The Structure of International Arbitration Law and the Exercise of Arbitral Authority

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THE STRUCTURE OF INTERNATIONAL ARBITRATION LAW AND THE EXERCISE OF ARBITRAL AUTHORITY

Joshua Karton*

ABSTRACT

Existing theoretical treatments of international arbitration deal adequately with the sources of international arbitrators’ authority to resolve disputes, but tend to neglect the exercise of that authority. In what ways is arbitral decision-making constrained? Are international arbitrators obliged to exercise their authority in any particular ways? If so, what are the sources of such obligations, and how might they be enforced? This article contributes to the theoretical literature on international commercial arbitration by adding a dimension that has thus far been neglected: the structure of the legal regime that governs international arbitrations. It applies a familiar concept from Anglo-American jurisprudence, H.L.A. Hart’s typology of primary and secondary rules, to argue that international arbitration law is essentially contractarian in its structure. The article concludes by considering the implications of the contractarian structure of international arbitration law for the ways that arbitrators may and must exercise their authority.

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I. INTRODUCTION

Most observers would reflexively expect that, like judges, international commercial arbitrators must resolve disputes on the basis of the relevant legal rules, not on some other basis, such as their own sense of fairness or of what the law should be. But is this true? The existing theoretical treatments of international arbitration tend to dwell on the sources of arbitrators’ power to resolve the merits of disputes, especially in relation to the jurisdiction of national courts. However, they have little to say about the actual exercise of that power—and, in particular, whether there are any constraints on arbitral power to decide the merits beyond the principle that awards which contravene national mandatory rules may be annulled or refused enforcement.

Rendering a decision on the merits, normally but not necessarily in the form of a reasoned award, is not the only function of international arbitral tribunals. But it is their core function, and the function that relates most directly to their actual and perceived legitimacy. As a shorthand, I refer to arbitrators’ power to bind the parties by issuing an award on the merits as “arbitral authority”. Theories of international arbitration quite reasonably focus on arbitral authority, as opposed to arbitrators’ procedural powers. On a practical level, the stakes are high: if arbitral authority is unconstrained, then arbitral justice is likely to be at best idiosyncratic and unpredictable, and at worst entirely arbitrary. Resolution of international disputes via arbitration would work in opposition to the rule of law, a concern that is particularly severe with respect to investor-state arbitration.

Is arbitral authority unconstrained? International arbitration has been both praised and criticized for exhibiting a kind of “lawlessness”, although it is often stated that the leading arbitrators of this era are better-versed in arbitration law than their forbears, and that their awards are more likely to be grounded in established legal principles. Today, the argument goes,

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1 Cf. Von Hoffmann (Bernd) v. Finanzamt Trier, Case No. C-145/96, Judgment of the Court, ¶ 17 (Sept. 16, 1997) (“The services of an arbitrator are principally and habitually those of settling a dispute between two or more parties.”).

2 By “arbitrary”, I mean a decision that is not just unreasonable, but is a departure from the rule of law in favor of rule according to the will of the decision-maker. See generally Timothy A.O. Endicott, Arbitrariness, 27 CAN. J. L. & JURISPRUDENCE 49 (2014).


commercial parties do not want “the open-textured discretion of international arbitration’s past . . . businesses use international arbitration to provide a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts, and this in turn promotes the legitimacy of international arbitration.”

5 Arbitrators—who depend on the continued favor of the parties for appointments—must avoid the appearance of arbitrariness and decide in accordance with accurate characterizations of the applicable legal rules. 6 The fact that most arbitrators have legal training and professional backgrounds also militates in favor of their making decisions by applying the law. Ethical obligations imposed by legal licensing bodies may also be relevant in some extreme cases, 7 although their applicability to international legal practice is uncertain.

In short, international arbitrators therefore have good reason to act as if they are obligated to exercise their authority in predictable, recognizably “legal” ways. Indeed, social conventions of the field and economic forces may in fact constrain them. But do arbitrators have any legal duty to exercise their power in any particular way? If so, where does the duty come from? To whom is it owed? What must arbitrators actually do in order to obey this duty? How and by whom may it be enforced?

that “The generational shift should not be taken for more than it is. While modern arbitrators are technocratic compared with the previous generation, the relationship between arbitrator and disputing party is such that arbitral decision-making remains more open to the influence of subjective and contextual factors than judicial decision-making.”)


6 Note, however, that there is reason to believe that international arbitrators are not incentivized to issue awards that are scrupulous in their application of the governing law; instead, the incentives that constrain arbitral behaviour relate mostly to arbitrators’ management of the dispute resolution process. See Karton, supra note 5, at 17-19. See generally Thomas Schultz & Robert Kovacs, The Law is What the Arbitrator Had For Breakfast: On the Determinants of Arbitrator Behavior, in SELECTED TOPICS IN INTERNATIONAL ARBITRATION – LIBER AMICORUM FOR THE 100TH ANNIVERSARY OF THE CHARTERED INSTITUTE OF ARBITRATORS (J.C. Betancourt ed., forthcoming 2016) (discussing the incentives that shape international arbitral decision-making); Sergio Puig, Social Capital In the Arbitration Market, 25 EUR. J. INT’L L. 387 (2014) (arguing that social networks, rather than work product, are the dominant factor in appointments to investor-state arbitration tribunals).

7 For example, if an arbitrator refused to apply a certain state’s law on the basis of racial animus against nationals of that state, such an action may violate canons of legal ethics. Thanks to Patrick Pearsall for suggesting this idea.

8 Non-binding codes of conduct may help to fill this gap, but only in a weak and incomplete manner. See generally CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION ¶¶ 2.49-2.100 (2014).
It is striking the extent to which these basic questions remain unasked and unanswered. This absence is due in part to the character of the international arbitration commentariat. International arbitration scholars tend to be practitioners as well, or (more often) to work primarily as practitioners. Only two significant theoretical explorations of international arbitration have been published in English, both of them written by active practitioners (albeit probably the two leading practitioners of the currently-dominant generation): Gaillard’s *Theory of International Arbitration* and Paulsson’s *The Idea of Arbitration*. Only in the last few years has arbitration scholarship evolved beyond purely doctrinal research to encompass theoretical and empirical methodologies. Moreover, to the extent that theoretical inquiries on international arbitration exist (even in other languages), they tend to dwell on the sources of arbitral authority (i.e., whether arbitral tribunals derive their authority, and awards their legitimacy, from the parties, the law of the seat, other national laws, international law, or some combination of these), and on defining the scope of arbitral versus judicial jurisdiction. In other words, much ink has been spilled on the questions of which issues arbitrators may resolve, but little on how they may resolve those issues.

For their part, legal theorists—even those who discuss international dispute resolution—have offered little insight on matters specific to international arbitration. Most of the most prominent theorists of general jurisprudence have avoided international law altogether; private law theory has tended to focus on basic concepts in well-defined areas of domestic law;

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12 For assessments of how international arbitration scholarship has evolved, see generally Shultz, supra note 9; Brekoulakis, supra note 9.


14 For example, Paulsson distills his conception of arbitral authority down to a single “overriding presumption” intended to define the matters on which courts should leave to arbitral tribunals to decide in the first instance, and the matters on which courts should not overrule tribunals. PAULSSON, supra note 11, at 81-82.


and the international law theory literature has focused largely on fundamental public international law concepts such as the nature of sovereignty and whether international law constitutes a legal system. The result is that few theoretical accounts of international arbitration have been proposed, and those that do exist are incomplete.\(^\text{17}\)

This article argues that arbitral authority can only be understood within the context of the structure of international commercial arbitration law. The argument presented here is limited to international arbitrations that arise out of contractual contracts; although many of the same things could be said about the authority of arbitrators in investor-state or state-to-state arbitrations, the structure of arbitration within public international law is sufficiently distinct that it must be treated separately.

This article offers some observations about the structure of international commercial arbitration law. It applies to international arbitration a familiar concept in general jurisprudence, H.L.A. Hart’s distinction between primary and secondary rules—respectively, rules that create legal duties and rules that confer powers. Specifically, it argues that international commercial arbitration law is composed almost entirely of secondary rules that create privately enforceable duties.

The national and international laws that collectively govern international commercial arbitration do not directly empower international arbitral tribunals, nor do they impose any duties upon arbitrators to exercise their authority over the merits of disputes in any particular manner. Rather, they empower the parties to agree to establish a tribunal and confer powers upon it, and then enforce the express and implied terms of that agreement within certain limits. Accordingly, any determinations as to the proper exercise of international arbitrators’ authority must be made based on parties’ arbitration agreement in the individual arbitration.\(^\text{18}\) Any obligations of arbitrators as to the exercise of their authority arise from the parties’ agreement, are owed to the parties, and are enforceable only by the parties.

