

Book Review

Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge Univ. Press 2008)¹

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Table of Contents

I.	INTRODUCTION.....	1370
II.	SELECTED BENCHMARKS CHARACTERIZING THE ICA	
	MILEAU	1372
	A. <i>Statutory and Procedural Unification</i>	1372
	B. <i>Arbitral Competency</i>	1377
	C. <i>The Courts as Gatekeepers and Enforcers—Arbitrator Jurisdiction and Control of Awards</i>	1378
	D. <i>Reform—Problems and Prospects</i>	1384
	E. <i>Investor-State Arbitration</i>	1388
III.	MINOR QUIBBLES AND FRIENDLY AMENDMENTS	1390
IV.	CONCLUSION	1393

1. MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (2008).

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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

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.

4. See Alan S. Kaplinsky & Mark J. Levin, *Consumer Arbitration: If the FAA “Ain’t Broke,” Don’t Fix It*, 63 BUS. LAW. 907 (2008); Mark Kantor, *Legislative Proposals Could Significantly Alter Arbitration in the United States*, 74 ARB. 444 (2008).

5. See *Council OKs Drafts for Annual Meeting, Approves International Arbitration Project*, 30(2) ALI REP. (Winter 2008), available at http://www.ali.org/_news/reporter/winter2008/3_Inter_Arbitration.htm; cf. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 469-70 (2007) (pre-approval investigation); see also George A. Bermann, Jack J. Coe, Jr., Christopher R. Drahozal, & Catherine A. Rogers, *Restating the U.S. Law of International Commercial Arbitration*, 113 PENN ST. L. REV. __ (2009).

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517; Symposia include: *The New York Convention: 50 Years*, 2(1) DISP. RESOL. INT’L 1 (2008) [hereinafter *50 Years*].

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

8. MOSES, *supra* note 1.

9. The paperback’s price is £16.99 (\$29.99); the hardback lists for £45.00 (\$90.00). See <http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=9780521685627>.

10. The ten, in the order of their appearance, are: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, arts. I-XVI, 21 U.S.T. 2517 [New York Convention]; UNCITRAL Model Law on International Commercial

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

Arbitration, adopted by The United Nations Comm'n on Int'l Trade, U.N. Doc. A/40/17, June 21, 1985, 24 I.L.M. 1302 (1985); Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration (2006), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf; UNCITRAL Recommendation Regarding the Interpretation of Article II, Paragraph 2 and Article VII, Paragraph 1 of the New York Convention, *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>; IBA Rules on the Taking of Evidence in International Commercial Arbitration, June 1, 1999, *available at* http://www.asser.nl/ica/documents/cms_ica_4_1_IBA_ROE2.pdf; IBA Rules of Ethics for International Arbitrators 1987 reprinted in IBA, Guidelines on Conflicts of Interest in International Arbitration (2004), *available at* www.ibanet.org; ABA, *Code of Ethics for Arbitrators in Commercial Disputes* Canon II (2004), *available at* http://www.abanet.org/dispute/commercial_disputes.pdf.

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).

13. MICHAEL MUSTILL & STEWART BOYD, *COMMERCIAL ARBITRATION* (2d ed. 1989) (English law).

14. Examples include: KLAUS PETER BERGER, *ARBITRATION INTERACTIVE* (2002); GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* (3d ed. 2008); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* (4th ed. 2007); THOMAS E. CARBONNEAU, *INTERNATIONAL LITIGATION AND ARBITRATION: CASES AND MATERIALS* (2005); CHRISTOPHER DRAHOZAL, *COMMERCIAL ARBITRATION CASES AND PROBLEMS* (2002); STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION CASES AND MATERIALS* (1999); ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* (3d ed. 2005); MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* (1997); TIBOR

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 corporations¹⁵ and evidenced by the large number of arbitration practice groups now maintained by international law firms.¹⁶

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

VÁRADY, JOHN J. BARCELÓ, III, & ARTHUR TAYLOR VON MEHREN, *INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE* (3d ed. 2009); RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION* (5th ed., Carolina Academic Press 2006).

15. See GERRY LAGERBERG & LOUKAS MISTELIS, *INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES* 5 (2006) (73% of survey companies prefer to use international arbitration rather than courts, but usually in combination with non-arbitral ADR).

