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2. Professor of Law, Pepperdine University. The author thanks J.D. candidate Sarah Christian for cheerful and capable research assistance.
I. INTRODUCTION

Among International Commercial Arbitration ("ICA") specialists, the suggestion that recent years have been eventful would likely pass without objection. In the Anglo-American context alone there have occurred important decisions,3 legislative proposals to limit arbitration,4 and the launching of an American Law Institute Restatement on ICA.5 These developments have punctuated a period already made memorable by events marking the fiftieth anniversary of the New York Convention.6 The latter treaty has long been the centerpiece of the regime that makes arbitration the preferred alternative to litigation for transnational commercial disputes,7 and a symbol of what can be accomplished on a multilateral basis. For the new entrant in the field, however, an appreciation of these and similar matters requires context. A book recently introduced by Cambridge University Press seeks to supply that context: *The Principles and Practice of International Commercial Arbitration* by Professor Margaret L. Moses.8

The book aims to provide—at an attractive price9—a comprehensive survey of the more important topics associated with the theory and practice of ICA. It comprises 340 pages (100 pages of which is devoted to its ten documentary appendices).10 A first chapter

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3. See Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008); infra notes 84-85 and accompanying text; the House of Lords decision in Premium Nafta Products Ltd., & Others v. Fili Shipping Co., Ltd., & others (Fiona Trust & Holding Corp., & others v. Yuri Privalov & Others), [2007] UKHL 40 (U.K.); see also MOSES, supra note 1, at 90 (discussing English Court of Appeals decision); infra notes 64-68 and accompanying text.


7. See infra notes 88-93 and accompanying text.

8. MOSES, supra note 1.


introduces ICA, the attributes that have sustained it, and the leading institutions that support it. Chapters two and three address the arbitration agreement with an emphasis on enforcement and drafting. Chapter four treats sources of law and important tenets of conflicts of law specific to international arbitration. Chapter five covers the role of the courts, and Chapter six—the tribunal. Arbitral proceedings are surveyed in Chapter seven. Chapters eight through ten are devoted to the award: its form, vulnerability to attack, and enforcement. A final chapter surveys investment arbitration.11

Whether a teacher or a practitioner, one might be forgiven for asking whether another arbitration reference is to be welcomed. In contrast to a former time when teaching ICA meant assembling materials from scratch (or for the practitioner—consulting perhaps Domke12 or Mustill & Boyd13), at present there is an abundant supply of books on arbitration, many for classroom use and many in advanced editions.14


11. The book is also designed to make information accessible: the book’s index and table of contents are thorough, and the work is logically ordered and arranged in headings and sub-headings that are descriptive and non-fanciful. The book is available in paperback and hard-bound versions. At approximately 7” x 10” x 1”, the paperback version I consulted is wonderfully portable. It has the feel of Redfern and Hunter’s Student Edition or of William Fox’s, International Commercial Agreements: A Functional Primer on Drafting Negotiating and Resolving Disputes (3d ed.1998) (4th ed. forthcoming 2008/2009). It is thus more treatise-like than George Bermann’s rightly popular Transnational Litigation in a Nutshell (2003).

12. MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION (3d ed. 2008).


The blossoming array of texts is of course market-induced. For international commercial disputes, arbitration is first among equals, a fact reflected in empirical studies canvassing multinational corporations and evidenced by the large number of arbitration practice groups now maintained by international law firms.

Certainly one justification for introducing another book on arbitration is to fill a niche, and to do it well. The fact that Professor Moses has done this is best appreciated when considering the significant challenge placed before her: with developments in the field unfolding at a steady pace, the goal was to present in a fresh, portable, form a good sense of the field at large, while striking a sensible balance between detail and coverage and achieving an apt mixture of evergreen issues, immutable principles, and broad trends. The following brief tour d’horizon suggests many of the areas of inquiry illuminated through the book’s thoughtful selection and treatment of topics and should also indicate why we who specialize in this field find it to be one of perennial richness.

II. SELECTED BENCHMARKS CHARACTERIZING THE ICA MILEAU

A. Statutory and Procedural Unification

The past three decades have seen developments fostering unification in expectations about arbitral procedures and, perhaps in equal measure, the development of global standards delineating the proper relationship between courts and arbitrators. Among the more significant formulae


16. Current law school curricula and related programs reflect the practical importance of arbitration in an interdependent world. In international arbitration, as distinct from its domestic cousin, speed and cost are less important than neutrality of location and process (the need to avoid domestic courts); the global enforceability of awards through treaties is also of paramount importance. With international law firms seeming to compete as never before for the significant arbitration work being generated by globalization, ICA and related courses have become relatively common. Certificate and LL.M. programs that offer students specialization in international arbitration are no longer novel and the leading international arbitration moot competition has become so popular that a Hong Kong version of that competition was inaugurated to absorb some of the demand and to complement the Vienna-based original.
informing these trends have been the UNCITRAL Arbitration Rules, the IBA Evidence Rules, and the UNCITRAL Model Law. Published in 1985, the latter model statute has been adopted in over sixty jurisdictions (including several U.S. States). Its attributes reveal a number of animating principles common to ICA: the effectiveness of pre-dispute agreements to arbitrate, wide party autonomy in configuring the proceedings, wide discretion in arbitral tribunals to conduct the proceedings in default of contrary party agreements, limited court involvement in the proceedings, and limits on court control of awards (characterized in particular by the absence of merits review and narrow conceptions of public policy).