I make no claim to present an entirely new theory of international arbitration, but only to offer a refinement to the dominant “hybrid theory”, which I argue is valid as far as it goes but is incomplete in its existing versions.\(^\text{19}\) Attention to legal structure makes possible a fuller account of the relationship between the various sources of international arbitral authority than is provided by the available theoretical treatments of international

\(^\text{17}\) See infra notes 37-40 and accompanying text.


\(^\text{19}\) On the nature of the various versions of the hybrid theory, and the other competing theories of international arbitration, see infra Part II.
arbitration. It reveals international arbitration law as essentially contractarian in nature: through ratifying treaties and enacting statutes, states create a legal space within which privately-created obligations are supreme. International arbitration law, despite its radical pluralism and its international law trappings, is structurally similar to the contract law found in any national jurisdiction.

This article begins by describing the gap in existing theories of international commercial arbitration (Part II), then briefly explains Hart’s concept of primary and secondary rules (Part III) and applies that concept to reveal the contractarian structure of international arbitration law (Part III). It concludes (Part IV) by setting out the implications of international commercial arbitration’s legal structure for the exercise of international arbitral authority.

II. THE GAP IN EXISTING THEORETICAL ACCOUNTS OF INTERNATIONAL ARBITRATION

This section argues that that the existing general theories of international arbitration are unsatisfactory, both on their own terms and when used to explain how arbitrators may exercise their power to decide disputes. I distinguish between general theories of international arbitration, which seek to explain the existence and legal validity or legitimacy of international arbitration as a system, from those that seek only to theorize the role of the arbitrator within that system. Three general theories of arbitration have been proposed, although individual expositions of the three theories vary. They are often called the consensual, jurisdictional, and hybrid theories.

According to the consensual theory, international arbitral tribunals derive their authority entirely from the parties’ agreement. That is, by agreeing to arbitrate a present or future dispute, the parties call the arbitral tribunal into being and confer upon it the legal authority to decide their dispute. This approach, sometimes called “contractual” because it emphasizes the contractual character of the arbitration agreement, or “autonomous” or “transnational” because it denies any necessary role for


21 For a good general overview of the three schools of thought, see Yu, supra note 13. Schill also divides the various theories of arbitration into three categories, which are similar to the three categories I adopt, but which do not overlap with them perfectly: interested primarily with discovering the basis of international arbitration’s “legitimacy”, Schill categorizes the theories according to whether they see arbitration as legitimized by a private normative order, by national law, or by a transnational legal order. Stephan W. Schill, Developing a Framework for the Legitimacy of International Arbitration, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES, 789, 803-09 (Albert Jan van den Berg ed., 2015).
states and state laws, is most associated with French theorists and had its heyday from the 1960s to the 1980s. Its most important implication is that arbitration can be entirely delocalized, or separated from national laws and court systems, in particular those of the seat of arbitration. In other words, the contractual theory sees arbitration as (at least potentially) a fully autonomous legal order, with national courts and national laws having no inherent role except as an enforcement mechanism.

The consensual theory is attractive: it is consistent with the central role of party autonomy in international arbitration law, and the parties’ arbitration agreement is undeniably the immediate source of the arbitrators’ authority. It also gains currency because it lends theoretical ballast to a preference for international solutions (and a corresponding denigration of national courts and legal systems) which is common among international arbitration practitioners.22 However, the consensual theory does not stand up to close scrutiny. The parties’ agreement to arbitrate can only confer upon tribunals the power to render legally binding awards because states are willing to employ their judicial machinery to enforce those awards. More broadly, so long as courts have the power—under their own national laws—to stay arbitrations, to remove arbitrators, to refuse to enforce arbitration agreements, and to annul arbitral awards, tribunals cannot be said to derive their authority solely from the parties’ agreement. Even as most states have moved away from close regulation of international arbitral awards,23 national courts continue to assert themselves over international arbitral tribunals at various points in the process. As Paulsson put it in a memorably-titled lecture, good arbitration cannot compensate for bad courts.24

Like some theories of public international law, the consensual theory is best understood as more aspirational than descriptive; that is, it describes international arbitration law as the theory’s proponents want it to be or predict it will become in the future, rather than its currently existing reality.25

22 On international arbitration practitioners’ dedication to an internationalist ethic, see KARTON, supra note 4, at 121-40.
23 Id. at 86, quoting Georges R. Delaume, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS 282 (1988):

In recent years [party autonomy] . . . has conquered new grounds heretofore denied to it . . . . Modern statutes and treaty provisions, together with enlightened judicial decisions, increasingly and relentlessly have given new dimensions to party autonomy in an effort to cope with the needs of transnational commerce and eradicate from national systems a former parochialism out of context with the necessities of contemporary economic and commercial relations.

24 Published as Jan Paulsson, Why Good Arbitration Cannot Compensate for Bad Courts, 30 J. INT’L ARB. 345 (2013).
25 The same may be said of many theories of public international law. See Alexander Orakhelashvili, The relevance of theory and history – the essence and origins of international law, in RESEARCH
Many members of international arbitration community—practitioners and academics alike—share a kind of utopian vision of international arbitration as transcending national legal orders, which are decried as parochial and ill-adapted for the modern commercial world. This impulse is understandable, as commercial dispute resolution in national jurisdictions has historically been both slow and dogmatic, and still is in some places. But a desire for international arbitration that is truly autonomous from national legal systems cannot actually provide that autonomy.

The opposing approach is usually called the jurisdictional theory; it is actually an opposing theory, not just a different one, because it was enunciated directly in reaction to the consensual theory. It emphasizes the fact that an international arbitration must take place somewhere, and therefore can only exist to the extent that a single national legal order—that of the jurisdiction that is the seat of the arbitration—permits it to exist. For this reason, Yu calls it the “concession” theory and Gaillard calls it the monolocal theory. The jurisdictional theory portrays arbitral tribunals essentially as adjuncts to the courts of the seat.

The classic formulation of the jurisdictional theory is F.A. Mann’s 1967 screed against the consensual theory, entitled Lex Facit Arbitrum (“the law makes the arbitration”). Mann decries the core notion underlying the consensual theory, that “the autonomy of the parties . . . may produce a contract without law . . . so that arbitrators are not called upon to apply any fixed rules of a specific system of law, but may have resort to a law of their own creation.” He argues that “in the legal sense no international commercial arbitration exists,” since arbitrations must take place within the borders of some state, and cannot exist without national laws and national courts at least as an enforcement system.

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26 See generally Ralf Michaels, Dreaming Law Without a State: Scholarship on Autonomous International Arbitration as Utopian Literature, 1 LONDON REV. INT’L L. 35 (2013). A classic example of such scholarship, which wears its utopianism on its sleeve, is Julian D.M. Lew, Achieving the Dream: Autonomous Arbitration, 22(2) ARB. INT’L 179 (2006). I have argued that this internationalist ideal is best understood as a socio-cultural norm of the international arbitration community. KARTON, supra note 4, at 121-40.

27 See F.A. Mann, Lex Facit Arbitrum, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157, 158-59 (Pieter Sanders ed., 1967). It is also an English and common law approach self-consciously positioned as a “realistic” correction to the decidedly French and civilian consensual theory.

28 Yu, Part 2, supra note 13, at 19-22.

29 GAILLARD, supra note 10, at 35-39.

30 Mann, supra note 27, at 158.

31 Id. at 159. After all, not all arbitration agreements and arbitral awards enjoy voluntary compliance, and the existence of legal rules mandating compliance, a legal apparatus for enforcement, and a legal
This statement is undeniably true. The New York Convention, which provides for the near-global enforceability of arbitration agreements and arbitral awards, is the only codified legal basis on which awards can be said to be delocalized. But under the New York Convention, all awards are “made” in the jurisdiction where the award was rendered; indeed, the Convention only applies when an award made in one contracting state is enforced in another state. The notion that arbitral authority is tied to the law of the seat is baked right into international arbitration law.

Nevertheless, the jurisdictional approach also fails under close scrutiny. First, it ignores the importance of the laws and courts of states other than the seat of arbitration; provisional measures may be sought and an eventual award may be enforced in other states, and those states will apply their own national laws and protect their own national public policies. Second, it ignores the role of the arbitration agreement. Just as an arbitration cannot go forward without the (tacit) consent of one or more states, it also cannot go forward without the (express) consent of the parties. Arbitrators may ultimately be empowered by states, but they are proximately empowered by the parties.

The consensual theory and the jurisdictional theory are not so much wrong as incomplete; each accurately describes some aspects of international arbitration law but fails to account for other aspects. Both theories are too reductionist.