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,¹⁷ the IBA Evidence Rules,¹⁸ and the UNCITRAL Model Law. Published in 1985, the latter model statute has been adopted in over sixty jurisdictions (including several U.S. States).¹⁹ Its attributes²⁰ 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).²¹

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.²² Though not a model statute, that text not only made the decision

17. *Arbitration Rules of the United Nations Commission on International Trade Law*, art. 34, U.N. Comm'n on Int'l Trade Law, U.N. GAOR, 31st Sess., Supp. No. 17, U.N.Doc.A/31/17(1976), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html.

18. *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, *supra* note 10.

19. See UNCITRAL Model Law on International Commercial Arbitration and list of adherent states, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

20. See *Analytical Commentary on Draft Text of a Model Law on Int'l Commercial Arbitration: Report of Secretary General* (A/CN.9/264), XVI Y.B. U.N. Comm'n Int'l Trade L. (1985), in BROWER ET AL., *infra* note 108, at 2. A leading reference on the Model Law is HOWARD M. HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 920-22 (1989).

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 5-7 (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.

22. See, e.g., *Arbitration Rules of the United Nations Commission on International Trade Law*, art. 34, *supra* note 17.

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 Tribunal²³ 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 evidence²⁶ and related problems of document disclosure and document exchange.²⁷ International arbitration

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); JACOMIJJN 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.

26. Charles Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 *INT'L LAW.* 47, 49 (1994); Martin Hunter, *Modern Trends in the Presentation of Evidence in International Commercial*, 3 *AM. REV. INT'L ARB.* 204, 204 (1992).

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.²⁸ 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”).²⁹ 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.³⁰

Nor do concordant rules of witness preparation or of privilege exist across domestic legal systems.³¹ 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 emerged³² that has shaped and reinforced expectations.³³ In the hands of

28. See generally Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, *ARB. DISP. RESOL. J.* 78 (1995); Siegfried Elsing & John Townsend, *Bridging the Common Law-Civil Law Divide*, 18 *ARB. INT'L* 59 (2002); Paul Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration*, 12(9) *MEALEY'S INT'L ARB. REP.* 25 (1997); Andreas Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 *MICH. Y.B. INT'L STUD.* 163 (1985).

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”).

31. See generally MOSES, *supra* note 1, at 171; Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 *INT'L COMPAR. L.Q.* 345 (2001). One recurrent problem with respect to privilege is that the communications of in-house counsel are not privileged in many legal systems. See Val Davies et al., *Legal Privilege Under European Community Law in Light of the 2007 Decision in Akzo Nobel Chemicals Limited and Akcros Chemical Limited v. The Commission*, in *INT'L LITIG. NEWS* 19 (2008). The divergent rules make for pivotal but often difficult choice of law determinations.

32. See generally Hans Smit, *Managing an International Arbitration: An Arbitrator's View*, 5 *AM. REV. INT'L ARB.* 129 (1994); Alan Rau & Edward Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 *TEX. INT'L L.J.* 89 (1995); Karl Heinz Böckstiegel, *Major Criteria for International Arbitrators in Shaping an Efficient Procedure*, in *ARBITRATION IN THE NEXT DECADE*, ICC INT'L CT. ARB. BULL. SPEC. SUPP., at 49 (1999).

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.

35. See UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS, U.N. Comm'n on Int'l Trade Law, U.N. GAOR, 29th Sess., U.N. Doc. A/51/17 (1996), available at <http://www.uncitral.org/english/texts/arbitration/arb-notes-e.pdf> (checklist for planning arbitrations); ICC Commission Report, *Techniques for Controlling Time and Costs in Arbitration* (2007); ICDR Guidelines for Arbitrators Concerning Exchanges of Information, available at <http://www.adr.org/si.asp?id=5288>.

36. MOSES, *supra* note 1, at 165.

37. See generally WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 8-9 (2006); cf. Roger P. Alford, *The American Influence on International Arbitration*, 19 *OHIO ST. J. ON DISP. RESOL.* 69 (2003) (discussing also positive contributions).

38. Several institutions are studying the E-discovery challenge, and some have issued guidelines. See Fulbright & Jaworski, *Chartered Institute of Arbitrators Protocol for E-Disclosure in Arbitration*, 2 *INT'L ARB. REP.* 15 (2008). For a somewhat dated—but still very useful—survey of techniques for maximizing arbitration's potential, see Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?* 12-13 (Richard B. Lillich & Charles N. Brower eds., 1993). The ICDR recently published guidance aimed at subduing expectations that international commercial arbitration should have all the trappings of litigation.

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

39. *The Bremen v. Zapata*, 407 U.S. 1 (1972).