Ultimately, the confidence necessary to pursue the Model Law and its subsequent success must be attributed in large part to the trail blazed by the Model Law’s 1976 older cousin—the UNCITRAL Arbitration Rules. Though not a model statute, that text not only made the decision

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21. The Model Law’s introduction in 1986 was thought by many to be relevant largely to countries with outdated arbitration laws yet modest access to drafting expertise. Today, far from being a template associated with less developed countries, the Model Law has assumed prominence as a leading influence on arbitration law in states of all sorts; its adopting jurisdictions include: California, Canada, Germany, Ireland, Scotland, Sweden, Texas and many other systems not associated with underdeveloped stores of legislative expertise; and its influence can be readily seen in the English Arbitration Act of 1996. See *DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, REPORT ON THE ARBITRATION BILL S-7* (February 1996) (in preparation close attention was paid to the Model Law). Evidencing the wisdom of its architects in not trying to do too much, and having been pressed into service in so many jurisdictions (often with modifications) the Model Law was bound to be revisited with an eye toward possible refinements. See Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, at 23. Unlike widely adopted treaties, such as the New York Convention, that cannot be so easily refined to meet modern needs, a model statute can be revised and offered to lawmakers on an individual basis. In the case of the Model Law, recent amendments have addressed, inter alia, the details associated with tribunal grants of interim measures.

to arbitrate without an institution much more feasible than before, but provided institutional drafters with a highly serviceable template with which to craft their own rules, once it became apparent that the UNCITRAL text represented a modern standard of sorts. Within a few years of the Rules’ publication, they had been adopted by the Iran-U.S. Claims Tribunal\(^{23}\) and contemporaneously by numerous institutions seeking to emulate an internationally accepted model.\(^{24}\) The Rules have guided not only nearly thirty years of Iran-Claims Tribunal proceedings, but have governed perhaps hundreds of ad hoc proceedings.\(^{25}\)

Neither the UNCITRAL Rules nor the Model Law address in detail the sometimes thorny questions of evidence\(^{26}\) and related problems of document disclosure and document exchange.\(^{27}\) International arbitration

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23. Many books have been written about the Tribunal. Among the better ones are Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal (1998), and George Aldrich, The Jurisprudence of the Iran-U.S. Claims Tribunal (1996). Useful collections of essays include: The Iran- U.S. Claims Tribunal at Twenty Five (Christopher Drahozal & Christopher Gibson eds., 2007); The Iran-United States Claims Tribunal and the Process of International Claims Resolution 283 (David Caron & John Crook eds., 2000). When adopting the UNCITRAL Rules, the Iran-U.S. Claims Tribunal was yet in its infancy, and the UNCITRAL Rules themselves were relatively new. Lucy Reed, formerly of the U.S. State Department and once posted to The Hague, would later remark: “I cannot emphasize enough how important it was that the Tribunal started with a suitable and clear set of procedural rules.” Institutional and Procedural Aspects of Mass Claims Settlement Systems: The Iran-United State Claims Tribunal, in PCA, Institutional and Procedural Aspects of Mass Claims Settlement Systems 9, 12 (2000). The expansive caseload and longevity of the Tribunal meant that it would perform a sustained test of the UNCITRAL Arbitration Rules and give rise to substantial practice under them. See generally David Caron et al., The UNCITRAL Arbitration Rules (2006); Jacomijn J. van Hof, Commentary on the UNCITRAL Arbitration Rules (1991); see also Stewart Baker & Mark Davis, Arbitral Proceedings under the UNCITRAL Rules—The Experience of the Iran-United States Claims Tribunal, 23 Geo. Wash. J. Int’l L. & Econ. 267, 347 (1989-1990).

24. Published in 1976, those rules have proven serviceable, so much so that they are essential to understanding the origins of most institutional rules, and the revisions likely to emerge from UNCITRAL’s present study of them will not likely represent a repudiation of their basic structure and underlying philosophy.

25. Not least among circumstances tending to press the UNCITRAL Rules into service has been their designation in perhaps thousands of Bilateral Investment Treaties (BITs), typically as the sole alternative to ICSID arbitration.


27. The term “discovery” is resisted by most specialists since it is specific to Anglo-American systems and misleading in that the exchanges that occur in international arbitration are voluntary unless ordered by the tribunal and, ordinarily, do not approach federal style discovery in scope. Proposals to pursue discovery as practiced in England and the United States are typically not enthusiastically received by civil law lawyers and arbitrators.
naturally brings into potential conflict expectations born of different legal traditions. These divergent approaches are particularly manifest in pre-trial practices related to fact-finding. Without the aid of some mediating regime, a civil law lawyer is unlikely to take as her default premise that there should occur obligatory pre-arbitration exchanges of documents between adverse parties, replies to interrogatories, or depositions (all techniques in what an American lawyer would call “discovery”). Indeed, while some form of cross-examination of witnesses often occurs in international arbitration, it is because regular participants from civil law backgrounds have come to accept it for purposes of arbitral proceedings, regardless of its absence in their domestic legal systems.

Nor do concordant rules of witness preparation or of privilege exist across domestic legal systems. The flexibility of the arbitral method of course has allowed experienced arbitrators and counsel to craft for each proceeding a via media. Over time, a collection of the best practices has emerged that has shaped and reinforced expectations. In the hands of


29. Although wide-ranging discovery as practiced in U.S. Federal courts is not the norm in international arbitration, if the parties agree, they may submit to an analogous regime of their own design. See KLAUS BERGER, INTERNATIONAL ECONOMIC ARBITRATION 430-31 (Springer 1993); REDFERN & HUNTER, supra note 11, at 30-34; cf. MOSES, supra note 1, at 170 (“Depositions are almost never allowed, unless both parties have agreed to them.”).

