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BOOK REVIEW / KİTAP DEĞERLENDİRMESİ

The American Influence on International Commercial Arbitration: Doctrinal Developments and Discovery Methods, 2nd ed, by Pedro J. Martinez-Fraga, eds, Cambridge: Cambridge University Press, 2020, ISBN: 978-11-07-15152-9, 474 pages

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Abstract

The author of the book outlines US common law doctrines related to international commercial arbitration. He presents the developments in the US common law jurisprudence in international commercial for two reasons: First to inform the reader regarding doctrinal transformations, and second, with hope of achieving the perfect workings of international commercial arbitration as an aspirational goal. To this end, examining the American influence on international commercial arbitration is important.

The author suggests that US common law may help to overcome challenges arising out of cultural differences in international commercial arbitration. While doing so, there are important contrasting and competing principles to consider, such as party-autonomy and arbitrator discretion, which stand out as saliently competing paradigms. The author indicates that giving equal weight to these competing principles in international commercial arbitration might be a useful strategy to harmonize seemingly polar opposite propositions.

The book focuses, in part, on the US common law of discovery and how it might be adopted in international arbitration to develop efficiency in such proceedings. The International Bar Association (IBA) Rules on Evidence Gathering, the Prague Rules, and the role of 28 U.S.C. §1782 in international arbitration are closely analyzed, among others, to develop alternative approaches concerning evidence gathering in international commercial arbitration.

Overall, the book contributes important discussions and suggestions to the literature. Also, the text presents analyses and suggested solutions with the help of leading principles developed by US common law, which facilitates understanding these principles from the author's perspective. While the book provides those valuable inquiries and discussions, the book review took a critical approach towards them. The authors of the review critically analyze those suggestions. The book review compares to other books that pursue a similar approach to international commercial arbitration. How justified suggestions in the book are, as well as their strong and weak points, are displayed in the review. Are all those suggestions in the book correct? It must not be forgotten that the book looks into issues from an American perspective and those suggestions are coming from US common law. However, this approach can be problematic in international arbitration. If there is a dominant legal system in international commercial arbitration, how "international" can international arbitration be? The review criticizes those contradictions and presents a comprehensive analysis of the book. The authors of this review believe that an idea can be developed if there is criticism against it. Thus, authors here offer a critical eye towards the book with the purpose of development of the ideas within the book. Acknowledging the hard work of the author of the book, the authors of the review offer some thoughts to develop the ideas in the book and to make its next edition even better. Therefore, those who are interested in learning about Martinez Fraga's book with a critical approach can find some interesting insights from the review.

Keywords

International Commercial Arbitration, Discovery (law), US Common Law

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Introduction

American influence and discovery in international commercial arbitration are important topics and they have attracted interest from others as well. International arbitration might be influenced by other factors as well. For some countries, specific legal systems that they are a part of influence arbitration. For example, for EU member states, there is the "EU law's influence on arbitration".[1] In general, however, common law influence is pretty obvious in international arbitration and "the influence of common law evidentiary practices in international arbitration is undeniable".[2] "The extent of the cultural influence on the process may differ." As there are many potential influences on international commercial arbitration, analyzing their effect provides a great discussion and enables us to better learn about the development of international commercial arbitration and how and why international commercial arbitration rules are developed in the way they are. Thus, the topic of the book is highly important and adds to the literature.

The book covers evidence gathering and discovery in international commercial arbitration, what American influence is on the discovery procedure in international commercial arbitration, and how it should be. The book explains the discovery methods and US doctrinal developments in international commercial arbitration. Discovery is a category of procedural devices employed by a party to a civil proceeding, prior to trial, to require the adverse party to disclose information that is essential for the preparation of the requesting party's case, and that the other party alone knows or possesses. There is no uniform discovery law in international commercial arbitration. The rules of the principal arbitration institutions vary with respect to discovery. Moreover, discovery in common law and civil law legal systems are substantially different from each other. As Cremades reports, a leading Swiss lawyer has explained "we feel that the principle onus probandi incumbat alleganti excludes the possibility of obtaining the help of the court to extract evidence from the other side. We react to the notion of discovery, be it English, or worse, American style, as an invasion of privacy by the court, which is only acceptable in criminal cases, where the public interest is involved…". While the contempt among civil lawyers for common law discovery, especially American style discovery, is apparent, the author of the reviewed book suggests US-style discovery brings greater transparency to international commercial arbitration and therefore, contributes to correcting the settlement deficit that now plagues international commercial arbitration.