40. Relying on robust pro-arbitration policies attributed to the Federal Arbitration Act (FAA), several United States Supreme Court decisions have confirmed that a broad range of statutory matters may be arbitrated. Under the FAA, the following have been found to be arbitrable: federal age discrimination claims in the employment context, *Gilmer v. Interstate /Johnson Lane Corp.*, 500 U.S. 20, 27 (1991); state discrimination and related tort claims in the employment context, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001); Sherman Act claims, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 (1985); federal securities claims, both under the 1934 Securities Exchange Act, *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 513 (1974), *Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), and under the Securities Act of 1933, *Rodriguez v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) *overruling* *Wilko v. Swan*, 346 U.S. 427, 485-86 (1953); federal “racketeering” claims: claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), *McMahon*, 482 U.S. at 242, and claims under the Carriage of Goods by Sea Act (COGSA), *Vimar Seguros y Reaseguros v. Sky Reefer*, 515 U.S. 528, 541 (1995).

41. *Mitsubishi*, 473 U.S. at 629-40.

42. *Cf. Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-08 (2003) (enforcement of arbitration agreement will not be denied merely because arbitrator might construe agreement to preclude awards of treble damages).

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 jurisdiction⁴⁵ and, significantly, under certain circumstances to do so with relative preclusiveness in particular jurisdictions.⁴⁶ This principle—the Kompetenz-Kompetenz doctrine—interacts with the “severability” principle to forestall maneuvers that could otherwise render international arbitration ineffectual.⁴⁷

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).

45. See *MOSES*, *supra* note 1, at 88-92. The doctrine's reception into mainstream arbitration jurisprudence is helpfully traced in Richard Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent is Not 'Clear and Unmistakable,'* 17 AM. REV. INT'L ARB. 545, 551-63 (2006).

46. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (parties may by agreement limit scope of review of jurisdictional questions); *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 (S.C.C.) (arbitrators entitled to deference in deciding their own jurisdiction); *Dancap Prods. Inc. v. Key Brand Entm't Inc.*, 2009 ONCA 135 (Ont. C.A.) (scope of arbitration agreement for the arbitrators); see also *MOSES*, *supra* note 1, at 90-91; William W. Park, *The Arbitrability Dicta in First Options: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996); William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 NEV. L.J. 135, 144-45 (2007) [hereinafter *Determining Jurisdiction*] (comparing German and American law on finality of arbitrators' jurisdictional rulings when requested to decide consent issues by the parties); Alan Scott Rau, *"The Arbitrability Question Itself,"* 10 AM. REV. INT'L ARB. 287, 289-302 (1999) (further analysis of *First Options*).

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.⁴⁸ 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.⁴⁹ 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.”⁵⁰

The House of Lords⁵¹ 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.⁵² 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).

50. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (FAA establishes that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”); *First Options*, 514 U.S. at 944-45 (1995) (citing with approval but distinguishing its *Moses Cone* decision); *Finegold v. Setty & Assocs., Ltd.*, 81 F.3d 206, 208 (D.C. Cir. 1996); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (1999) (relying on the *Moses Cone* presumption to construe “arising in connection with” broadly).

51. *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.).

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 law”⁵³ 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.*

58. See Recommendation regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session, available at <http://www.uncitral.org/pdf/English/texts/arbitration/NY-conv/A2E.pdf>.

the domestic arbitration law.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.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.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,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?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”).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.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.⁶⁶ The English exception to this pattern is narrow,⁶⁷ so that there, as elsewhere, award effectiveness depends modernly not on whether the court addressed would have

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

60. MOSES, *supra* note 1, at 24-26.

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.

62. *50 Years*, *supra* note 6, at art. V(1)(e).

63. See MOSES, *supra* note 1, at 214-16; Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9(1) ICC INT’L CT. ARB. BULL. 14 (1998); Christopher Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT’L ARB. 451 (2000).

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

65. MOSES, *supra* note 1, at 213.

66. *Id.* at 196-97.

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 agreement⁷² 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

68. See generally William W. Park, *Why Courts Review Arbitral Awards*, in LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY: LIBER AMICORUM KARL HEINZ BOCHSTIEGEL 595 (2001).

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]”).

70. See generally L. Yves Fortier, *The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration—“A Few Plain Rules and a Few Strong Instincts,”* in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 396 (A. van den Berg ed., 1998).

71. *Hall St. Assocs. v. Mattel*, 128 S. Ct. 1396, 1403 (2008).