30. See MOSES, supra note 1, at 170; cf. IBA Rules on the Taking of Evidence in International Commercial Arbitration, supra note 10, art. 8(2) (following direct testimony, other parties may question a witness “in an order to be determined by the tribunal”).


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experts, these modes of operating can be explained in writing, undergoing further refinement in the process. The principal accomplishment of this type is the above-mentioned IBA Rules on Evidence in Arbitration.34 Along with other guides,35 the IBA Evidence Rules have, in Professor Moses's terms, a "harmonizing" influence on international arbitral procedure.36

What one calls procedural unification, of course, another might call an unwelcome drift toward litigation-like, common law procedures, a trend sometimes pejoratively referred to as the "Americanization" of ICA.37 Certainly, there is a constant tension between the litigator's desire for familiar methods and arbitration's claim that it can offer relative speed and agility. Undoubtedly, the problem has been exacerbated by the advent of "E-discovery," which has inevitably become just another potentially contentious element in a tribunal's management of the proceedings.38

33. These are not so much exclusive techniques as they are a number of accepted variations on a general approach.

34. See generally V.V. Veeder, Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules, 65 ARB. 291 (1999); Michael Buhler & Carroll Dorgan, Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration—Novel or Tested Standards?, 17 J. INT’L ARB. 3, 12-13, 15 (2000). The IBA Rules apply when the parties designate them or when the arbitrators, in their discretion, determine that they will be guided by them. Although the IBA Rules have been influential, that text's constituent rules are often relied upon piecemeal, rather than through adoption of the text as a whole.


36. MOSES, supra note 1, at 165.


B. Arbitral Competency

While in no legal system are the powers of arbitrators and courts coextensive, the recognized subject matter and remedial competency of arbitrators has become considerable. In the United States, the train of essential decisions began in 1972 with the U.S. Supreme Court’s forum selection decision in *Bremen v. Zapata*[^39^] and continued apace as subject matter reserves favoring the judiciary underwent persistent reconsideration and, correspondingly, party autonomy came to enjoy a more central and powerful function. Under the resulting jurisprudence, provided there exists an arbitration clause of sufficient scope, an arbitrator may adjudicate both garden variety tort claims and statutory claims of most kinds.[^40^] This is true even though the arbitrators in question might not have received their legal training in the United States, may have been instructed to conduct the arbitration abroad, and will apply—at least in part—the foreign law designated in the contract (a pattern many will recognize as the watershed *Mitsubishi* case).[^41^] In the process of adjudicating public law claims, moreover, arbitrators are in appropriate cases entitled to, and indeed perhaps expected to,[^42^] award remedies having a penal flavor, such as punitive damages and statutory treble damages,[^43^] and may also grant anti-suit injunctions and other injunctive relief.[^44^]


[^41^]: *Mitsubishi*, 473 U.S. at 629-40.


[^43^]: *See* *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 58 (1995) (if parties agree to include a claim for punitive damages, FAA ensures state law prohibition of punitive damages in arbitration will not have effect). Indeed, contractual attempts to restrict a tribunal’s power to award multiple damages under a statute otherwise contemplating such a remedy may be invalid. *Cf.* *Pacificare*, 538 U.S., at 406-08 (issue
So too has substantial authority confirmed an arbitral tribunal’s power to determine its own jurisdiction and, significantly, under certain circumstances to do so with relative preclusiveness in particular jurisdictions. This principle—the Kompetenz-Kompetenz doctrine—interacts with the “severability” principle to forestall maneuvers that could otherwise render international arbitration ineffectual.

C. The Courts as Gatekeepers and Enforcers—Arbitrator Jurisdiction and Control of Awards

A canvassing of arbitration case databases will readily confirm that, overwhelmingly, arbitration comes before judges with respect to two issues: the enforcement of putative agreements to arbitrate, and requests to vacate awards (typically coincident to cross-petitions to confirm them).

With respect to the first, the two-part inquiry is the same in most legal systems: does the arbitration agreement exist, and does it encompass the dispute in question? The answer to the first question—whether there exists an agreement to arbitrate—is what distinguishes an arbitrator from an officious volunteer. Though in some legal systems not reached as Court would not assume arbitrator would refrain from granting statutorily authorized exemplary damages.

44. See Rintin Corp. v. Domar, Ltd., 476 F.3d 1254, 1257 (11th Cir. 2007); Telnor Mobile Commc’ns AS v. Storm LLC, 524 F. Supp. 2d 332, 363 (S.D.N.Y. 2007).


47. The severability principle—the doctrine that the arbitration clause is, in law, autonomous from the contract in which it is embedded—has generated much debate, in part because it depends on legal fiction to sustain itself (at least in some circumstances). See JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 132-33 (1997) [hereinafter PRINCIPLES & PRACTICE]; see also infra notes 103-07 and accompanying text (discussing proposals to eliminate severability for certain contracts). The doctrine’s reception into mainstream arbitration jurisprudence is helpfully traced in Hulbert, supra note 45, at 551-63.
that fundamental inquiry may be entrusted to the arbitrators to perform with relative conclusiveness, it is the review of that question by the courts that prevents arbitral jurisdiction from degenerating into a grotesque legal fiction. Given that arbitral jurisdiction is a function of consent, the scope question arguably is as fundamental as its existence; taken together the two questions determine what, if anything, the parties agreed to arbitrate.