It is therefore not surprising that no one really subscribes to the consensual or jurisdictional theories any more, at least not in their pure forms. Instead, theorists have proposed “hybrid” theories that take into account the contributions of party consent, the law of the seat, and the law of other states. For the most part, such theories, like the jurisdictional theory, emphasize the role of state power in undergirding the international arbitral system; however they improve upon the jurisdictional theory by acknowledging the role of all states that may legitimately insist on respect for their mandatory laws when recognizing and enforcing arbitration agreements and arbitration awards. For this reason, Gaillard describes the hybrid theories as “multilocal”. What they have in common is a conception of international arbitration as brought into being by the interaction of overlapping private, state, and international orders. In his monograph espousing a version of the hybrid theory, The Idea of Arbitration, Paulsson writes that the essential characteristic of the hybrid

sanction for non-compliance are what compliance with arbitration agreements and awards a legal obligation, as opposed to a moral or social one.


33 Id. Art. I.

34 GAILLARD, supra note 10, at 24-25.
theories is their pluralism: “The argument here is that a plurality of legal orders may serve as foundations of the same arbitral process.” Gaillard’s version of the hybrid theory also recognizes the plurality of legal orders that make some claim to regulate each individual arbitration, but he emphasizes those views that are part of a consistent transnational practice, while largely denigrating more idiosyncratic or minority approaches.

Unlike the jurisdictional and contractual theories, the hybrid theories are not so reductionist as to be unsustainable. However, they are incomplete. Yes, the laws of the seat and the laws of other states matter. Yes, the parties’ agreement matters as well. But how much do they matter? Which yields to which? The hybrid theories may resolve aspects of these questions—in particular by acknowledging that party autonomy is limited by mandatory rules of national law—but they provide a theoretical basis only for the existence of arbitral power, not for the exercise of that power. In other words, they describe who has authority over what, without accounting for how that authority is constrained.

To put the matter differently, the hybrid theories are incomplete because they do not link arbitral powers with arbitral duties. Paulsson writes, “the law applicable to arbitration is not the law applicable in arbitration. The latter provides norms to guide arbitrators’ decisions. The former refers to the source of their authority and of the status of their decision: the legal order that governs arbitration.” Thus, for Paulsson, the nature of arbitral powers is a matter of the fundamental legal order of international arbitration, while the nature of arbitral duties is a simple question of conflict of laws; the law governing the merits should be identified, and once it is, arbitrators just apply that law.

35 PAULSSON, supra note 11, at 29. Despite his emphasis on pluralism, Paulsson’s approach is arguably a more sophisticated version of the consensual theory, rather than a hybrid theory. Paulsson writes that arbitration “may be effective under arrangements that do not depend on national law or judges at all”, id. at 30. See also id. at 16, where Paulsson further states:

As the foundation of arbitration, or more precisely a sufficient foundation for some arbitrations, this … conception does not depend directly either on law or judges. It therefore does not seek to attach itself . . . to the somewhat dreamy and self-contradictory premise of an ‘autonomous’ order recognized by the very state orders from which is [sic] purports to be free.

Citing these and other passages from The Idea of Arbitration, Schill characterizes Paulsson as a consensual theorist, writing that in Paulsson’s conception, arbitration “derives its legitimacy from the disputing parties and from the acceptance by the community of (past, present, and future) participants in arbitral proceedings for whom arbitration is a means to order private relations independently of the help of states and their institutions, Schill, supra note 21, at 804.

36 GAILLARD, supra note 10, at 24-25.

37 PAULSSON, supra note 11, at 29 (emphasis in original).
Such a focus on the source of international arbitrators’ power is understandable; since the emergence of arbitration as a means for the resolution of international commercial disputes, state court intervention in international arbitrations has been an existential fascination—too much interference and the parties’ choice to have their dispute resolved by arbitration rather than in court is subverted.\footnote{As the U.S. Supreme Court noted in \textit{Scherk v. Alberto-Culver}, a “parochial refusal by the courts of one country to enforce an international arbitration agreement” would not only “frustrate the purposes of such an agreement” but would also “imperil the willingness and ability of businessmen to enter into international commercial agreements.” \textit{Scherk v. Alberto-Culver}, 417 U.S. 506, 516-17 (1974).} Arbitration theorists—who have overwhelmingly been arbitration specialists rather than general legal theorists, and are therefore personally invested in the success of arbitration\footnote{I mean this in both the material and the psychological sense: they earn income from their involvement in arbitration, and they also share a deeply-held belief in the value of arbitration. \textit{See} \textit{Karton, supra} note 4, at 108-09.}—have thus far been quite concerned with defending arbitral authority (and, through it, the autonomy of the parties) against the depredations of the state.\footnote{For example, Paulsson’s “overriding presumption” would require courts to “presume that the agreement to arbitrate intends that an arbitral tribunal . . . should be first to decide any controversy as to what parties are bound by the agreement, and as to its validity, as well as what claims and defenses are covered by it.” \textit{Paulsson, supra} note 11, at 81.} Their theories correspondingly emphasize the power of arbitrators to resolve disputes and seek to provide accounts of how that power may be unconstrained by the necessary involvement of state courts.

But all legal powers (outside of absolute monarchies) are subject to legal constraints and therefore have corresponding duties relating to the exercise of those powers. A theory that lavishes attention on powers but disregards the question of how those powers must be exercised cannot be complete. Arguing that arbitrators’ duties with respect to their decision on the merits are simply to be determined according to the governing law dodges the question of whether arbitrators must apply the law at all, let alone whether they must apply it in any particular way.

Attention to the structure of international arbitration law helps to illuminate this blind spot in the hybrid theory. Here, I do not propose a novel general theory of international arbitration, but rather make some observations about the legal structure of the field in order to improve upon existing versions of the hybrid theory. Specifically, I argue that the focal point of both arbitral power and the constraints on the exercise of that power is the parties’ arbitration agreement. This is not because the parties themselves are the sole source of the arbitrators’ power (as would be the case under the consensual theory) but rather because states have enacted rules that empower the parties to confer legal powers and obligations upon arbitral tribunals.
III. PRIMARY AND SECONDARY RULES

In this section, I provide some necessary background for my observations regarding the structure of international arbitration law. I take as my jumping-off point one of the most frequently cited concepts in general jurisprudence: H.L.A. Hart’s distinction between primary and secondary rules, most fully set out in his 1961 book, *The Concept of Law*. This section explains the concept of primary and secondary rules and describes the role that such rules play in constituting legal systems. The discussion here is brief and incomplete; it is intended only to give an overview of Hartian theories sufficient to understand the observations about international commercial arbitration law that I make in Part III.

Hart’s most famous work, *The Concept of Law* is the leading text of the positivist school and the foundation of modern analytic jurisprudence. In English-speaking legal-philosophical circles it is dominant, in that subsequent works of general jurisprudence have either followed it or set themselves up in opposition to it. *The Concept of Law* is primarily concerned with defining legality—that is, distinguishing law from not-law. For Hart, rules are legal if they are the product of a legal system, and legal systems, in turn, are defined according to the existence within them of both primary and secondary rules.

In brief, Hart argues that all legal rules may be characterized as either primary or secondary. Primary rules impose duties—they prescribe or proscribe conduct—while secondary rules confer the power to create or change duties—they govern the creation, alteration, and extinction of primary rules. In other words, primary rules are rules of conduct, while secondary are rules about rules. Hart was perhaps overly simplistic in characterizing all rules as either duty-imposing or power-conferring; it is clear that some rules contain both elements, and that some rules-about-rules do not in themselves confer powers. However, positivist theorists continue to rely on Hart’s theory and the associated terminology.

To understand Hart’s typology of rules, it is helpful to recall the context in which he was writing. Hart’s focus was not so much on the creation of rules as on their legitimacy. His self-declared goal was to explain—in opposition to the theories of John Austin—how it is possible for legal systems not to be ultimately founded in the coercive power of a sovereign. In that context, he concluded that a primary legal rule is one enacted by those

43 For example, any rule that requires a public official to promulgate and enforce a certain ordinance is both duty-imposing and power-conferring, and a rule that states simply that bills under consideration by the legislature must receive three public readings is a rule-about-rules that does not confer a power.
empowered by the legal system to create it, and that the same empowered persons might also enact a secondary rule, which would empower others to enact a primary rule. In some ways his choice of words is unfortunate because it creates an impression that primary rules are “superior” to secondary rules. By using the terms “primary” and “secondary”, Hart did not mean that secondary rules are subsequent to, dependent on, derived from, or subordinate to primary rules—only that primary rules create duties (they directly govern conduct), while secondary rules are a step removed from the creation of duties.