The book, authored by Pedro J. Martínez-Fraga, brings a very important perspective when approaching international commercial arbitration. The influence and dominance of some legal systems in international arbitration are felt heavily. Although international

1 Engelmann, Jan. International Commercial Arbitration and the Commercial Agency Directive. Springer International Publishing AG, 2017, p. 24.

2 Jalal (n 1) 112.

commercial arbitration cannot be classified under a common law system, and it certainly carries both common and civil law characteristics, the dominance of the supremacy, "an elite cadre of lawyers who imbed a fixed American or Eurocentric conception" in international commercial arbitration cannot be denied. This conception is dominant in international commercial arbitration, and counsels and arbitrators also mostly come from common law jurisdictions; the applicable law is generally a common law system, and the whole procedure of international commercial arbitration resembles common law features more than civil law features.

Thus, the author rightly chose to analyze the American influence on international commercial arbitration. By doing so, doctrinal developments in the American legal system concerning international commercial arbitration are analyzed excellently. Specifically, discovery methods in the American legal system are analyzed through fundamental common law doctrines. However, there is room for criticism towards those analyses, which is offered in the conclusion of the book review.

Review of the Book

This is the second, 2020 edition of the book, containing timely updates eleven years after the first edition. In the first edition, the foreword was written by Professor Michael H. Graham. In this second edition, the foreword is written by Professor Jack J. Coe, Jr., the faculty director of the LLM concentration in international commercial arbitration at the Pepperdine University School of Law. Professor Coe cites Professor Graham, who states in the first edition that the book was an "exceedingly thoughtful, thorough, and provocative work" and suggests that the second edition is at least as good as the first edition. In his foreword, Professor Coe praises the book and highlights that it presents profitable reading not only for academics but also for practitioners as well. This foreword heightens the expectations of the book, already high having simply read the title. T he book satisfies, and perhaps even exceeds, all expectations a reader can potentially have. However, the authors of this review offer thoughtful criticism of the book, to be found in the conclusion of the review.

The book has nine chapters, an introduction and a conclusion. After the introduction, the first chapter gives a background on how international and domestic arbitration was formed and transformed in the United States. The chapter points out the historically conventional view of arbitration in the United States and elaborates skepticism of arbitral proceedings in the United States. The reasons for bias against arbitration in England were that "arbitration agreements were not enforceable in equity, could not give rise to a cognizable cause of action, and did not constitute a viable ground for issuing a stay of a judicial proceeding based on the identical underlying cause of action between the same parties".

This skepticism and bias come to the US from English courts. However, there has been some homegrown skepticism against arbitration in the US, too, such as the notion that arbitration is only for simple disputes, not complex ones. This is a relatively short chapter with only ten pages. Therefore, the author gives all the necessary information regarding this important background on the historical development of arbitration without boring readers. Importantly, the chapter concludes that all these obstacles and biases are overcome, and a doctrine on arbitration has developed to its intended level, to confirm the equal status of arbitration and judicial proceedings.

The second chapter elaborates three important cases in the United States: Wilko v. Swan, Scherk v. Alberto-Culver, and Mitsubishi v. Soler. The Mitsubishi case is important to prove that "for the first time, the Supreme Court placed arbitration on a level playing field with judicial proceedings". The structure of this chapter has not been changed, and it is the same structure and title as in the first edition. The chapter is important because with those three cases the second chapter shows how in the United States the playing field is levelled in arbitration with the judicial proceedings. In this chapter, the author concludes that Wilko incorrectly decided that under the Securities Act §14, any agreement to arbitrate future controversies was void. This was inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions. This chapter is also a relatively short one, with 24 pages. It ends with the author's confirmation of the significance and importance of overruling the Wilko decision and how it helped with jurisprudence and arbitration.

