the determination of arbitrators); see also In re Erdheim and Selkowe, 51 A.D.2d 705, 705 (N.Y. App. Div. 1976) (“[W]e find nothing in the record before us authorizing or empowering this privately chosen arbitration board to censure members of the Academy; and the power to censure attorneys as members of the Bar is reserved to the Appellate Division of the Supreme Court in each department.”). Other New York cases have considered related matters, such as the proper forum for motions for disqualification from an arbitration, and whether attorney disqualification is a matter that a generally worded arbitration agreement can be interpreted as submitting to the arbitral tribunal. See In re Erlanger and Erlanger, 20 N.Y.2d 778, 779 (App. Div. 1967) (holding that “jurisdiction to discipline an attorney for misconduct is vested exclusively in the Appellate Division” and that motions for disqualification are matters to be resolved by the court in which the matter is pending, as opposed to another court); see also In re Arbitration between R3 Aerospace, Inc. and Marshall of Cambridge Aerospace Ltd., 927 F. Supp. 121, 125 (S.D.N.Y. 1996) (finding that the issue of attorney disqualification from representation in arbitral proceedings is not arbitrable and does not relate to an arbitration agreement due to the lack of federal jurisdiction under the New York Convention for disputes concerning disqualification of counsel in arbitration). A claim for disqualification of counsel, while bound up in ethical issues, is procedurally distinct from sanctions. As such, many argue that such claims should be based on a different substantive standard. See, e.g., Thomas, supra note 35, at 563 (arguing that disqualification is not a remedy aimed at punishing misconduct, but rather a pragmatic effort to protect the integrity of ongoing proceedings).
public functions in arbitration—a French court has held that arbitrators, in their role as private judges, have the responsibility of assuring party compliance with the rules of international public policy.\(^{270}\) This power arguably would include at least the fundamentals of legal ethics, which ensure basic procedural fairness. While providing interesting background, these scant precedents do little to resolve the issue.

Arbitrators do generally have the power to formulate procedural rules,\(^{271}\) which might be presumed to include the power to enforce those rules.\(^{272}\) Although more controversial, it has also been suggested that in formulating damage awards, arbitral tribunals can take into account the failure of a party to carry out an interim order.\(^{273}\) Another analogous power is arbitrators' ability to issue a default award when a party or its counsel refuses to submit to arbitral jurisdiction or to participate in arbitration.\(^{274}\) A default award is a means for proceeding in the absence of a party, but can also be viewed as a sanction for refusing to participate in an adjudication.\(^{275}\) When arbitral rules become incorporated by reference into the parties’ agreement, parties are contractually obligated to abide by the arbitral rules.\(^{276}\) Failure to abide by arbitral rules, like failure to abide by any other contractual obligation, could give rise to a claim for damages, though parties rarely assert such claims.\(^{277}\)

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\(^{272}\) The Paris Court of Appeal has ruled that arbitrators have not only the authority but also the jurisdictional right to apply the rules of international public policy. *Société Ganz*, 478 CA Paris at 480. A few U.S. courts have reached similar results, again with little explanation. See Forsythe Int’l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1023 n.8 (5th Cir. 1990) ("Arbitrators may . . . devise appropriate sanctions for abuse of the arbitration process."); Bigge Crane & Rigging Co. v. Docutel Corp., 371 F. Supp. 240, 246 (E.D.N.Y. 1973) ("[A]rbitrators . . . may be able to devise sanctions if they find that a party has impedied or complicated their task by refusing to cooperate in pretrial disclosure of relevant matters."). Similarly, the ICTY has assumed, since its inception, the power to sanction attorneys for misconduct:

> A power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded. Thus the power to deal with contempt is clearly within its inherent jurisdiction. That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community.


\(^{273}\) Horning, *supra* note 163, at 155 (citing Seventh Secretariat Note, A/CN.9/264, on Article 18.5 of the UNCITRAL Model Law, in HOWARD M. HOTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 543 (1989)).

\(^{274}\) FOUCHE, GAILLARD & GOLDMAN, *supra* note 145, ¶ 1224.


\(^{276}\) See Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 644 (1989) (stating that arbitration agreements should be enforced when they are valid and effective under applicable law).