These concepts can best be illustrated by a few examples. Criminal law rules, such as the ban on murder, are for the most part primary. By enacting the provisions of the criminal code that deal with murder, the state proscribes certain acts. It imposes a duty not to murder and sets a penalty for violations of that duty. Although with respect to criminal law, the legal duties created by the primary rules are owed to the state and enforceable by the state, this is not a necessary characteristic of primary rules. Like criminal law, tort law is mostly characterized by primary rules; it directly imposes duties upon the public (for example, not to be negligently harm others or intentionally defame them) but stipulates that those duties are owed to and may be enforced by individuals who are harmed by breaches of the duties.

By contrast, the rules of administrative law are mostly secondary; they establish the powers of executive agencies to create and enforce rules of conduct (primary rules), along with specifications about how those powers are to be exercised (for example, by opening rules for public consultation before promulgating them, or by publishing the rules in an official register) and limits beyond which the power cannot be exercised (that is, the agency may not exceed the scope of its enabling legislation). Like primary rules, secondary rules may be enforced in court—in the case of administrative law, through the process of judicial review.

Contract law is paradigmatic of a field of law composed mostly of secondary rules (which distinguishes it from primary-rule-heavy areas like criminal law and tort law) in which the duties established by those rules are owed only to other private individuals and are enforceable by the private individuals to whom those duties are addressed (which distinguishes it from administrative law and property law). The law empowers private parties to impose legal duties (to enact primary rules), duties that are owed to other private parties but are enforceable in court. The secondary rules that empower parties to create contracts may also subject those powers to various stipulations about how they must be exercised (for example, rules on contract formation and on formal validity) and to limits beyond which the duties they

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44 If anything, he meant the opposite, since secondary rules may regulate the creation primary rules but not the other way around.
create will not be enforced (for example, the unenforceability of contracts with an illegal object).

As this review shows, primary and secondary rules may appear in public and private law, and may be owed to the state or to individuals. However, because The Concept of Law is concerned with defining the legality of rules and the nature of law and legal systems, Hart was most interested in those secondary rules that are addressed to government officials (including administrative law, but also rules about the enactment of statutes by legislatures and rules that govern adjudication by the courts). Legal theorists who have followed Hart also direct the lion’s share of their attention to secondary rules that shape the exercise of governmental powers. Some positivists even define secondary rules as those that relate to the behavior of officials.45

The distinction between primary and secondary rules must be understood in the context of Hart’s theory of legal systems. For Hart, a legal system consists of “the union of primary and secondary rules”. That is, one can distinguish legal systems from non-legal systems of rules (such as the bundle of social norms in a community, or the rules of sports) based on whether they contain both primary and secondary rules. However, it is insufficient simply for primary and secondary rules to both be present in a given system:

Hart does not claim, of course, that the union of primary and secondary rules completely distinguishes legal systems from all other normative systems. The rules of corporations, for example, contain secondary rules as well. There are rules about who can change the rules of the corporation and which rules corporate officers are required to recognize when doing their job. Yet, corporations are not legal systems. The postulation of secondary rules is at best only partially constitutive of the identity of law.46

The coexistence of primary and secondary rules is a necessary but not sufficient condition for the existence of a legal system. What else is necessary? Hart provides a few answers, but the most important and well-known is the requirement of a “rule of recognition” that validates all other primary and secondary rules. The rule of recognition is a kind of secondary rule, but it differs from other secondary rules according to the central role

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45 See, e.g., David Lefkowitz, The Sources of International Law: Some Philosophical Reflections, in PHILOSOPHY OF INTERNATIONAL LAW 187, 189 (Samantha Besson & John Tasioulas eds., 2010).
that it plays in constituting legal systems.\footnote{Note that Hart never expressly identifies the rule of recognition as being a secondary rule, but it makes no sense to describe it as a primary rule. \textit{Id.} at 4.} Some have argued that it is the rule of recognition in particular, and not the presence secondary and primary rules more generally, that is a prerequisite for the existence of a legal system.\footnote{See S.G. Sreejith, \textit{Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism}, 9 SAN DIEGO INT’L L.J. 5, 17 (2007).} It is, for Hart, the key organizing principle that distinguishes law from not-law.

The rule of recognition serves three functions that are conceptually distinct but that overlap in practice.\footnote{See, e.g., Mehrdad Payandeh, \textit{The Concept of International Law in the Jurisprudence of H.L.A. Hart}, 21 EUR. J. INT’L L. 967, 974 (2010); Lefkowitz, \textit{supra} note 45, at 198.} First, it provides a procedure and a set of criteria for identifying other rules within the system. In this sense, the rule of recognition is an “authoritative mark” that identifies rules as belonging to the legal system; it sets a clear standard for identifying those rules that are “legal rules” within the system.\footnote{H.L.A. HART, \textit{THE CONCEPT OF LAW} 95 (1994).}

Second, the rule of recognition provides a procedure and a set of criteria for validating other rules. Within a legal system, those rules that have been promulgated in accordance with the rule of recognition are legally valid, and those that have not are invalid. Writes Hart, “To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.”\footnote{\textit{Id.} at 103.}

Third, the rule of recognition unifies and systematizes the rules of a legal system because it provides a single set of criteria for identifying and validating all other rules. The rule of recognition “introduces, although in embryonic form, the idea of a legal system: for the rules are now not just a discrete unconnected set but are, in a simple way, unified.”\footnote{\textit{Id.} at 95.}

The rule of recognition is thus an “ultimate rule”, which means that it has no legitimizing source. While the rule of recognition identifies and validates all other rules, it cannot use these functions on itself; the rule of recognition must be seen as the original or ultimate rule, the validity of which is taken as a given and not subject to any superior rule.\footnote{Thomas M. Franck, \textit{Legitimacy in the International System}, 82 AM. J. INT’L L. 705, 751 (1988); \textit{See also} Lefkowitz, \textit{supra} note 45, at 198.} Sebok therefore likens the rule of recognition to Wittgenstein’s conception of a unit of measurement:
There is one thing of which one can say neither that it is one meter long, nor that it is not one meter long, and that is the standard meter in Paris. But this is, of course, not to ascribe any extraordinary property to it, but only to mark its peculiar role in the language-game of measuring with a meter-rule.\textsuperscript{54}

Hart had an essentially sociological explanation for the rule of recognition; it exists and has force and content only because of “social facts”\textsuperscript{55}—it is used by all officials of the legal system to identify and validate rules of the system, and it is habitually treated by all members of the system as the “official way in which the law is to be determined in their community”.\textsuperscript{56} Other authors have found it unnecessary to identify the source of the rule of recognition’s “ultimateness” and have just said the rule is ultimate and valid of its own regard.\textsuperscript{57} An example is Franck, who described the rule of recognition in public international law as “autochthonous: one sprung from the earth itself.”\textsuperscript{58}

**IV. The Structure of International Commercial Arbitration Law**

This section describes the structure of international commercial arbitration law. Specifically, it observes that while the various sources of international commercial arbitration law do contain some primary rules, they are mostly composed of secondary rules that empower the parties to make rules that bind arbitrators; moreover, the primary rules that do exist are in aid of ensuring that the empowerment of the parties is meaningful.

States have made the conscious decision to leave up to parties in each case almost all matters related to the decision on the merits. In other words, when it comes to the decision on the merits, the laws of the various national legal systems that collectively govern the arbitration—those of the seat and of any states where enforcement of an award or interim measures may be sought—simply empower the parties (within certain limits) to make the rules that bind the arbitral tribunal. The set of primary rules that empower arbitrators to decide disputes and that constrain their exercise of that power are all made by the parties, not by states (or, still less, international organizations). In this way, international arbitration law is structured like contract law more generally, and should be seen in this light.

\textsuperscript{55} HART, supra note 50, at 110.
\textsuperscript{56} Shapiro, *supra* note 46, at 4-5. In this sense, it is just like the standard meter in Paris, which defines the length of a meter simply because everyone agrees that it does.
\textsuperscript{57} Sreejith, *supra* note 48, at 43.
\textsuperscript{58} Franck, *supra* note 53, at 754.
A. Applying Hart’s Model to International Commercial Arbitration

Hart’s analysis is notorious among international lawyers for its state-centric perspective. Moreover, Hart’s typology of primary and secondary rules was developed for the purpose of distinguishing legal systems from other systems of rules. Arguably, the model has no relevance for international commercial arbitration, a pluralistic amalgam of national laws, international laws, rules generated by contracting parties and private entities, and customs specific to this field of dispute resolution. This section considers the applicability of the typology of primary and secondary rules to international arbitration.

The Concept of Law’s last chapter, the only one to consider international law, concludes that the international legal system consists only of primary rules—that international law contains no secondary rules whatsoever, nor does it possess a rule of recognition—and therefore that international law more closely resembles a “primitive” system than a full-fledged national legal system. Thus, Hart applied his theoretical model to international law only so far as to argue that international law does not display a “union of primary and secondary rules” and therefore is not a legal system.