The third chapter talks about arbitrator immunity, an extremely important issue. The author rightly draws attention to the fact that even though the Federal Arbitration Act (FAA) endorses arbitration completely, it is silent on the immunity of arbitrators and arbitration institutions. The chapter details civil law and state common law approaches on arbitral immunity. Importantly, jurisdictions which adopted the United Nations Commission on International Trade Law (UNCITRAL) model law sometimes may adopt rules on this issue, as Argentina did, even though there is no role on arbitrator immunity in the model law.

However, apart from this exceptional civil law jurisdiction example from Argentina, many civil law jurisdictions do not have explicit rules on arbitrator immunity. Thus, the author accurately highlights this significant difference between civil law and common law jurisdictions, where arbitrators have absolute immunity in common law jurisdictions, and arbitrators might have contractual liability in civil law jurisdictions . Furthermore, the chapter also explains the proliferation of the arbitrator immunity doctrine. Now the doctrine extends to all professionals who serve in an arbitrator capacity. Moreover, state legislation on arbitrator immunity has also expanded. This

doctrine also has significant support from federal jurisprudence. This chapter is one of the longest, and consists of comprehensive explanations on the doctrine of arbitrator immunity not only in the United States but also in the world.

The fourth chapter gives detailed explanations on 28 U.S.C. § 1782 and presents the conflict between the taking of evidence and common law discovery. The author refers to the legislative history of 28 U.S.C. § 1782 and confirms that this Section has been passed by Congress to enhance international cooperation in litigation. The chapter continues with elucidations on how US Courts have applied this Section. Appellate courts have held that "a district court has to research the procedural or substantive law of the petitioning foreign jurisdiction as a condition to the adjudication of a § 1782 application". The chapter further elaborates the case law on the application of the Section extensively.

The fifth chapter is another lengthy chapter, with 83 pages. This chapter discusses the unusual use of common law transparency in international arbitration over evidence gathering and orality. The author points out that the evidence-gathering phase in arbitration is far from its counterpart in civil law courts; however, it is very similar to common-law discovery. The author boldly concludes that the evidence-gathering phase in arbitration has failed to keep the promise of transparency, and remains invisible in arbitration proceedings. The author gives details of the International Bar Association (IBA) rules on the taking of evidence (IBA Rules) and talks about how much IBA Rules are affected by US common law. However, he points out that "many civil law jurisdictions are incorporating orality into their respective codes of civil procedure" and he suggests that "traces of U.S. common law are present in the IBA Rules but only as part of an amalgamation of many juridic-cultural influences". He further analyzes some selected articles from the IBA Rules. The chapter goes deeper into the meaning of IBA Rules and questions their integrity, concluding that they need further definitions of the terms "relevance" and "materiality". Martínez-Fraga further talks about some terms such as "good faith", and the inconsistency of a good faith standard in the IBA Rules. Overall, the chapter highlights some important standards in the IBA Rules and analyzes them.

The sixth chapter is a relatively short chapter with 36 pages. The author revisits 28 U.S.C. § 1782 and inquires into the consequences of manifest disregard of the law. The interplay between Section 1782 and § 10(a)(3) of the FAA and New York Convention Article V is laid out, including how preventing someone's evidence might result in potential problems in the enforcement stage. Two paradigms are suggested to overcome this problem. In the first, consequences of manifest disregard and relevant case law are discussed. The author elaborates on Duferco analysis, and talks about the need for a uniform standard for manifest disregard of the law. Other case laws on this

issue are also further explained. The second paradigm is to avoid Section 1782. The author supports the grounds for this approach; however, he points out the absence of any authority and the need for scholarship on this issue.

The seventh chapter talks about perjury and arbitration. The author first complains that perjury has not received much attention in arbitration, and witnesses in arbitration generally testify without taking an oath. The author suggests implementing an oath-based perjury regime in international commercial arbitration. To this end, the author uses a Swiss example and mentions how a witness failing to testify truthfully may face criminal liability in Switzerland. The author stresses that false testimony should and must be punished. The author further talks about the relevant case law on the effects of perjury in arbitration in the US. This is also a relatively short chapter with 14 pages.