The scope question tends, however, to be associated with delicate rules of construction sometimes bordering on tenuous legalisms. American courts for instance generally consider the expression “all disputes arising out of a contract” to be a narrower submission than one consenting to arbitrate “all disputes related to” the contract. The exact words used matter despite the Moses Cone presumption under which doubts about the scope of the arbitration clause must be “resolved in favor of arbitration.”

The House of Lords has recently acknowledged that little can defensibly be inferred from slight differences among certain scope formulae known to English law. In particular, should the question of contract rescission for alleged illegality be kept from the arbitrators because the arbitration clause in question entrusted to them only disputes “arising under” the contract? However elusive the phrasing distinctions may seem to an outsider, the argument was not completely fanciful under English precedent. Whatever its origins, the potential for such shading to dictate the scope of arbitral jurisdiction “reflected no credit upon

48. See Park, Determining Jurisdiction, supra note 46, at 140.
49. Compare Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983) (any dispute “arising hereunder” did not catch fraud in the inducement claims), and Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1513-17 (9th Cir. 1983) (any dispute “arising in connection with” the contract caught antitrust claims having a reasonable factual connection to it).
52. Some of the phrasing variations said to be meaningful under former English case law must certainly have posed traps for the unwary, whose reliance on plain meaning might lead them astray. See DAVID SUTTON & JUDITH GILL, RUSSELL ON ARBITRATION 59-60 (2d ed. 2003) (“The words ‘arising out of contract’ have been said to have a wider meaning than ‘arising under a contract.’”).
English commercial law53 and warranted a "fresh start"54—one that would accord more feasibly with the parties' likely intentions. Thus:

[T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.55

When consulting Professor Moses's book, one learns more about the international regime superimposed upon domestic systems than about nuances of individual national systems. The book covers, for instance, the formal requirements attaching to the agreement to arbitrate under the New York Convention—notably that it be embodied in a writing.56 As Professor Moses explains, that predicate is narrowly described in the New York Convention's fifty-year old formula, promoting among courts some ingenuity in giving effect to agreements to arbitrate that may comport with modern trade usage but which may not strictly speaking be "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."57 As she notes, some relief has come in the form of UNCITRAL recommendations,58 issued in 2006, that suggest (if elliptically) that an agreement to arbitrate falling under the Convention should be enforced if it satisfies what will often be the more liberal writing requirements of

53. Premium Nafta, UKHL 40, at ¶12.
54. Id.
55. Id. at ¶13. Applied to the case at hand, the "arising under" language caught the claim for rescission. Id. The "fresh start" decreed by the Lords would seem to make English law less concerned with the phrasing of clauses than U.S. law, which still makes distinctions. See infra note 62 and accompanying text. The decision’s other principal holding was that credible claims of illegality addressed to the underlying contract do not undermine the effectiveness of the arbitration clause embedded therein, which by virtue of its legal autonomy survives to provide arbitral jurisdiction. Premium Nafta, UKHL 40. The decision confirms an interpretation of the 1996 Act that corresponds rather closely with that announced by the U.S. Supreme Court, in Buckeye Check Cashing Inc. v. Cardegna, in which the Court ruled that the operation of the severability principle did not depend upon whether the attack on the main contract rendered it void or merely voidable. 546 U.S. 440, 447-48 (2006).
56. MOSES, supra note 1, at 19-24 (discussing New York Convention, art. II(2)).
57. Id.
the domestic arbitration law.\textsuperscript{59} In a contemporaneous development, UNCITRAL has amended its Model Law to either (at the election of the adopting state) prescribe no writing requirement, or a relatively liberal one that accounts for both electronic communications and such established trade practices as the oral incorporation of written trade terms.\textsuperscript{60}

The treatment of award "set aside" (roughly synonymous with "annulment" or "vacatur") and award enforcement occur in the book's Chapters nine and ten respectively.\textsuperscript{61} Within the international treaty framework serving arbitration, the two questions are linked. An award that has been set aside by a competent court need not be enforced abroad under either the Panama or the New York Convention,\textsuperscript{62} though much intellectual skill and energy has been devoted to the related question: when, if at all, should an award that has been annulled nevertheless be enforced?\textsuperscript{63} As Professor Moses reminds us, the power to set aside an award is traditionally vested exclusively in the courts at the seat of arbitration (which American courts refer to as those having "primary jurisdiction").\textsuperscript{64} By contrast, a court refusing enforcement under a convention is not denaturing the award, but merely exerting a form of secondary control available to the court under the New York Convention.\textsuperscript{65} Though refused recognition in one country, the award may be enforced elsewhere.

In combination, Chapters nine and ten do reveal an important congruency between set aside law and refusal practice under a convention; in neither context are awards ordinarily reviewed on the merits, at least under approaches prevailing in legal systems favorably associated with international arbitration.\textsuperscript{66} The English exception to this pattern is narrow,\textsuperscript{67} so that there, as elsewhere, award effectiveness depends modernly not on whether the court addressed would have

\textsuperscript{59} MOSES, supra note 1, at 19-24 (discussing New York Convention, art. II(2)).

\textsuperscript{60} MOSES, supra note 1, at 24-26.

\textsuperscript{61} Types of awards—final, partial, interim, consent and default—are surveyed in Chapter 8 of the book as are the award's preclusive effects.

\textsuperscript{62} 50 Years, supra note 6, at art. V(1)(e).


\textsuperscript{64} See TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 941 (D.C. Cir. 2007).

\textsuperscript{65} MOSES, supra note 1, at 213.

\textsuperscript{66} Id. at 196-97.