\(^{277}\) In my practical experience, the only such claims I saw were allegations that a party had failed to engage in good faith negotiations, as required by the agreement as a predicate to commencing arbitration. Since it is nearly impossible to assess whether a party engaged in settlement negotiations in "good faith," such allegations were used more as an attempt to disparage the opponent than as an assertion of a substantive claim. The most likely reason why there are no reported cases alleging breach...
hand, these powers have not traditionally been sufficient to overcome the reluctance, particularly in civil law countries, to empower arbitrators to perform traditionally public or punitive functions.\(^{278}\)

Objections raised against arbitrators exercising public functions, such as using sanction power, boil down to essentially three types of concerns. The first area of concern is about substantive results—that arbitrators often intentionally do not apply the law or are not as competent as judges at applying complex national laws and, as a consequence, will get it wrong.\(^{279}\) The second area of concern is procedural—that the public interests involved require the procedural protections and judicial oversight that are lacking in arbitration.\(^{280}\) The final area of objection is more symbolic—that punishment and enforcement of mandatory law involve traditional notions of the government’s function and should therefore be reserved solely for government officials.\(^{281}\) Of these three areas of concern, the first two are ameliorated if not completely redressed by the proposed regime, while the third requires investigation of what is really at stake.

1. Arbitrator Competence

Arbitrator competence may be subject to question when arbitrators are asked to apply complex law with which they are unfamiliar, such as complex national statutory law.\(^{282}\) This concern does not, however, translate into the context of an arbitrator sanction power in international arbitration. Arbitrators would be applying ethical rules developed especially for international commercial arbitration and tailored specifically to the procedures used in their particular arbitration.\(^{283}\) The conduct at issue would, by definition, have occurred during the arbitral proceedings. Consequently, as explained in more detail above,\(^{284}\) arbitrators are uniquely qualified to interpret arbitral ethical

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\(^{278}\) For a discussion of reluctance among different systems to empower arbitrators to award punitive damages and perform other public functions, see *supra* notes 73–91 and accompanying text.

\(^{279}\) See *Ware*, *supra* note 64, at 735.


\(^{281}\) See *supra* Subpart I.B.5.


\(^{283}\) See *Rogers*, *supra* note 4, at 379–387.

\(^{284}\) See *supra* notes 91–92 and accompanying text.
rules and uniquely positioned to evaluate whether attorney conduct comports with those rules.

2. Procedural Protections

The second area of concern, lack of procedural safeguards, is also redressed in this proposed regime, which contemplates publication and enhanced judicial review of sanction awards. It is not clear whether, as a matter of U.S. constitutional law, heightened judicial review of sanction awards is necessary because of their punitive nature. There has been extensive scholarly debate about whether arbitration involves state action and thereby implicates constitutional protections such as due process. It is not necessary in this Article to weigh in on that debate because, even if constitutional due process concerns do not require increased procedural protections when arbitration is punitive, prudential concerns do.285 The procedural protections of my proposal are sufficient to satisfy both prudential concerns and any constitutional due process requirements implicated from sanction awards.286

As proposed above,287 heightened review of reasoned sanction awards would be formulated as something more penetrating than the current factors in Article V of the New York Convention, but something less exacting than de novo review. This deferential but substantive review would allow courts to ensure that arbitral interpretations of ethical rules are reasonable and that there is some support for the factual findings.

In much the same manner, the U.S. Supreme Court has suggested, although not particularly clearly, that reluctance about submitting such claims to arbitrators is alleviated if national courts take a “second look” at arbitral awards involving mandatory law claims.288 Although the meaning and application of the second look doctrine remain unclear, at a minimum the

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285 Even if under constitutional doctrine the Due Process clause is formally implicated, the question then becomes: How much process is due? When parties waive their right to a jury trial, they cannot then appeal a judicial verdict on the ground that it was not rendered by a jury. Similarly, it seems that when parties agree to waive their right to go to court and opt instead to be bound by an arbitration clause, they cannot argue that they were unfairly denied all the rigors of traditional adjudication.

286 In Merriman v. Security Ins. Co., the Fifth Circuit summed up the current approach to attorney discipline under Rule 11, stating:

In the Rule 11 context, due process demands only that the sanctioned party be afforded notice and an opportunity to be heard. What constitutes sufficient process depends on the circumstances of each case... [D]ue process does not demand an actual hearing. In Rule 11 cases, the opportunity to respond through written submissions usually constitutes sufficient opportunity to be heard.