This narrow conception of international law has been vociferously criticized, and a number of theorists have explored the presence and role of secondary rules in international law. While this literature does not typically deal with international arbitration, but rather with public international law generally, it nevertheless provides a crucial link between international law and basic legal theory concepts of duties and powers. In particular, it argues that secondary rules of recognition do exist in international law and can be found in international adjudication. Some authors root rules of recognition in a global consensus rooted in norms shared by members of an international adjudicative community:

59 Cf. Schill, supra note 15, at 5 (“Arbitration thus reflects the paradigm of a pluralistic, heterarchical ordering of the international community.”).

60 For example, Waldron—who is generally a positivist like Hart—has called Hart’s treatment of international law “unhelpful” and criticized Hart for his “carelessness” and “indifference” toward international law. Jeremy Waldron, Hart and the Principles of Legality, in THE LEGACY OF H.L.A. HART 67, 68-69 (Matthew H. Kramer et al. eds., 2008).


If the members of a community of adjudicators globally share convictions about what shall be treated as binding reasons for a decision, then these convictions will form the social conventions to which they actually appeal in arguments about what standards they are bound to apply. . . . Put more bluntly, legal decisions are rendered in application of legal rules shaped by social conventions. Secondary rules of recognition identify primary rules of conduct; thus, according to the social thesis, social conventions take part in the determination of the contents of the applicable law.  

Others, who perhaps share a more traditional, state-sovereignist, view of international law, argue that international law rules of recognition can nevertheless be found in the consent, legal capacity, and behavior of states: “Thus there is an interrelation between law-formation and law-interpretation; the ‘rules of recognition’ of international law, as it were, are a product of the practice of states. Why this has come about is a matter of sociology, but there is no doubt that it does occur.”

To my knowledge, the only scholar who has applied Hartian principles to international commercial arbitration is Schultz, who has characterized the generation of non-state law through international arbitral awards in Hartian terms:

The branch (of legal positivism) that I follow relies on the proposition (which is fundamental throughout legal positivism) that a rule of law, in order to be a rule of law, must be posited, that is selected by the officials of the relevant legal system, in accordance with the system’s rule of recognition. This approach admits of non-State law; it is compatible with legal pluralism, which, to be sure, is a necessary condition (though not a sufficient one) to admit of the lex mercatoria as law.

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63 Thomas Schultz, Transnational Legality: Stateless Law and International Arbitration 122 (2014). Later, Schultz gives a slightly different version of this argument: “These rules of recognition may be found, for instance, in the social conventions that develop among the officials of the normative orders in questions—for example, within the global communities of international arbitrators and judges of international courts and tribunals.” Id. See also Lefkowitz, supra note 45, at 188-96 (summarizing the positions of various legal philosophers). Such a strategy is consistent with the ultimately sociological basis of Hart’s theory of legal validity.

64 D’Amato, supra note 62, at 323. See also Franck, supra note 53, at 736-38.

Undoubtedly, both primary and secondary rules appear in the various national and international laws that relate to international commercial arbitration, although the primary rules relate almost entirely to procedural matters, while all of the rules that relate to the decision on the merits are secondary.\textsuperscript{66} If international arbitration law, as a field, contains both primary and secondary rules, and the union of primary and secondary rules constitutes a legal system, does that mean that international arbitration constitutes a legal system?

I argue no. International arbitration is a system in that it provides a distinct and definable mechanism for the resolution of disputes, but it is not a legal system.\textsuperscript{67} There are at least two reasons for this. They are distinct from each other, but both derive from the pluralistic character of international arbitration law.

First, international arbitration law’s pluralism—the range of national, international, and non-national sources of law that apply concurrently in every international commercial arbitration—means that international arbitration lacks a single rule of recognition that is the “ultimate rule” from which all other rules draw their validity.\textsuperscript{68} Rather, each of the various national laws that may become relevant\textsuperscript{69} is legally validated by the promulgating state’s rule of recognition, any international law rules that are directly applicable are validated by public international law rules of recognition, and other rules—even codified ones like institutional rules of procedure or the International Bar Association Rules on the Taking of Evidence—are not legal rules at all and are legally validated by no rule of recognition whatsoever.\textsuperscript{70} There is no one rule of recognition that unifies and systematizes the other rules, and therefore there is no legal system according to the Hartian model.

Some writers, such as Payandeh and Benvenisti, have argued that to be a legal system, international legal orders need only mirror national systems in the results they produce—whether they create a set of norms that are

\textsuperscript{66} This phenomenon is taken up in \textit{infra} Part IV.B.

\textsuperscript{67} \textit{Cf.} Schill, supra note 21, at 803 (“International arbitration . . . is a global, quasi-judicial system that provides the legal infrastructure (norms, actors, and processes) for the consent-based settlement of disputes.”).

\textsuperscript{68} See supra notes 53-58 and accompanying text.

\textsuperscript{69} That is, the law of the arbitral seat as \textit{lex arbitri}, along with the national laws of other states whose courts may be called upon to enforce or enjoin implementation of the arbitration agreement, to issue interim measures in support of the arbitration, and to enforce or refuse to enforce an award.

\textsuperscript{70} Such rules may be valid in the sense that the parties who subscribe to them treat them as binding apart from their being embedded in national laws. However, the parties’ habitual compliance does not \textit{legally} validate such rules. They only create binding obligations to the extent that they are incorporated into contracts (the arbitration agreement between the parties, the parties contract with an administering institution, the arbitrator’s contract) that are themselves only enforceable through and according to national laws.
treated as legally valid (and therefore binding) by the international community—rather than in the underlying structure of the system.\textsuperscript{71} Thus, public international law can be a legal system even without a rule of recognition because it ordinarily (although not invariably) produces the outcomes of a legal system. However, even if one accepts this position, international commercial arbitration still would not constitute a legal system. It does not produce results in itself, but only through the cooperation of national courts, which themselves act according to their own national laws, laws that are in turn validated by their own separate and independent national rules of recognition.\textsuperscript{72} Admittedly, most arbitral awards are voluntarily complied with, but this does not show that international arbitration produces results independent of national legal systems. However, losing parties do not comply with arbitral awards solely out of a sense of moral obligation, or just because members of their commercial community will mete out informal sanctions for noncompliance. They comply with awards at least in part because they perceive those awards to be legally valid, and it is the fact that awards meet the standards of enforceability contained in state laws that makes them legal valid.\textsuperscript{73}

Second, the pluralism of international arbitration law means that it is not independent. Most saliently, parties and tribunals must frequently look to national and international laws, including many that have broad applicability beyond international arbitrations, to determine their rights and obligations. International arbitration thus lacks the “internal point of view” that, in Hart’s view, is the distinctive characteristic of rules generated within a legal system; that is, arbitral awards are not perceived as valid purely according to rules internal to the international arbitral order, but rather by reference to external national and international legal orders.

Schultz phrases the matter differently, but his analysis of international arbitration leads to the same conclusion. As he argues, a legal system “must be sufficiently independent from other systems (otherwise it has no identity of its own but is merely a part of another system).”\textsuperscript{74}


\textsuperscript{72} These rules are often derived from, or at least must be compliant with, treaties and customary international law, especially the New York Convention. However, the New York Convention does not validate national arbitration statutes; such statutes are valid by virtue of their being enacted in accordance with the rule of recognition of the state that enacted them.

\textsuperscript{73} Of course, awards may also be valid in other senses—morally, economically, practically—but I am interested here in legal structure and therefore in validity.

\textsuperscript{74} Schultz, supra note 65, at 688. Schultz calls this the “external” requirement for the existence of a legal system. Schultz also posits that legal systems have an “internal” requirements, which constitute the role of law in guiding normative conduct among members of a community associated with a given legal system. These concepts are based on Fuller’s conception of a legal system and do not fit precisely within the Hartian rubric; accordingly, I have not addressed them here.
law does not even claim this kind of independence. Rather, it is both structurally dependent upon national legal systems (since it cannot enforce its own rules) and normatively dependent upon national legal systems (since it cannot autonomously determine which norms constitute it).  

Although international commercial arbitration does not constitute a legal system, the typology of primary and secondary rules can nevertheless be applied to international commercial arbitration to useful effect. Individual rules can still be characterized as primary or secondary, and the characteristics associated with primary and secondary rules continue to be relevant. After all, “contract law” and “tort law” are not legal systems, but the differing character of these two fields of law can be seen in the different structure of their rules—the one essentially secondary and the other essentially primary.