\textsuperscript{67} See id.
reached the same result, 68 but on whether the tribunal had jurisdiction, stayed within that jurisdiction, 69 and accorded suitable levels of procedural fairness to the participants. 70 In the United States, the Supreme Court has recently reinforced this expectation by ruling in its Hall Street decision that the statutory bases for vacatur found in the FAA are exclusive, 71 thus precluding merits review by party agreement 72 and, by seemingly clear implication, disallowing as a separate basis for vacatur "manifest disregard of the law." The latter idiosyncratic doctrine of American law has been invoked frequently but without regular success. It was born of dictum in a case long ago vacated, and applied with variations among the different U.S. circuits, some of which continue to intone it after Hall Street. 73

While mention is made above of the Panama Convention, 74 Professor Moses is correct to emphasize the New York Convention, 75 which in its fiftieth year is of singular importance. Easily the most important among the arbitration treaties, 76 the New York Convention has

69. Excess of mandate, though variously described, is a common ground for annulment. See, e.g., UNCITRAL Model Law, supra note 10, art. 34(a)(iii) ("the award deals with a dispute not contemplated by or not falling within the terms of the [agreement to arbitrate]").
72. Id. at 1409. For discussion of the pre-Hall jurisdictional splits on the question of expanded review by agreement, see MOSES, supra note 1, at 197-98 (noting grant of cert. by the Court); for a recent assessment, see Alan Scott Rau, Fear of Freedom, 17 AM. REV. INT’L ARB. 469 (2006). See generally PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES, supra note 37, at 18-20.
73. Those believing that Hall Street would put an end to overt merits review have been proven wrong. Courts have found room to maneuver notwithstanding Hall Street. See Stolt-Nielsen SA v. Animal Feeds Int’l, 548 F.3d 85, 101 (2d Cir. 2008) (manifest disregard subsumed, and thus available under, FAA Section 10(a)(4) (excess of arbitral powers)); Coffee Beanery, Ltd. v. WW L.L.C., 300 Fed. App’x 415, 418-419 (6th Cir. 2008) (Hall Street showed reluctance to prohibit manifest disregard in all circumstances as a basis of vacatur); Cable Connection v. Direct TV, Inc., 190 P.3d 585, 599 (Cal. 2008) (under state arbitration statute, parties may agree to merits review; FAA as construed in Hall Street not preemptive).
74. See MOSES, supra note 1, at 8.
75. A leading reference on the Convention, even with the passage of time, is ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 50 (1981).
76. For a thoughtful argument that the Panama Convention adds little of value to the New York Convention regime, see Claus von Wobeser, The Influence of the New York Convention in Latin America and on the Inter-American Convention on International
largely succeeded in promoting globally the enforcement of agreements to arbitrate and of arbitral awards. Though some have argued that revisions are called for, or that supporting institutions could add value, the Convention remains a workable mix of obligations and exceptions. What might not have been expected in 1958 is the extent to which the exceptions, especially with respect to award enforcement, would be read narrowly by courts. This self-restraint is particularly impressive given that public policy is among the enumerated grounds for refusing enforcement. Professor Moses’s book conveys this general sense well, while supplying details about the individual Article V exceptions to a state’s undertakings to recognize and to enforce arbitral awards.
D. Reform—Problems and Prospects

Newcomers to the field of ICA may conclude that whatever ICA's pedigree, its legitimacy issues seemingly have not been fully resolved. As with commercial arbitration in general, the system, after all, continues to rely on party-appointed "wing" arbitrators, who, while charged with independence and impartiality, are often appointed after an ex parte interview, and may be compensated directly by the appointing party. The apologist's reply to this incomplete depiction is that the duty to be and remain independent and impartial (the international standard) is not solely self-policing, but rather is regulated by several loosely interconnected regime features tending to foster observance of neutrality standards and to detect violations thereof. These include limits imposed on the scope of pre-appointment interviews, the requirement that an arbitrator disclose potential conflicts, the ability of a party to challenge an arbitrator upon discovery of troubling facts, the operation of certain intra-tribunal policing mechanisms, and court controls both at the place of arbitration (in the form of set aside proceedings) and under the New York Convention.

A thoroughgoing critique concerned with systemic transparency might also take note of the privacy that is touted by some as one of arbitration's virtues. ICA continues to be characterized by private...

85. A party appointed arbitrator who exhibits partiality will often come to be viewed guardedly by the other two arbitrators, and will lose influence as a result.
86. See, e.g., New Regency Prod. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007) (award properly set aside where arbitrator failed to disclose post-appointment conflict resulting from change of employer).
proceedings,\textsuperscript{87} non-systematic access to awards,\textsuperscript{88} and the possibility in some jurisdictions that awards will be issued without an elaboration of reasons.\textsuperscript{89} These process features admittedly reduce ICA’s transparency quotient,\textsuperscript{90} but they are offset, if only in part, by several factors. First, the types of arbitrations most obviously redolent of the public interest—investor state arbitrations—have become remarkably transparent through a more predictable access to such awards (almost invariably reasoned),\textsuperscript{91} a trend toward open hearings,\textsuperscript{92} and occasional access by amici to the proceedings in the discretion of the tribunal.\textsuperscript{93} Second, with respect to private commercial arbitration, the default provision in most international rule formulae is that awards are to be reasoned,\textsuperscript{94} and though they remain only episodically available, institutions have increasingly published redacted extracts of tribunal reasoning in various forms. What is more, a dissenting arbitrator ordinarily will be entitled to

\textsuperscript{87} The UNCITRAL Arbitration Rules, for instance, provide that oral hearings shall be held \textit{in camera} unless the parties otherwise agree. \textit{Arbitration Rules of the United Nations Commission on International Trade Law, supra} note 17, Rule 25(4).