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 586, 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,⁷⁷ 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.⁷⁸ This self-restraint is particularly impressive given that public policy is among the enumerated grounds for refusing enforcement.⁷⁹ 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.⁸⁰

Commercial Arbitration, 2 DISP. RESOL. INT'L 43 (2008) (suggesting the Panama Convention should be terminated).

77. Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, in THE INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION 109 (Martin Hunter et al. eds., 1995) (proposing creation of an international court for enforcement and set aside of arbitration awards); H.E. Judge Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, in *id.* at 115, (discussing treaty implementation of Judge Holtzmann's proposal).

78. See Gerald Aksen & Wendy Dorman, *Application of the New York Convention by United States Courts: A Twenty-Year Review (1970-1990)*, 2 AM. REV. INT'L ARB. 65, 81-86 (1991); Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979); Albert Jan van den Berg, "Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few," in ARBITRATION IN THE NEXT DECADE, ICC INT'L CT. ARB. BULL. SPEC. SUPP., at 86 (1999); Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18(2) ICC INT'L CT. ARB. BULL. 1 (2007).

79. The overwhelming trend among modern systems with respect to Convention awards is to conceive of public policy quite narrowly. See, e.g., V.V. Veeder, *The New York Convention in Common Law Countries—and in the European Union*, in THE NEW YORK CONVENTION OF 1958 117, 126 (1996) (Conference Proceedings) ("To my knowledge, no English Court has ever refused to enforce or recognize a foreign arbitration award on the ground of public policy. Under English law generally, public policy is a narrow ground of defence. . ."). The doctrinal distinction customarily made—particularly among civil law authorities—is that "domestic" public policy must be distinguished from the more exceptional and compelling "international" public policy ("ordre public internationale"); only the latter should hold sway under the Convention. See generally International Law Association, Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitration Awards* (2000)(on file with author); ILA, *Report With Recommendations on Public Policy*, REPORT OF THE 70TH ILA CONFERENCE 16, 352 (2002); cf. Karl H. Böckstiegel, *Public Policy as a Limit to Arbitration and its Enforcement*, in *50 Years, supra* note 6, at 129, 130 (in case of doubt award enforceable; exceptions include if enforcement would equate to criminal activity or would further terrorism, drug trafficking, money laundering, smuggling or genocide).

80. See MOSES, *supra* note 1, at 202-19.

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,⁸¹ and may be compensated directly by the appointing party.⁸² 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 inter-connected 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,⁸³ the ability of a party to challenge an arbitrator upon discovery of troubling facts,⁸⁴ the operation of certain intra-tribunal policing mechanisms,⁸⁵ and court controls both at the place of arbitration (in the form of set aside proceedings) and under the New York Convention.⁸⁶

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

81. See generally Gavin Griffith, *Constitution of Arbitral Tribunals: The Duty of Impartiality in Tribunals or Choose Your Arbitrator Wisely*, 13 ICSID REV. 36 (1998); Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L. J. 59 (1995).

82. See generally D. Bishop & L. Reed, *Practical Guidelines for Interviewing, Selecting, and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395 (1998); James Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 AM. REV. INT'L ARB. 153 (1992). The interview process is regulated by rules that, *inter alia*, prohibit discussions of the merits during the interview process; permissible topics include the arbitrator's availability, linguistic abilities, and apparent conflicts. See Ben Sheppard, *A New Era of Arbitrator Ethics for the United States: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*, 21 ARB. INT'L 91, 95-97 (2005).

83. Leading guides addressing disclosure are ABA, *Code of Ethics for Arbitrators in Commercial Disputes* Canon II (2004), available at http://www.abanet.org/dispute/commercial_disputes.pdf, and IBA, *Guidelines on Conflicts of Interest in International Arbitration* (2004), available at www.ibanet.org; see also IBA, *Background Information on the IBA Guidelines on the Conflicts of Interest in International Arbitration*, available at www.ibanet.org/pdf/InternationalArbitrationGuidelines.pdf.

84. See Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 ARB. INT'L 241 (2005).

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,⁸⁷ non-systematic access to awards,⁸⁸ and the possibility in some jurisdictions that awards will be issued without an elaboration of reasons.⁸⁹ These process features admittedly reduce ICA's transparency quotient,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),⁹¹ a trend toward open hearings,⁹² and occasional access by amici to the proceedings in the discretion of the tribunal.⁹³ Second, with respect to private commercial arbitration, the default provision in most international rule formulae is that awards are to be reasoned,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

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

88. Awards are not invariably circulated in the public domain. *See, e.g., 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”). *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., *Taking Stock of NAFTA Chapter Eleven in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1409 (2003) [hereinafter *Taking Stock*]; *cf.* Martin Hunter, *Publication of Awards and Lex Mercatoria*, 54 ARB. 55 (1998) (Iran-U.S. Claims Tribunal awards valuable to scholars and students); *see also* PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES, *supra* note 37, at 383 (discussing, generally, the benefits of publishing awards).