More importantly, in any individual arbitration, the precise combination of legal orders (and individual legal rules) will differ, but they will nevertheless constitute a complete set of legal rules for that arbitration. Those rules may not be subject to a clear hierarchy, and they may not form a harmonious whole. But for each individual arbitration, there will be some identifiable law that governs each issue. In any given arbitration, it will be possible to identify the rules that determines whether the tribunal has the power to take a particular action, and whether an eventual award will or will not be enforceable in a jurisdiction where the winning party seeks to enforce it. The structure of those rules can still be characterized in such a way as to show the relationship between them, and the concept of primary and secondary rules is useful for this purpose.

B. Primary and Secondary Rules in International Commercial Arbitration Law

Although international arbitration is sometimes described as a challenge to the traditional conception of sovereign states as the only subjects of international law, states continue to be the essential actors. Whatever theory of international arbitration one subscribes to, it is undeniable in our Westphalian system that arbitration agreements and awards are dead letters without the backstop of state enforcement. Accordingly, I will look to state

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75 Arbitrators’ power to bind the parties is not entirely dependent upon national courts’ enforcement of awards, but before an award has been recognized by a state, it is only binding upon the parties by virtue of their contractual obligations to each other through the arbitration agreement, which obliges the parties to abide by the decision of the tribunal. See infra Part IV.

76 Cf. PAULSSON, supra note 11, at 29.

lawmaking (in both domestic statutes and treaties) as the source of both primary and secondary rules. A review of these laws, and other non-state rules that may apply, shows that international commercial arbitration law is overwhelmingly composed of secondary rules, and moreover that the few primary rules that do exist are irrelevant to the exercise of arbitral authority over the merits of disputes.

The New York Convention is considered to be the lynchpin of the entire international commercial arbitration system. \(^78\) It applies to the enforcement of international commercial arbitration agreements and awards issued in any of its 156 contracting states, \(^79\) and governs most international arbitrations in the world, albeit indirectly, through national laws that must comply with it. \(^80\) The New York Convention contains some primary and some secondary rules, but the latter predominate.

For example, Article III empowers contracting states to create or adapt their own rules of procedure to govern applications for the recognition and enforcement of foreign arbitral awards, but constrains states’ discretion by requiring that such rules of procedure do not impose “substantially more onerous conditions or higher fees” for the recognition of international arbitral awards than are imposed on domestic awards. Any rule that empowers officials to create rules, within certain prescribed limits, is prototypically a secondary rule.

Article V, the provision that governs the enforcement of arbitral awards, is entirely composed of secondary rules. At first glance, it seems to be a primary rule that imposes a duty directly upon states: to enforce international arbitral awards unless one in an exhaustive list of exceptions is proven by the party opposing enforcement. However, the first clause of Article V states only that “enforcement may be refused” on the basis of the grounds set out in the various subsections of the article. In other words, Article V is actually a rule about rules; it empowers national courts to enforce or refuse arbitral awards based on their own national laws, with the limitation that the grounds set out in national law must be at least as favorable to arbitration as Article V. \(^81\) This point is well illustrated by the long-standing position of French courts their national arbitration statute, which contains narrower grounds for

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\(^78\) See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 102-05 (2014).


\(^80\) Other jurisdictions, such as Taiwan, are not parties to New York Convention but have promulgated arbitration statutes that comply with it.

\(^81\) Similarly, Art. VI empowers, but does not require, a court seized of an enforcement action to stay the enforcement proceeding pending resolution of a challenge to the award in the courts of the seat of arbitration.
refusing enforcement of awards than those in Article V, is compliant with the New York Convention.82

Article II does contain a set of primary rules directed at contracting states, rules that require states to recognize arbitration agreements that meet certain requirements (Art. II(1) and (2)) and, correspondingly, to dismiss lawsuits relating to disputes that are subject to valid arbitration agreements (Art. II(3)). However, although these principles are phrased as primary rules, their ultimate effect is to empower commercial parties to impose legal duties upon both courts and arbitrators—respectively, not to decide their dispute and to decide their dispute.

The same pattern can be seen in a variety of national arbitration statutes; they are composed primarily of secondary rules, although they do contain some primary rules (most of which are directed at the courts of the state, not at parties or arbitrators, and which are ultimately intended to empower the parties). I will use as an exemplar the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”), which has been adopted in whole or in part as the national arbitration law of 100 states and subnational jurisdictions.83

Article 8 of the Model Law is a primary rule that requires courts to refer disputing parties to arbitration if the dispute is subject to a valid arbitration agreement. Similarly, Article 12 imposes a duty on prospective arbitrators to disclose any circumstances that might give rise to a conflict of interests, and Article 18 imposes a duty upon tribunals to treat the parties with equality. Like New York Convention Article II, these provisions are phrased as primary rules but have the effect of ensuring the effectiveness of the parties’ choice of arbitration. They therefore act like secondary rules: their purpose is to empower the parties to create legal obligations for seized courts and arbitral tribunals, with the limitation that the process thereby created must be fair. The remainder of the Model Law is taken up with secondary rules, some directed at courts (such as Article 17J, which empowers courts to issue interim measures in relation to arbitral proceedings), some at tribunals, (such as Article 16(1), which empowers tribunals to decide on their own jurisdiction), and some at the parties (such as Article 19(1), which empowers the parties to determine the procedure to be followed by the tribunal).

As a codified set of voluntary rules, the International Bar Association Rules on the Taking of Evidence (the “IBA Evidence Rules”) are not “law”; they only have effect if and when the parties or the tribunal decide to apply

82 Born, supra note 78, at 334.
them. However, they are frequently employed by parties and tribunals and have become a de facto international standard. They, too, contain at least one primary rule but are populated for the most part by secondary rules. The only primary rule I could identify is Article 4(1), which requires parties to disclose the identity of witnesses on whose testimony they will rely, along with the subject matter of that testimony. However, as with the previous examples, even this provision has a secondary rule aspect, in that it also empowers tribunals to set time limits within which such disclosures must be made. All of the other provisions in the IBA Evidence Rules specify the powers of the parties or of the tribunal to determine the evidentiary standards or procedures of the arbitration—secondary rules.

When one looks at rules that relate to arbitrators’ authority over the merits of disputes, the predominance of secondary rules is even more striking.

Only two provisions of the Model Law provide any possible constraint on the exercise of arbitral authority. The first is Article 31, which requires tribunals to give reasons in their awards, unless the parties have agreed otherwise. To begin with, Article 31 is derogable, although anecdotal evidence suggests that parties seldom derogate from it. This means that the law itself imposes no obligation to give reasons, it only sets a default rule while empowering the parties to choose otherwise. In addition, although the tribunal’s duty to give reasons is provided in national law, it is typically conceived of as an obligation owed to the parties, rather than to the state. For example, Caron describes the duty to give a reasoned award thus: “Among the most important obligations that the arbitral tribunal owes the parties is the rendering of a coherent, accurate and complete award.”

Moreover, even where the obligation to give reasons is enforced, the bar is so low that it provides no meaningful constraint on the exercise of arbitral authority—unless, that is, the parties choose to set a higher bar. In Bremer Handelsgesellschaft v. Westzucker, the English Court of Appeal held that “All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.” Around the world, awards have been successfully challenged

86 Bunge GmbH v. Westzucker GmbH (No. 2), [1981] 2 Lloyd’s Rep. 130 (CA) 123. Of course, this case interprets the English Arbitration Act, not the Model Law, but the provisions in the two statutes that require a reasoned decision are the same. See also Soyak Int’l Constr. & Inv. Inc. v. Hochtief AG [NJ] [Supreme Court] 2009 p. 128 Ö 4387-07 (Swed.) (“it is only where there is a total lack of reasoning, or where the reasoning in the circumstances must be considered so insufficient that it can be considered to be the same as a total lack of reasoning, that a procedural error can be said to have
for a failure to give reasons only where the reasons were irredeemably self-contradictory, totally illogical, or so incorrect as to constitute a procedural error. In short, Article 31 has all the indicia of a secondary rule.

The second provision of the Model Law dealing with arbitrators’ decision on the merits is Article 28(1), which requires tribunals to “decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.” If the parties do not make a choice of law, the tribunal must “apply the law determined by the conflict of laws rules which it considers applicable.” The tribunal must therefore decide according to some law or rules of law (a term which is taken to refer to non-state bodies of commercial law, such as lex mercatoria or the UNIDROIT Principles of International Commercial Contracts).

Once again, this may appear to be a primary rule binding arbitrators, but is actually a default provision as part of a secondary rule; it empowers the parties to require the tribunal to exercise its authority only in accordance with chosen rules of law. The parties may choose any law or rule of law to govern their dispute, and may also choose to have it determined according to no law at all. If they want to have their dispute resolved by non-lawyers deciding according to their technical or commercial expertise, they may establish an arbitration with those characteristics. The parties may call for ex aequo et bono arbitration or amiable composition, under which the tribunal is to decide based on its own sense of fairness, rather than according to any rule of law. They may stipulate that the tribunal must decide based on the text of the contract alone, or that it is “not bound to apply the substantive law of any jurisdiction”. Finally, they may call for the application of general principles or lex mercatoria which, due to their indeterminacy, are inherently more flexible than national laws and grant arbitrators a great deal of leeway.