The eighth chapter regards the severability doctrine. "The severability doctrine postulates that a single contract containing an arbitration clause is to be analyzed as two separate agreements, one agreement reflecting the business transaction between the parties and a separate, autonomous agreement to arbitrate, with the result that a challenge to the validity of the underlying contract does not necessarily vitiate the jurisdiction of the arbitral tribunal". The s everability doctrine raises a few questions. Not surprisingly, the chapter deals with three questions arising out of this doctrine. The first question deals with whether an arbitration clause is severable from the main contract. The second question deals with who decides on a challenge regarding the validity of a contract containing an arbitration clause. The third question deals with how the US law of international arbitration considers the definition of arbitrability, and whether it expands its scope or not.

The ninth chapter is the last chapter before the conclusion. It deals with how US arbitration law interacts with the New York Convention. As a result of this interaction, developments of four issues are analyzed: (i) non-signatories to agreement to arbitrate, (ii) jurisdiction to enforce, (iii) forum non conveniens, and (iv) annulled awards. Having accepted the fact that US common law developments in international commercial arbitration are diverse and difficult to categorize, the author analyzes only four principles in the chapter. Those four principles are the principles of uniformity, predictive value, certainty, party-autonomy, and the transparency of standards in the Convention's application. These four principles are chosen because they all can justify amending the New York Convention. A criticism may be brought against the selection method of those four principles. The author has only "one common denominator: the extent to which they may justify amending the New York Convention". It seems that the four principles were randomly selected by the author, since other common law principles could also be used to justify amending the New York Convention.

Finally, in the conclusion, the author reaches some conclusions after long analyses in each chapter. The first conclusion is that the hostility towards arbitration in the past has gradually diminished. The f ulfilment of this gradual decrease was achieved by the Supreme Court's mandate in the Mitsubishi case. Then, after embracing arbitration, the author questions whether arbitration served the parties in the arbitration efficiently and met their expectation. To this end, the integration of international arbitration is the biggest challenge according to the author. He continues by elaborating how integration, i.e. true "internationalization" of the international commercial arbitration, could raise barriers for arbitration to be embraced internationally because it can be a system unfamiliar or unknown, not reflecting the features of any legal system. Moreover, he stresses that for arbitration to be completely international, it must integrate doctrines from all legal systems. Arbitration should carry doctrines from all cultures, not from only some. Thus, the author suggests that conceptual rules, not territorial rules are necessary for international arbitration to achieve internationalism. According to the author, if this is not achieved, the legitimacy and efficacy of international arbitrations are at stake. The author accepts that the US common law on international commercial arbitration is not perfect. However, not the content of this common law but the common law itself may serve international arbitration best to contribute because of the common law's emphasis on (i) its own critical introspection, (ii) party-initiative, (iii) party-autonomy, and (iv) transparency.

The book also has five appendixes and an index. First, Appendix A gives the Federal Arbitration Act (USA). Second, Appendix B presents the Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. case. Third, Appendix C gives the Bradley v. Fisher case. Appendixes B and C are both US Supreme Court cases. Fourth, Appendix D gives State Court Cases. Finally, Appendix E gives the Case Law concerning 28 U.S.C. § 1782 and International Arbitration. An index follows those five appendixes and helps readers to find relevant information much easier.

The book has 474 pages in total, and none of those pages is spent wastefully. It is a significantly important and interesting topic. If a second book were written on the subject, it would be equally interesting since there are many other terms, standards, and rules to examine in relation to American influence in international commercial arbitration. However, no book can be entirely complete, and this book, of course, has some shortcomings as well. First of all, American influence on international commercial arbitration is not limited to the issues discussed in this book. There is the further influence of the American common law system. Second, international arbitration is not only under American influence, but is also under the influence of English common law, and maybe less clearly, the influence of the civil law system. Thus, further studies would be useful to inquire into whether other impacts on international commercial arbitration, especially English, Australian and European influence, could have been

further examined. A comparison of one or two cases with American influence would be another great contribution to the international commercial arbitration literature. Thus, the book might be criticized for not discussing and comparing all American influence with that of some other major legal systems. Lastly, another shortcoming of the book is that the author fails to reach conclusions. Although this is the author's stylistic choice, it might have been better if the author had a more definitive voice in the book in terms of reaching conclusions on the issues raised.