\textsuperscript{88} Awards are not invariably circulated in the public domain. See, e.g., \textit{Arbitration Rules of the United Nations Commission on International Trade Law, supra} note 17, art. 32(5) (“the award may be made public only with the consent of both parties”). \textit{Strictu sensu}, no formal system of precedent operates in ICA; awards bind only the disputing parties and only as to the dispute submitted. In some sectors, however, notably investor-state arbitration, awards are entering the public domain with relative predictability. In that sector and others, despite the absence of formal precedent it has become obvious that when such materials are available, tribunals and advocates acquaint themselves with the reasoning and outcomes produced by other arbitrations. The NAFTA awards contain particularly good examples of this explicit cross-referencing. See Jack J. Coe, Jr., \textit{Taking Stock of NAFTA Chapter Eleven in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods}, 36 \textit{VAND. J. TRANSNAT’L L.} 1381, 1409 (2003) [hereinafter \textit{Taking Stock}]; cf. Martin Hunter, \textit{Publication of Awards and Lex Mercatoria}, 54 \textit{ARB.} 55 (1998) (Iran-U.S. Claims Tribunal awards valuable to scholars and students); see also Park, \textit{Arbitration of International Business Disputes, supra} note 37, at 383 (discussing, generally, the benefits of publishing awards).

\textsuperscript{89} Unreasoned awards are enforceable in the United States. See \textit{Principles and Practice, supra} note 47, at 35 (1997).


\textsuperscript{91} Many examples are present on line; e.g., http://www.investmentclaims.com/.

\textsuperscript{92} See \textit{NAFTA Leadership, supra} note 90, at 1360-62.

\textsuperscript{93} Id. at 1362-78.

\textsuperscript{94} See, e.g., \textit{Arbitration Rules of the United Nations Commission on International Trade Law, supra} note 17, art. 32(3) (award shall state reasons upon which it is based unless the parties agree otherwise).
issue a dissenting opinion, by which vehicle weaknesses in the majority's reasoning may be identified (thus promoting deliberateness and care in reasoning and drafting on the part of the majority). Third, many awards enter the public domain because they are the subject of post-award court proceedings, typical of vacatur and enforcement actions.

A search of the literature will reveal that, not all have stopped questioning the wisdom of entrusting public law claims to arbitrators, but it is only a narrow form of these sensibilities that has taken a foothold among U.S. lawmakers and the reform-minded. In the United States, the scope of the FAA has been construed broadly, and its muscular pro-arbitration policies in principle apply with equal force to transactions and contracts involving consumers, employment, domestic commerce, and international commerce. Thus, unlike other jurisdictions that may for instance require post-dispute consent when a consumer transaction is involved, the United States leaves to the law of unconscionability the principal role in policing unfair arbitration agreements. This entrusting of bargaining issues chiefly to the general state law of contract may come to an end in the near future in favor of supplementing federal legislation designed to operate with less nuance.

Of late, Congress has shown a sustained interest in initiatives designed to limit party autonomy and to secure for courts a greater role in supervising the quality of the consent that empowers arbitrators in certain kinds of cases. The proposed cure, however, may be worse than the malady.

Lawmakers who are troubled by enforcement of pre-dispute arbitration clauses against consumers, franchisees, employees, and

95. PRINCIPLES & PRACTICE, supra note 47, at 295. Despite the mandate that arbitrators be impartial and independent, published sources (admittedly a small sample) suggest that when a dissent issues it will ordinarily be to address a point upon which that arbitrator's appointing party lost. At the same time there are many more examples of unanimous awards.


98. The standard two-part inquiry applied in dozens of cases is exemplified by Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005) (considering both "procedural" and "substantive" unconscionability).

similar classes of market participants tend to fear that arbitration is structured by stronger, repeat-players, is to a large extent "non-negotiable," and removes from the non-drafting party important rights and protections (such as access to class actions, and juries and decision-makers bound to apply the law who can be counted upon as impartial).\textsuperscript{100} Such concerns persist although empirical studies do not fully support the underlying assumptions at work.\textsuperscript{101}

However valid the basis for reform might be with respect to contracts of adhesion affecting certain weaker classes of market participants,\textsuperscript{102} one would expect carve-outs in legislative reactions to the problem to insulate commercial arbitration from overly inclusive reform. In the international setting in particular, pre-dispute arbitration agreements and the associated doctrines of severability and Kompetenz-Kompetenz solve a cluster of problems that would otherwise burden commerce with considerable uncertainty in the management of disputes. Yet, two of the more influential draft "fairness" enactments do not distinguish between international and domestic arbitration, nor between consumer-business and business-to-business disputes.\textsuperscript{103}

Consider for the sake of illustration the Feingold variant of the several proposals under consideration, and its treatment of severability:

\begin{quote}
[T]he validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.\textsuperscript{104}
\end{quote}

This assault on the severability principle is particularly ironic, since the United States Supreme Court\textsuperscript{105} and the English House of Lords\textsuperscript{106}
each recently endorsed robust versions of the principle by preserving the enforceability of arbitration clauses embedded in allegedly unlawful contracts. The failure to insulate international commercial arbitration is not an oversight, and the price paid in overruling the severability principle and certain other draft provisions will likely be the diversion of a certain percentage of otherwise U.S.-bound international arbitrations to seats abroad. There may also be an incentive for certain litigants to sue in a U.S. court when the objective is to evade an arbitration clause by attacking the underlying contract's validity. That the U.S. Supreme Court has long sought to discourage that result is evident from its *Prima Paint* decision\(^{107}\) and decades of subsequent case law redoubling the point.