287 See supra Parts II.D & II.G.

288 This doctrine derives from the Court’s now famous dicta in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), where the Court stated that in arbitrations implicating U.S. antitrust claims:

[t]he tribunal... should be bound to decide that dispute in accord with the national law giving rise to the claim... [I)n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 636–37 & n.19. This language has been interpreted to suggest that in arbitration of mandatory law claims such as antitrust claims, U.S. courts will take a second look to ensure that U.S. mandatory law has been honored.
doctrine suggests that arbitration of mandatory law claims are more palatable to the U.S. Supreme Court if there is heightened review by national courts beyond the minimal review permitted by the New York Convention. Under the proposed regime, national courts would be invited to undertake heightened review of sanction awards, facilitated by the requirement that arbitrators articulate the bases for their decisions.\textsuperscript{289} As courts protect the system against underenforcement by reviewing substantive arbitral awards,\textsuperscript{290} so will they protect individual attorneys against overenforcement or procedurally improper enforcement of arbitral ethical rules by reviewing sanction awards.

3. **Symbolic Categories**

Symbolic concerns about contracting out the government’s role in performing public functions must be weighed against practical needs and evaluated in light of existing powers. Any discussion about an arbitrator sanction power must begin with the acknowledgement that arbitrators \textit{do} and \textit{will} confront misconduct in proceedings before them. Misconduct by counsel can affect the balance between the parties and, ultimately, the fairness of the proceedings. Ignoring misconduct or failing to rectify the advantage gained by an advocate through improper conduct taints the proceedings before the tribunal. Over time, incidents of unfairness and an absence of even the possibility of institutional response will damage the integrity of the larger international arbitration system.

With misconduct comes the reality that arbitrators inevitably employ a host of clandestine techniques to respond to misconduct or perceived misconduct, which amount to de facto sanction powers. For example, an arbitrator who believes that an attorney is making arguments that are not adequately rooted in established and applicable legal doctrine may conclude that the attorney is inherently untrustworthy and discount or disregard arguments made by that attorney.\textsuperscript{291} It is also possible that if an arbitrator detects what she perceives to be inappropriate pretestimonial communication with a witness, she may discount or discredit the witness’s testimony.\textsuperscript{292} Finally, under virtually all international arbitral rules, arbitrators can award costs and fees using a “loser pays” theory or a more equitable analysis that includes an assessment of whether a party inappropriately increased the cost of arbitration.\textsuperscript{293} Not
coincidentally, U.S. judges regulate misconduct primarily by awarding costs and fees, thereby punishing transgressors and compensating victims.\(^\text{294}\)

The problem with the current exercise of these de facto sanction powers is that they violate the most fundamental notions of due process and fundamental fairness. These informal techniques amount to the imposition of sanctions for unarticulated violations of unknown rules and without any opportunity to be heard.\(^\text{295}\) In addition, these clandestine techniques for responding to perceived attorney misconduct may sanction an innocent party.\(^\text{296}\) Clients may be made to pay substantive awards and costs and fees even when the misconduct belongs wholly to the attorney.\(^\text{297}\)

With this understanding of the current state of affairs, it becomes clear that the debate over an arbitrator sanction power is not so much about whether to endow arbitrators with a new power; it is about whether to acknowledge, validate, and provide formal protections against arbitrators’ use of existing powers. For international arbitration to become a fully operational and enduring transnational adjudicatory process,\(^\text{298}\) arbitrators must be empowered to guide and regulate the conduct of attorneys who participate in the process.

C. Defining the Relationship Between International and National Ethical Rules

One final area of consideration raised by my proposed regime is how to define the perimeters of arbitration ethics and arbitrators’ sanction power in relation to national ethical rules. The lifespan of an individual case can involve pre-dispute representation and appearances in national courts,\(^\text{299}\) as well as participation in arbitral proceedings. The difficulty lies in determining

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\(^\text{294}\) Compensation is the most frequent judicial response under Rule 11 to attorney misconduct, even though Rule 11 does not require compensation and in fact authorizes court discretion in awarding a wide variety of sanctions, including reprimands and fines payable to the court. Robert S. Gerber, Bringing and Resisting Rule 11 Sanctions, 47 AM. JUR. TRIALS 521, § 15 (1993). This empirical reality exists notwithstanding the general acknowledgement that the purpose of Rule 11 is to deter groundless proceedings and not necessarily to compensate victims of misconduct. See Elliot v. The M/V Lois B, 980 F.2d 1001, 1007 (5th Cir. 1993) (citing Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 873–74 (5th Cir. 1988) (en banc)).

\(^\text{295}\) The fact that these rules are unarticulated and unknown is exacerbated by different perceptions of what is appropriate attorney conduct in different legal cultures. Rogers, supra note 4, at 357–59.

\(^\text{296}\) See id. at 377.