Conclusion

Overall, this is an ambitious book that covers a principal topic in international commercial arbitration. The author engages in an excellent analysis of American influence through doctrinal developments and discovery methods. The author has a sharp wit, intelligent comments, and critical analysis. He shows exceptional research output in his book since he refers to many examples, case law and relevant legislation in many jurisdictions. Therefore, for those who want to read, research or learn about the American influence in international commercial arbitration, Martínez-Fraga's book presents excellent discussions, thoughts and suggestions. Here, however, the authors of the review will give their thoughts on some suggestions and ideas in the book. These can open the floor for further academic discussions on those issues or give Martinez-Fraga some further thought in the next edition of his book.

First, as is well-known, international commercial arbitration is the main dispute settlement mechanism for cross-border disputes. Therefore, it is expected to be international, involving characteristics of many legal systems around the world. Unfortunately, this is not the case now. Some legal systems have more influence than others. Here, the reviewed book analyzes the American influence on international commercial arbitration. Moreover, the author suggests that the discovery method developed by the US common law system be adopted by international commercial arbitration for better efficiency, transparency, and utility in international commercial arbitration. Whether this would result in a more efficient discovery method in arbitration or not, it would undermine internationalization of international commercial arbitration. If a discovery method is taken by a method developed by the American common law, how "international" can international arbitration be? Thus, this suggestion is problematic because it distorts a fundamental feature of international arbitration, which is its "international" feature. This would make arbitration "American-international" arbitration.

Furthering the first point above, adopting a US-style discovery method is against the party-autonomy. The US discovery method can be an option for parties in international arbitration and can only be applied if parties choose it. Otherwise, there are many

other discovery methods all around the world and parties can be free to choose them as they are free to choose others. Moreover, the author suggests the US discovery method be adopted in arbitration because US common law supports party autonomy in the discovery process. However, again this would cause some problems. First, this would favor US-educated lawyers in international arbitration. Second, the idea of international arbitration is that it is not attached to any legal system but consists of features common in all legal systems around the world such as the notion of justice. Attaching more US-style features to it would distort this fundamental feature in international commercial arbitration. Third, US-style discovery is expensive. American civil discovery is disproportionately expensive and prone to abuse as its widely accepted characterization. Adopting a US-style discovery will make already expensive international commercial arbitration even more expensive, which is not a desirable consequence.

Second, some principles are well-established in international commercial arbitration. As an example, party-autonomy is one of such principles fundamental to international commercial arbitration. Party autonomy means that "parties are given the right to determine the procedural rules and the laws governing the merits". This principle is central in the book because of common law's strong emphasis on it. However, the author discusses party autonomy together with arbitrator's discretion, and suggests that these two should be given equality. However, this is not the case in our understanding, as party autonomy and arbitrator's discretion are not competing principles but complement each other. Party-autonomy is a fundamental principle in international commercial arbitration and arbitrator's discretion is a principle with the same goal of making arbitration more flexible. The arbitrator has discretion over issues that have not been decided by the parties. Even in discovery, courts have upheld arbitrators' discretion when there is no "agreement between both parties on whether and how to conduct pre-hearing discovery". Thus, they are not necessarily contradicting principles, as the author demonstrates, but complementary.

Third and lastly, it is important to question how "international" international commercial arbitration really is and how more "international" we want it to be. While there are two distinct legal systems in the world, common law and civil law, each country has a legal system which has distinctive features. With this in mind, American common law has its own distinctive features. Between those distinctive legal systems around the world, how a truly international, harmonized arbitration practice can be created is a difficult task to achieve. However, with the right approach of not adopting any specific law from any jurisdiction would be a good place to start. Thus, favoring US-style discovery would go against the goal of internationalization of the international commercial arbitration.

In conclusion, the book opens the floor for great discussions on discovery in international commercial arbitration and which method is the best to adopt. However, the author's conclusion does not seem right to us in this discussion, and not only US-style, but any single jurisdiction's discovery method should be adopted. Instead, existing international rules such as IBA rules, developed by many lawyers coming from different legal backgrounds around the world, is better to guide international commercial arbitration. Maybe those rules can be improved. However, even though we do not agree with the author's solution, this does not lower the value of the book and ideas in the book are extremely remarkable for anyone who is interested in the field. Thus, we would suggest this book to anyone who is keen on reading or researching on topics we laid out in this book review.

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