89. Unreasoned awards are enforceable in the United States. *See* PRINCIPLES AND PRACTICE, *supra* note 47, at 35 (1997).

90. *See* UNCTAD, *A Review*, *infra* note 112, at 56; V.V. Veeder, *The Transparency of International Arbitration: Process and Substance*, in PERVERSIVE PROBLEMS IN INTERNATIONAL ARBITRATION 88 (Loukas Mistelis & Julian Lew eds., 2006); Jack J. Coe, Jr., *Secrecy and Transparency in Dispute Resolution: Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 KAN. L. REV. 1339 (2006) [hereinafter *NAFTA Leadership*]; *cf.* Jack J. Coe, Jr., *The Transparency Features of the Iran-U.S. Claims Tribunal*, in THE IRAN U.S. CLAIMS TRIBUNAL 25 (Oxford Univ. Press, 2007) (discussing antecedents to the present investor-state transparency initiatives).

91. Many examples are present on line; *e.g.*, <http://www.investmentclaims.com/>.

92. *See* *NAFTA Leadership*, *supra* note 90, at 1360-62.

93. *Id.* at 1362-78.

94. *See, e.g., 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).⁹⁵ 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,⁹⁶ 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,⁹⁷ the United States leaves to the law of unconscionability the principal role in policing unfair arbitration agreements.⁹⁸ 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.⁹⁹

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.

96. MOSES, *supra* note 1, at 217 (citing Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 481 (1999)).

97. See generally Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C.J. INT'L L. & COM. REG. 357 (2002); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002).

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).

99. See generally Thomas Carbonneau, "Arbitracide": *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB. 233 (2007); Alan Kaplinsky & Mark Levin, *Consumer Arbitration: If the FAA "Ain't Broke," Don't Fix It*, 63 BUS. LAW. 907 (2008).

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).¹⁰⁰ Such concerns persist although empirical studies do not fully support the underlying assumptions at work.¹⁰¹

However valid the basis for reform might be with respect to contracts of adhesion affecting certain weaker classes of market participants,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.¹⁰³

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

[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.¹⁰⁴

This assault on the severability principle is particularly ironic, since the United States Supreme Court¹⁰⁵ and the English House of Lords¹⁰⁶

100. See Kaplinsky & Levin, *supra* note 99, at 908-09.

101. See *id.* at 909-11 (relying on several studies); cf. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-264 (2006) (arguing that enforcing pre-dispute arbitration agreements produces indirect benefits to consumers and thus can be justified on that basis).

102. See *supra* note 97; Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627 (2008).

103. See Mark L. Kantor, *Update: Legislative Proposals Could Significantly Alter Arbitration in the United States*, in ARB. (Chartered Institute of Arbitrators Newsletter), Nov. 2008.

104. U.S. Congressional Research Service, Official Summary, Arbitration Fairness Act, S. 1782 and H.R. 3010 (CRS summary as excerpted in Kantor, *supra* note 103).

105. See generally *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (finding that an arbitration clause is severable and unless effectively challenged specifically, a dispute is to be referred to the arbitrators who are then entitled to rule on the validity of the main contract and render an award accordingly; Florida Supreme Court erred in distinguishing between void and voidable contracts, the application of the

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* decision¹⁰⁷ 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 ICSID¹⁰⁸ 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

severability principle being the same in either case). For thoughtful case-notes on *Buckeye*, see Ben H. Sheppard, Jr., *The Moth, the Light and the United States' Severability Doctrine*, 23(5) J. INT'L ARB. 479 (2006); Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007).

106. See *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.).

107. *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967).

108. See *Convention on the Settlement of Investment Dispute between States and Nationals of Other States*, art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The leading commentary on the ICSID Convention is CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001). The literature addressing it is extensive. See *id.* at 1291-1329 (bibliography); see also CHARLES H. BROWER, II, ET AL., *NAFTA CHAPTER ELEVEN REPORTS* 683-700 (2005) (Chapter Eleven bibliography).

109. See *List of ICSID Cases*, <http://icsid.worldbank.org/ICSID/> (follow the "Cases" hyperlink; then follow the "List of Cases" hyperlink).