\(^\text{297}\) Indeed, clandestine sanctions may conceal from clients the existence and extent of misconduct that victimizes them. This misconduct would, however, be brought to clients’ attention if attorney conduct was dealt with explicitly.

\(^\text{298}\) Carbonneau, supra note 186, at 580–81.

\(^\text{299}\) Even before the enforcement stage, parties to an arbitration often end up in court for a number of reasons, including challenges to the validity of an arbitration clause, challenges to the arbitrability of a dispute, requests for interim relief, requests for assistance in procuring discovery, and appeals of interim awards. Henry P. DeVries, International Commercial Arbitration: A Contractual Substitute for National Courts, 57 TUL. L. REV. 42, 47 n.21 (1982).
precisely when the proposed arbitral ethics will apply and how conflicts with national ethical regimes will be resolved.\textsuperscript{300} Contributing to this problem is the likelihood that misconduct in a case could be discovered after the close of arbitral proceedings. Is it better to reconvene the arbitral tribunal or leave national courts (or bar associations) with the task of investigating party conduct during past arbitral proceedings? Although these may be difficult questions to resolve, they are not unlike the problems present in any cross-jurisdictional practice.

Whenever attorneys appear in a jurisdiction in which they are not licensed, they are obligated to investigate and abide by the ethical regulations of the new jurisdiction. At a more general level, professionals are often required to adopt different standards of behavior in different contexts or when performing different functions.\textsuperscript{301} Attorneys may be initially reluctant to act in ways that are permissible in international arbitration but are prohibited in their home jurisdictions. For example, it has been observed that arbitrators who hail from jurisdictions in which they cannot administer an oath are reluctant to put witnesses under oath, even if the arbitration is being conducted in a place where local law authorizes arbitrators to administer oaths.\textsuperscript{302} Similarly, attorneys hailing from civil law jurisdictions may be reluctant to talk to witnesses before they take the stand, even if they know that opposing counsel is doing so. The difficulty in shifting roles is understandable, particularly for those lawyers who only occasionally dabble in international matters. However, for those whose role as international advocate or arbitrator is a primary occupation, an understanding of role-shifting in different contexts and an ability to comply with international ethical norms must be part of what defines professional competence.\textsuperscript{303}

\section*{IV. Conclusion}

Arbitration has proven to be the normal way in which international business disputes are resolved, and virtually every international contract

\begin{footnotesize}
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\item \textsuperscript{300} National ethical rules will necessarily apply during court proceedings to compel or stay arbitration or to enforce an arbitral award. See, e.g., Robinson v. Dean Witter Reynolds, Inc., 129 F.R.D. 15, 21 (D. Mass. 1989) (imposing sanctions for frivolous opposition to motion to compel arbitration). This problem is complicated by the possibility that parties can modify the ethical rules at some point after they become binding on the attorneys. See \textit{supra} Part II.B.
\item \textsuperscript{301} See Carrie Menkel-Meadow, \textit{Ethics in ADR Representation: A Road Map of Critical Issues}, \textit{Disp. Resol. Mag.}, Winter 1997, at 3, 3 (discussing whether a different set of ethical rules for lawyers in the alternative dispute resolution context is necessary and desirable).
\item \textsuperscript{302} See \textit{Craig et al.}, \textit{supra} note 62, § 25.01, at 398–99.
\end{itemize}
\end{footnotesize}
contains an arbitration agreement. Arbitration is a highly effective and popular form of international dispute resolution, but it is also a rather fragile one. The functioning of the entire system depends on party confidence to select arbitration and on simultaneous deference and support from national legal systems to enforce arbitration agreements and awards. Historically, the legitimacy of the system was premised on the personal integrity of its founders and participants. Since those early days, international arbitration has grown in popularity as its importance to international trade has been fully realized and has expanded both in terms of the nature of claims brought and the identity of the claimants. The days are gone when the international arbitration system could rely on informal and largely clandestine mechanisms to control and regulate attorney conduct.

Instead, international arbitration must develop its own set of ethical rules that are binding and enforceable on the attorneys who practice in that arena. The most efficient way to effectuate this goal is to relegate primary responsibility for rulemaking and rule enforcement to those entities that have the greatest institutional competences—arbitral institutions and arbitrators. Permitting parties and their counsel to modify the basic rules will ensure that the ethical rules chosen fit with the roles assigned by the arbitral procedures. National court review of sanction awards and substantive awards will provide the necessary constraints and controls. This proposed regime represents a balance between the flexibility and insulation from national courts that is necessary to keep international arbitration functioning, and the protections for national interests that are implicated by the regulation of attorney conduct.

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