### E. Investor-State Arbitration

Ten years ago one might have questioned Professor Moses's decision to allocate twenty pages to investor-state arbitration. In 2008, however, there can be little question that the topic had become sufficiently important to include in a book devoted to "commercial" arbitration. As evident from the ICSID\(^{108}\) docket which lists approximately 270 cases (pending and concluded combined),\(^ {109}\) investor-state disputes now place in controversy billions of dollars.\(^ {110}\) Augmenting the ICSID list of proceedings are an unknown but probably comparable number of claims brought under non-ICSID regimes such as the UNCITRAL Rules.\(^ {111}\) The flood of cases has been promoted by an

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unprecedented number of pre-dispute consents to arbitration found primarily in the many hundreds of Bilateral Investment Treaties (BITs) now extant.112 By prefiguring en masse direct access to an arbitral remedy for aggrieved investors, modern BITs readily can generate dozens of potential claims when sector-wide and country-wide disruptions affect foreign investors.113

That Professor Moses treats investor-state cases in a separate chapter is logical in light of their distinctive features.114 In such proceedings, public and private international law intersect in numerous ways within a basic procedural structure borrowed from international commercial arbitration,115 making for distinctive questions of jurisdiction116 and challenging issues of substantive law.117 Given the often novel and complex character of these proceedings, Professor Moses might be applauded for accomplishing the task in twenty pages.118

rules/arb-rules.pdf. Many BITs give claimants the option of proceeding without an institution under the UNCITRAL Rules.


114. The admiration I have for the book, which is considerable, comes in part from having produced a similar reference. My now out-of-print volume published in 1997 sought roughly the same audience as Professor Moses' book, and covered much of the same ground. See PRINCIPLES & PRACTICE, supra note 47.


118. More comprehensive treatments include R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY (2005); CAMPBELL McLACHLAN, LAURENCE SHORE, & MATTHEW WEINGER, INTERNATIONAL INVESTMENT ARBITRATION (2007).
III. MINOR QUIBBLES AND FRIENDLY AMENDMENTS

In the main, Professor Moses's book is written with clarity, accessibility and authoritativeness. Its documentary appendices have been well selected. The table of contents and detailed index make the information physically accessible, and the authorities Professor Moses relies upon are balanced, varied, and substantial. As the following brief litany of observations will demonstrate, my quibbles with the work are truly minor in comparison to the admiration I have for it.¹¹⁹

For instance, one hoping for an extensive exploration of non-arbitral ADR and how it might mesh with arbitration will be left wanting more in Professor Moses's book. As the title suggests, of course, the book is about arbitration. Professor Moses does provide a starting place by short paragraphs defining mediation and conciliation (though unconvincingly suggesting the two are different processes in practice)¹²⁰ and alerts the reader also to the prevalence of clauses calling for mediation before arbitration (often called "step" or "med-arb" clauses). The literature concerning various blends of mediation and arbitration is rich, however, so that the introductory treatment found in the book can readily be supplemented.¹²¹

While I would have liked to find in her book a table of cases and a bibliography, the footnotes provide the researcher a good point of entry, and the table of useful website addresses she assembled was a pleasant surprise—and very useful. Additionally, some practitioners and scholars might find the in-laid box technique for surrounding the verbatim

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¹¹⁹. See supra note 114 and accompanying text.

¹²⁰. Even if technical differences between the two processes could be agreed upon, an agreement not found in the literature, in practice the two methods merge; ordinarily, little turns on any supposed distinctions. Accordingly, Burhing-Uhle uses the two terms interchangeably for purposes of his book. Either term was to refer to "the non-binding intervention by a neutral third party who helps the disputants negotiate an agreement." CHRISTIAN BUHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 273 (1st ed. 1996). The same approach is adopted in HENRY BROWN & ARTHUR MARRIOTT, ADR PRINCIPLES AND PRACTICE 127 (2d ed. 1999), and in PRINCIPLES AND PRACTICE, supra note 47.

observations of well-known arbitrators and counsel to be, at first blush, digressive. Though it is a technique not often used in law texts, it succeeds in separating the author’s words from her sources’ comments, and I suspect that students and many others will appreciate the glimpse into the minds of some of the personalities in the field. Most readers upon modest reflection should realize that the quotes both add charm and convey information not found elsewhere—sometimes of a kind for which one would pay a substantial sum at an arbitrator training seminar.  

The substantive deficiencies one might identify are trivial and arguable. For instance, a technician might have paused at the following statement found under the heading “Place of Hearing”:

The place of the hearing is normally determined in the arbitration clause, but if not, the arbitrators will choose a seat, usually one that is neutral in the sense of not being in the country of either party. Once the seat is chosen, the tribunal can, on occasion decide to hold meetings elsewhere, without changing the legal situs of the arbitration.

The first sentence is troubling because it invites one to conflate the place of hearing and the place of arbitration. The latter, which is variously referred to as the “seat,” “the situs,” or “the place,” when used in its technical, non-geographic sense is a term carrying both jurisdictional and governing law implications. It is to the courts of that place to which a dissatisfied party must turn to seek annulment of the award, a petition that will be adjudicated using the substantive arbitration law of that place (at least in the vast majority of cases). It is that place that will give the award its national affiliation for purposes of the New York Convention’s reciprocity provisions and the award will be deemed made at that place (no matter where the arbitrators deliberated, or signed the award). Professor Moses makes these essential points elsewhere in the book.