110. See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 57-64 (2007).

111. See United Nations Commission On International Trade Law (UNCITRAL) *Arbitration Rules*, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb->

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.

112. See generally UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (2005) [hereinafter *A Review*] (“[S]ince the 1990’s the number of cases has grown enormously.”) (report on file with the author); RUDOLPH DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (1995); KENNETH VANDELDE, *UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE* (1992); Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287 (1997).

113. See R. Doak Bishop & Roberto Aguirre Luzi, *Investment Claims: First Lessons from Argentina*, in *INTERNATIONAL LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL INVESTMENT TREATIES AND CUSTOMARY INTERNATIONAL LAW* 425, 435-69 (T. Weiler ed., 2005).

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.

115. See generally Barton Legum, *The Innovation of NAFTA Investor-State Arbitration*, 43 HARV. INT’L L.J. 531 (2002) (tracing mixed claims processes historically).

116. Jack J. Coe, Jr., *The Mandate of Chapter 11 Tribunals—Jurisdiction and Related Questions*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 215 (T. Weiler ed., 2004).

117. Charles H. Brower, II et al., *Fair and Equitable Treatment Under NAFTA’s Investment Chapter*, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC’Y INT’L PROC. 9, 19 (2002) (hereinafter *ASIL Proceedings*); L. Yves Fortier & Stephen Drymer, *Indirect Expropriation in the Law of International Investment: I Know it When I See It, or Caveat Investor*, 19 ICSID REV. 293 (2004); J. Christopher Thomas, *Reflections on Article 1105 of the NAFTA: History State Practice and the Influence of Commentators*, 17 ICSID REV. 21, 98-101 (2002); see also UNCTAD, *A Review*, *supra* note 112, at 1 (vagueness of some treaty guarantees adds unpredictability).

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

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.

121. For a sampling of representative discussion, see BUHRING-UHLE, *supra* note 120; Jack. J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-States Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L LAW & POL'Y 7 (2005); Michael Collins, *Do International Arbitral Tribunals have any Obligations to Encourage Settlement of the Dispute before Them?*, 19 ARB. INT'L. 333 (2003); Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553 (2005); Robert Dobbins, *The Layered Dispute Resolution Clause From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 161 (2000); Haig Oghigian, *Arbitrators Acting as Mediators*, 68 ARB. 42 (2002); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83 (1997); Jeswald Salacuse, *Is There a Better Way? Alternative Methods of Treaty -Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138 (2007).

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.¹²²

The substantive deficiencies one might identify are trivial and arguable. For instance, a technician might have paused at the following statement¹²³ 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.¹²⁴

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

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.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.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. . . .”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 arbitration¹²⁸—and correspondingly that ICSID's internal control mechanism¹²⁹ is not available, let alone exclusive.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.¹³¹

125. See, e.g., *United Mexican States v. Metalclad Corp.* (B.C. Sup. Ct.), available at http://www.naftaclaims.com/disputes_mexico_metalclad.htm (arbitration seated in British Columbia but tribunal held all hearings in Washington D.C.).

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.” GERAL AKSEN, *A Practical Guide to International Arbitration*, in *PROCEEDINGS OF THE SOUTHWESTERN LEGAL FOUNDATION PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTION IN INTERNATIONAL BUSINESS* 51 (1976).

127. MOSES, *supra* note 1, at 228.

128. Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA*, 19(3) *J. INT'L ARB.* 185, 185-86, 194-96 (2002) [hereinafter *Achilles Heel*].

129. See Aron Broches, *Observations on the Finality of ICSID Awards*, 6 *ICSID REV.—FILJ* 321 (1991); Michael W. Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 *DUKE L.J.* 739 (1989); Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 *ICSID REV.—FILJ* 85 (1987); Andrea Giardina, *ICSID: A Self-Contained, Non-National Review System*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY?* 199 (R. Lillich & C. Brower eds., 1994); Michael W. Reisman, *Repairing ICSID's Control System: Some Comments on Aron Broches' “Observations on the Finality of ICSID Awards,”* 7 *ICSID REV.—FILJ* 196 (1992).

130. *Achilles Heel*, *supra* note 128, at 185-86.

131. See generally David Williams, *Review and Recourse Against Awards Rendered under Investment Treaties*, 4(2) *J. WORLD INV.* 251(2003); *Achilles Heel*, *supra* note 128.

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.

133. Eloise Henderson Bouzari, *The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence*, 30 TEX INT’L L.J. 205, 217-18 (1995).

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.