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88 SPA Abati Legnam (Italy) v. Fritz Häupl, 17 Y.B. COMM. ARB. 529 (Corte di Cassazione 1992).

89 HR 8 Januari 2010, BK 6056, Hoge Raad, 08/02129 (AZ NV/NN) (Neth.), cited in U.N. COMMITTEE ON INT’L TRADE LAW, supra note 87, at 127.

90 BORN, supra note 78, at 241–42.

91 As an indication of the non-legal character of such procedures, Lord Bingham notes that, in these kinds of arbitrations, there is “no room” for the giving of reasons in the award. The Rt Hon Lord Justice Bingham, Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award, 4(2) ARB. INT’L 141, 145 (1988).

92 These terms are generally considered to be synonymous. Case No. 11663 of 2003, 32 Y.B. COMM. ARB. 60, ¶ 17 (ICC INT’L CT. ARB.).

93 This formulation was used in the well-known Arthur Andersen arbitration. Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms, Case No. 9797 of 2000, part 3 (ICC INT’L CT. ARB.), http://www.unilex.info/case.cfm?id=668.
to craft legal rules that will yield an outcome independently arrived at by the tribunal.

All of these options are rare, but their existence highlights the secondary rule character of the choice of law provisions in national arbitration statutes, including Article 28(1) of the Model Law. To the extent that arbitrators fail to apply the governing law (or indeed, to decide incorrectly on any matter of the merits), the eventual award would be refused enforcement only if tribunal violated the parties’ agreement, not because it violated national law. Enforcement has only been refused when a tribunal has clearly applied a different law than the one chosen by the parties, has decided under amiable composition without express authorization of the parties, or has based the award on errors of law so egregious as to constitute a failure of the tribunal to fulfil its mandate.\(^94\)

In sum, all national and international laws relating to the exercise of the arbitrator’s authority to decide disputes are secondary rules: they empower the parties to impose legally enforceable obligations upon each other, and to confer legally enforceable powers and duties upon the tribunal. The state’s role is restricted to establishing the outer limits of party autonomy and to enforcing the parties’ agreements and the consequences of those agreements.\(^95\) The structure of international arbitration law is essentially that of contract law. The only significant difference between international arbitration law and contract law is international arbitration’s inherent pluralism—the fact that multiple national and international legal orders collaborate to validate the parties’ agreement and enforce the obligations that flow from it.

V. THE STRUCTURE OF INTERNATIONAL ARBITRATION LAW AND THE EXERCISE OF ARBITRAL AUTHORITY

International commercial arbitration law is notoriously complex; in any one arbitration, a myriad of sources of law intersect: domestic and international, formal and informal, public and private, statute and case law and custom. However, although the specific sources of these laws vary from arbitration to arbitration, the relationship between them is the same in all international arbitrations. Accordingly, the underlying legal structure of the field can be characterized simply: states will enforce the agreements of arbitrants to arbitrate cross-border commercial disputes, subject to certain

\(^{94}\) See Karton, supra note 5, at 25-26. Only in a very few cases have awards been annulled or refused enforcement on this basis. The case law is reviewed and discussed in James Hope & Mattias Rosengren, Arbitrators: A Law unto Themselves?, COMM. DISP. RESOL. (Dec. 3, 2013), http://www.cdr-news.com/categories/expert-views/4616-arbitrators:-a-law-unto-themselves.

\(^{95}\) Cf. Paulsson, supra note 11, at 29 (asserting that the international arbitration system would still function if there were only two rules: “(i) those who fail to fulfil their bargains must compensate for losses caused; and (ii) rule (i) may be given binding effect by arbitrators”).
specifications and within certain limits, including all consequences that flow from those agreements, most importantly arbitral awards. States do not empower arbitral tribunals, nor do they dictate how tribunals must exercise their authority. Rather, they empower the parties to create tribunals and to direct the exercise of their authority, subject to limits of fundamental public policy. Nearly every rule of international arbitration law deals either directly with the enforcement of arbitration agreements (or supplies default rules in the absence of party agreement), or works indirectly to ensure that the consequences of those agreements are seen through to their conclusions—especially the enforcement of awards.

The overwhelming bulk of international arbitration law is composed of secondary rules, and the primary rules that do exist are intended to ensure that arbitration agreements are effective (such as the rules on enforceability of awards that ensure that the scope of the parties’ submission to arbitration and the procedures they have chosen are respected) and that the results are fair and consistent with states’ fundamental public policies (such as rules on arbitrator conflicts of interest and on arbitrability). Moreover, the rights and obligations created by international arbitration agreements are owed to other private parties and are enforceable by them—states cannot initiate actions for the removal of a biased arbitrator, or for the non-enforcement of an invalid award. This is, in essence the same structure as the law of contract in national jurisdictions: composed primarily of secondary rules, by which state courts are enlisted to enforce legal duties created by, owed to, and enforced by private parties.

These structural aspects of international arbitration law have a range of consequences for the exercise of arbitral authority, but all of the consequences flow from one fundamental principle: to the extent that arbitrators have any legal duties related to the exercise of their authority to decide disputes, those duties must derive from the parties’ agreement. Any limits on the enforceability of arbitral awards that do not derive from the parties agreement—in particular, the rules requiring that both parties have an adequate opportunity to present their cases, the rules on non-arbitrability of some categories of disputes, and the public policy exception to enforcement—should be seen as limits not on arbitrators, but on the permissible scope of agreements to arbitrate. Biased arbitrators may be removed by the courts not because the presence of a biased arbitrator in itself contravenes the law, but because the law does not permit parties to choose to be bound by the award of a biased arbitrator. The broader legal

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96 It is important to remember that the arbitration agreement directly incorporates any rules of procedure referred to in it, and indirectly incorporates any default rules that apply to matters on which the parties have not exercised their autonomy.

97 To put it another way, arbitration agreements inherently include a term (expressly or by necessary implication) that arbitrators must be independent and impartial.
framework—in particular the New York Convention and the statutes that incorporate its principles—simply sets the outer limits of party autonomy.

The observations on the structure of international commercial arbitration law offered above yield three categories of logical implications. First, consideration of legal structure provides a theoretically attractive explanation for uncontroversial aspects of existing international arbitration law and practice. Second, it provides answers to controversies over the arbitral role. Third, it leads to some provocative conclusions that call for further thought. In this conclusion, I will outline the first two only briefly and concentrate on the third.

Several characteristics of international arbitration law are consistent with and can be explained in terms of its contractarian structure. For example, the need for arbitrators to observe mandatory rules has been explained largely on the basis of practical necessity: tribunals must ensure that their awards are consistent with the mandatory rules of the jurisdictions where awards may be challenged, or else courts of those jurisdictions will annul or refuse to enforce the awards. But a better explanation is that mandatory rules constitute limits on party autonomy to conclude arbitration agreements in the first place; like the rules against enforcement of illegal contracts, they are part of the secondary rule that empowers parties to agree to arbitrate disputes.

Similarly, attention to the structure of international commercial arbitration law explains why there are normally no criminal or regulatory consequences for arbitrators when an award is annulled or refused enforcement. Arbitrators are never subject to liability against the state except in case of criminal conduct, such as when the arbitrator accepts a bribe or becomes a knowing party to a money laundering or tax fraud scheme. This state of affairs, too, is usually justified by both courts and commentators on the basis of policy rather than principle—arbitrators, like judges, should be free from state interference so that they can discharge their duties


99 In most states, arbitrators also enjoy some degree of immunity from liability to the parties. See infra notes 111-113 and accompanying text.

100 China appears to be a lone exception to this general rule. Since a 2006 amendment to the Criminal Law of the People’s Republic of China, an arbitrator who “intentionally runs counter to facts and laws and twists the law when making a ruling in arbitration” may be subject to criminal liability if “the circumstances are serious.” See Xiaosong Duan, Criminal Liability of Arbitrators in China: Analysis and Proposals for Reform, 23 PAC. RIM L. & POL’Y J. 343, 351 (2014).
independently. A more satisfying explanation is provided by the contractarian structure of national laws relating to international arbitration: the obligations they give rise to are private obligations, which may be enforced only by individuals who are harmed by breach of those obligations. The state assigns itself no regulatory role to deal with rogue arbitrators; all it does is refuse to enforce the awards they issue.