Because of the central importance of the place of arbitration, the standard clauses sponsored by institutions typically invite the parties to designate the place of arbitration in their arbitration provision (a practice exemplified by the many standard clauses found in the book’s Appendix I). By contrast, rule formulae do not suggest designating a place of hearing. Hearings may well be held at the place of arbitration, but, as Professor Moses notes, they need not be. Indeed, there are examples of arbitrations in which none of the hearings were held at the place of arbitration.

122. A good example is a pre-conference agenda letter used by arbitrator David Wagoner. See MOSES supra note 1, at 154-56.
123. Id. at 161.
124. Id. at 43.
arbitration, and yet the award was not questioned on that basis.\textsuperscript{125} No doubt the parties may attempt to limit the tribunal’s discretion by designating exclusive places of hearing in the clause, but that practice is not particularly common.\textsuperscript{126}

Another opportunity for clarification—or at least amplification—is found in the investor-state chapter. In discussing ICSID’s Additional Facility, Professor Moses writes: “[T]he major significance of the inapplicability of the ICSID Convention is that the Convention’s provisions on recognition and enforcement do not apply. Rather, an Additional Facility award, like an award under the ICC or LCIA, is subject to enforcement under the New York Convention. . . .”\textsuperscript{127}

The distinction made is certainly important. Nevertheless, I would have thought it equally useful to note that when rendered under the Additional Facility and thus not governed by the ICSID Convention, the award can be attacked in a set aside action at the place of arbitration\textsuperscript{128}—and correspondingly that ICSID’s internal control mechanism\textsuperscript{129} is not available, let alone exclusive.\textsuperscript{130} This is particularly important because the ICSID Convention, for want of ratifications by Mexico or Canada, has never governed a NAFTA Chapter Eleven arbitration, a fact reflected in several attempts to set aside Chapter Eleven awards in local courts.\textsuperscript{131}

\begin{thebibliography}{9}
\bibitem{126} There is room to consider me insufferably didactic on this point. Indeed, Professor Moses has powerful company in her choice of words. Gerry Aksen, when he was General Counsel to the American Arbitration Association, wrote: “Whenever possible, the clause should designate where the arbitration hearing is to take place. Experience has shown that one of the most common prearbitral disputes is over the situs of the hearing itself.” Gerry Aksen, \emph{A Practical Guide to International Arbitration}, in \textit{PROCEEDINGS OF THE SOUTHWESTERN LEGAL FOUNDATION PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTION IN INTERNATIONAL BUSINESS} 51 (1976).
\bibitem{127} \textit{Moses, supra} note 1, at 228.
\bibitem{128} Jack J. Coe, Jr., \emph{Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA}, 19(3) \textit{J. INT’L ARB.} 185, 185-86, 194-96 (2002) [hereinafter Achilles Heel].
\bibitem{128} Achilles Heel, \textit{supra} note 128, at 185-86.
\bibitem{131} See generally David Williams, \textit{Review and Recourse Against Awards Rendered under Investment Treaties}, 4(2) \textit{J. WORLD INV.} 251(2003); Achilles Heel, \textit{supra} note 128.
\end{thebibliography}
In limiting herself to a neutral presentation, and seeking balance in her sources, Professor Moses leaves generous room for classroom discussion. For example, she suggests:

[A]wards are so rarely refused enforcement on grounds of public policy that some commentators have urged courts to reconsider application of the public policy defense of Article V(2)(b) to make more than a theoretical defense, and to apply it somewhat more flexibly as a basis for refusing enforcement where enforcement would condone unjust or improper results.132

Supporting this observation, she quotes an article which observes: "The equitable path for article V(2)(b) jurisprudence to take would be . . . [to preserve] a deferential stance toward arbitration while recognizing that the court system need not condone the unjust results that are sometimes reached in alternative dispute resolution."133 In a room full of international arbitration specialists, a call for Article V(2)(b) to be used to redress "unjust results" would give rise to considerable bristling. Professor Moses in an adjacent section gets to the heart of the matter: "Although a number of countries construe the public policy defense narrowly, there is room for it to be used parochially to protect national political interests. To the extent that a country does this, it undermines the utility of the Convention."134

The way to develop a sense of this debate in the classroom is to ask how the Convention's success story might have been different if public policy became a basis upon which courts could explore the merits in dispute in order to assess the "justness" of an outcome. The question of course has implications beyond the Convention since the Model Law, and the arbitration jurisprudence of many non-Model Law states, includes "public policy" as a ground for set aside.

IV. CONCLUSION

After teaching for twenty-five years, it is not difficult to imagine the Friday phone call from a former student who has an opportunity to transition from her firm's banking regulation department to its arbitration group. The matter will be more fully discussed at a meeting with partners on Monday. She asks: is it likely to be an intellectually enriching move and how does one quickly prepare to discuss the field with a measure of confidence?

132. MOSES, supra note 1, at 229.
134. MOSES, supra note 1, at 218.
As to its substantive allure, and putting aside its singular real world importance, ICA remains fascinating. Whether one emphasizes process design, comparative law and procedure, or private international law, ICA represents a rich admixture of distinctive problems, pragmatic solutions, and recurrent policy issues. The level of advocacy encountered is high, and the sophistication of one’s judges (the arbitrators) is impressive.

As to the weekend, in trying to acquire an introductory perspective or to refresh one’s sense of the field, one would do well to consult Professor Moses’ book. It is an excellent reference for law students and lawyers seeking exposure to the principal doctrines, regimes, institutions, and issues that typify the field. No doubt, to devote a weekend to the book in the above circumstances—and in many others—would represent a weekend well spent.