Several of controversies in the contemporary arbitration literature may be resolved by attention to the structure of international arbitration law. For example, commentators continue to disagree about whether arbitral awards can create substantive law—that is, whether awards may act as precedents in the sense of *stare decisis*; disputes also continue in the literature about how arbitrators ought to deal with a hierarchy of norms in the laws they apply—that is, whether they ought to refuse to apply laws chosen by the parties on the ground that those laws are invalidated by hierarchically superior norms within the same legal system; finally, a low-level civil war continues to simmer within the international arbitration community between those who see arbitrators more as legal adjudicators, bound to strictly apply the law, and those who see arbitrators more as commercially-minded problem-solvers, who should seek reasonable outcomes even (or especially) when the applicable law might lead to unreasonable ones.

These three controversies are all different instances of the core issue of how arbitrators ought to exercise their authority. Thinking of national and international laws in arbitration in terms of secondary rules helps provide a kind of answer, or at least a way for arbitrators to determine how they should

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103 The literature is voluminous, especially with respect to investor-state arbitral awards, which are mostly published, making possible the development of a body of case law. For an overview of the issues and the various viewpoints expressed by commentators, see generally W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51(5) WM. & MARY L. REV. 1895 (2010).

104 In the commercial arbitration context, this debate is most prominently expressed in a series of duelling publications by Paulsson and Mayer: Jan Paulsson, *Unlawful Laws and the Authority of International Tribunals*, 23 ICSID REV. – FOREIGN INV. L. J. 215 (2008); Pierre Mayer, *L’arbitre International et la Hiérarchie des Normes*, 2011 REVUE DE L’ARBITRAGE 361; Paulsson, supra note 11, at 231-55. In the investor-state arbitration context, the debate is expressed in terms of whether investment arbitrators are agents of the parties (in which case they should see their mandate narrowly, and not look beyond the relevant investment treaty to broader public international law) or trustees of the treaty regime (in which case they should look to the full scope of public international law and apply any norms that claim precedence over or fill gaps in the investment treaty). See, e.g., Jürgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 257 (Zachary Douglas et al. eds., 2014).

105 See *Karton*, supra note 5, at 13-17.
proceed in a given arbitration. In each of these situations, national and international laws are irrelevant; the arbitration agreement establishes both the tribunal’s authority to decide the dispute and any constraints on that authority. Accordingly, arbitrators should make determinations about how they ought to exercise their authority based only on the agreement of the parties.

It follows that all questions relating to the exercise of arbitral authority should be answered by interpretation of the arbitration agreement. Thus, precedents should be followed to the extent that the parties intend them to be followed. Of course, it is only on rare occasions that a choice of law provision goes into such detail. However, the parties’ implied intentions can be discerned. If (as us usual), the parties’ choice of law stipulates only that the law of a particular jurisdiction should be applied, tribunals should presume that the parties intended to apply all of that jurisdiction’s law, including whatever sources of law (such as precedents) that would be applied as binding by a court of the jurisdiction, and any hierarchy of rules recognized in the jurisdiction. But this is only a presumption, and if the tribunal finds that following such a course of action would defeat the express or implied intentions of the parties, it should proceed differently.\(^{106}\)

On the matter of whether arbitrators should adjudicate more in the manner of judges, legally bound to apply the law, or commercial problem-solvers, bound only to provide a reasonable resolution to the dispute before them, this too should be decided according to the intentions of the parties in the individual case.\(^{107}\)

Finally, following the structure of international arbitration to some of its logical conclusions can lead us in some peculiar and potentially unsettling directions.

First, it is term of all arbitration agreements that the parties will abide by an eventual award, usually expressed by inclusion of a provision to the effect that the award is final and binding or incorporation of institutional rules that contain such a provision. It follows that arbitral awards have legal validity and binding force independent of their being recognized or enforced by a state court, it is just that this effect arises from a contractual obligation, rather than being imposed by the state through a primary rule.

If a losing party refuses to comply with the award, the winning party could sue for breach of the arbitration agreement, even if the award is not yet effective in any jurisdiction. In practice, parties do not sue for breach of the arbitration agreement as an indirect way to enforce arbitral awards because

\(^{106}\) For example, if the parties’ negotiations make clear that they understood their obligations in the context of a particular piece statute—a sale of goods act, say, or a patents act—but the statute’s applicability to the particular issue in dispute in the arbitration has been called into question, it would defeat the intentions of the parties for the tribunal to refuse to apply the statute.

\(^{107}\) See Karton, supra note 5, at 37 (arguing that “The duty of arbitrators when deciding the merits is not to provide ‘commercial justice’ nor indeed is it to provide ‘legal justice’. Tribunals should decide in the manner and according to the rules chosen by the parties to the individual dispute.”).
the global regime for enforcement of awards created by the New York Convention is much more favorable to parties seeking enforcement than the regime for enforcement of contractual obligations. However, a breach of contract suit for failure to comply with an award is a theoretical possibility, and may become an appealing option in certain circumstances, such as when an award is annulled by the courts of the seat due to some idiosyncrasy of the national law that would not lead to non-enforcement elsewhere, but the state in which the non-complying party’s assets are located will not enforce awards that have been annulled in the seat of arbitration.

Second, nothing in any national or international law actually requires arbitrators to comply with arbitration agreements; after all, when arbitrators violate the arbitration agreement—such as by exceeding the scope of the parties’ submission to arbitration, or adopting procedures contrary to those chosen by the parties—the only legal consequence is nullity of the award. However, arbitrators are bound to comply with the arbitration agreement by virtue the arbitrator’s contract (whether that contract is entered into directly with the parties in an ad hoc arbitration, or with the institution in an institutional arbitration). The arbitrator’s contract seems like an odd thing to highlight; it is rarely mentioned in discussions of international commercial arbitration law or investment protection. But it is an underappreciated key to the entire international arbitral system. The arbitrator’s contract is the only possible source of a binding legal obligation for arbitrators to obey the arbitration agreement, including any rules of procedure incorporated by reference into it.

Third and last, if arbitrators are contractually bound to comply with the arbitration agreement, it follows logically that they should be subject to breach of contract liability for failing to comply with it. Immediately, a number of thorny technical questions arise: what law would apply to disputes over the arbitrator’s contract? What forum would they be resolved in? Would they be arbitrable? What kind of contract is the arbitrator’s contract (employment, service, agency, mandate, etc.)? What remedies would be available for breach? If damages are awarded, how would they be calculated? Should arbitrators be able to insure against liability and, if so, should insurers enjoy rights of subrogation? And so on.

108 To my knowledge, only one significant study of the arbitrator’s contract has been published: EMILIA ONYEMA, INTERNATIONAL COMMERCIAL ARBITRATION AND THE ARBITRATOR’S CONTRACT (2010). The only major arbitration treatise that addresses the arbitrator’s contract with more than a passing mention is BORN, supra note 78, § 13.03.

109 Cf. id. at 1975 (“The . . . arbitrator’s contract is of fundamental importance. Although it functions within a framework of national arbitration legislation, the arbitrator’s contract defines (or incorporates) most of the arbitrator’s obligations towards the parties . . . .”).

110 For this reason, the result is the same whether the arbitrator is actually in contractual privity with the parties, or only with the institution that administers the arbitration.
But the bigger issue is the proper scope of arbitrators’ civil liability to the parties. A number of jurisdictions confer upon arbitrators either absolute immunity from suit or qualified immunity (such that they might only be liable in cases of deliberate or grossly negligent conduct). Immunity is intended to ensure the independence and integrity of the tribunal and protect arbitrators from undue pressure—a laudable goal. But the contractarian structure of international arbitration—and the corresponding contractual basis of arbitral authority—militate in favour of broader private liability. However, contractual liability for arbitrators would also be an effective means to rein in many of the vices of modern international arbitration, such as excessive delays, lack of effective ethical regulation, and asymmetries in the market for arbitration services that may insulate arbitrators from the consequences of their carelessness or incompetence.

111 The various national regimes are summarized in Susan D. Franck, The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity, 20 N.Y. L. SCH. J. INT’L & COMP. L. 1 (2000). Note that various exceptions to immunity have been recognized, such as liability for wrongful resignation of the arbitral mandate or for acts in bad faith, for which the usual remedy is forfeiture of the arbitrator’s fees. The existence of these exceptions and the remedy available are both best explained by the contractual nature of arbitrators’ relationship with the parties. Rogers, supra note 8, ¶ 9.42 (2014).

112 See, e.g., Babylon Milk & Cream Co. v. Horvitz, 151 N.Y.S.2d 221, 224 (Sup. Ct. 1956) (holding that arbitrators “must of necessity be uninfluenced by any fear of consequences for their acts”).

113 A vocal minority of commentators have argued for greater arbitrator liability. See, e.g., Rutledge, supra note 102; Emmanuel Truli, Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity, 17 AM. REV. INT’L ARB. 383 (2006); Franck, supra note 111.
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