

2013

Review of The Principles and Practice of International Commercial Arbitration by Margaret L. Moses

Adrian Roberto Villagomez Aleman

Recommended Citation

Adrian Roberto Villagomez Aleman, *Review of The Principles and Practice of International Commercial Arbitration by Margaret L. Moses*, 31 BERKELEY J. INT'L LAW. 461 (2013).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol31/iss2/4>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38WT03>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Review of *The Principles and Practice of International Commercial Arbitration* by Margaret L. Moses

By
Adrian Roberto Villagomez Aleman*

In recent decades, globalization has expanded and strengthened states' economic relations around the world. In this context, the effects of globalization have benefited private commercial entities by providing them broader and more attractive means of concluding transactions. As a consequence, international transactions have experienced increasing degrees of complexity regarding legal matters. The old paradigm that applied local laws in every dispute is no longer the answer for new international transactions. The latest element of internationalization involves application of other countries' laws and, consequently, involvement of their judicial systems. This latter effect represents a disadvantage for private entities unfamiliar with the legal system of a particular country. International litigation can also be very expensive, and it may take several years before the parties reach a final resolution. Therefore, parties are usually resistant to subjecting themselves to the jurisdiction of a foreign court.¹

Not surprisingly, “[a]rbitration has become the dispute resolution method of choice in international transactions.”² International commercial arbitration is a relatively new method of dispute resolution in which the parties can create their own private system in order to resolve disputes.³ In arbitration, parties have the opportunity to choose the rules of procedure applicable in the resolution of the dispute, the governing law of the contract, the place where the dispute should be resolved, the decision-makers who will decide the dispute, and the language used during the proceedings, among many other essential considerations. In addition, by selecting arbitration as their dispute resolution

* University of California, Berkeley, School of Law, LL.M. Candidate, 2013.

1. MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 1 (2d ed. 2012).

2. *Id.* at 3, 4.

3. *Id.* at 1.

method, the parties do not waive the possibility of seeking assistance from local courts when certain circumstances require it, such as interim measures.

The Principles and Practice of International Commercial Arbitration is a book that aims to explain “how and why arbitration works.”⁴ Margaret L. Moses builds on her extensive professional and academic experience in international commercial arbitration to offer comprehensive guidance on this topic. Her book includes a variety of materials regarding rules, guidelines, cases, procedures, practical examples, and definitions in international commercial arbitration, “provid[ing] the reader with immediate access to understanding the world of international arbitration.”⁵ Moses is an internationally recognized scholar who teaches international commercial arbitration, international business transactions, European community law, international trade finance, and contracts at Loyola University Chicago School of Law. She is also the Director of the International Program at Loyola and coaches the Vis Moot International Arbitration teams. In addition to her academic experience, Moses also serves as an arbitrator under the auspices of the International Chamber of Commerce, the Court of Arbitration, and the American Arbitration Association’s International Centre for Dispute Resolution.

The Principles and Practice of International Commercial Arbitration contains a wide variety of topics useful for those with no experience in the field as well as for experts looking for a certain rule, law, case or simply an answer for a particular case. Moses covers topics ranging from the basics of international commercial arbitration to the complexities of Investment Arbitration. In this transition, the book explores many issues that could arise when parties decide to arbitrate a dispute. Moses addresses practical answers for the following questions: Why should a party choose arbitration instead of litigation? How and when can the parties agree to arbitrate? What are the requirements and stipulations that an arbitration agreement should contain? What are the institutions available for a particular dispute? What laws should apply for each dispute and procedure? How can the final award be enforced? What is the procedure to follow in investment arbitration?

An essential truism underlying international arbitration is that “[e]ach party fears the other party’s ‘home court advantages.’”⁶ Arbitration gives flexibility to the needs of the parties, providing them with party autonomy and neutrality. Disputing parties have the opportunity to choose the arbitrators, who are not necessarily lawyers, based on their individual capabilities and expertise. Also, since parties may set the rules of the arbitration procedure, they may limit the discovery proceedings, an option that might result in a shorter and cheaper process. Moreover, arbitration guarantees a confidential procedure and award for the parties if they so decide. In addition, Moses suggests that the New York

4. *Id.*

5. *Id.* at 0.

6. *Id.* at 1.

Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 makes an arbitration award easier to enforce internationally than a foreign court judgment, since more than 145 countries are parties to the treaty.⁷ Finally, the award encompasses the characteristics of being final and binding, leaving aside the possibility of an appeal to a higher court. Moses argues that the lack of opportunity to appeal on the merits is an attractive element for companies trying to finish the dispute and refocus on their business.⁸

On the other hand, Moses points out some of the disadvantages of arbitration. First, because the discovery process may be shortened, it might decrease the chance of a claimant to meet the required burden of proof. Also, she proposes that the lack of appeal of the award on facts or application of law may characterize a lack of ability to vacate an award on the merits. In addition, arbitrators lack coercive powers to impose penalties or to force a party to take a particular action. However, she suggests that a party is still able to seek court assistance in order to ensure compliance with tribunal orders. A final disadvantage is the lack of gender or ethnic diversity in the pool of experienced arbitrators.⁹

Moses also explains the difference between institutional and *ad hoc* arbitration, and she outlines some of the benefits posed by each method.¹⁰ She suggests that one of the main advantages of institutional arbitration is that the administrative functions are performed by the institution, thus their awards have greater credibility in the international community and courts. On the other hand, she contends that in *ad hoc* arbitration, costs are reduced because there is no need to pay for an institution, and the procedure is more flexible, allowing the parties to tailor it to a particular dispute.¹¹ The disputing parties may choose their own rules, the UNCITRAL Arbitration Rules,¹² or those of another institution such as: the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Center for Dispute Resolution (ICDR), or the London Court of International Arbitration (LCIA).

One of the strengths of Moses's work is that she shows a practical approach to understanding the legal framework for arbitration. She uses an inverted pyramid as a method to explain that the arbitration agreement, being the base of the pyramid, is the underpinning of the governing process.¹³ This example aims to show that if the agreement is not valid, there is no legal basis for arbitration. The arbitration rules will then supplement what the parties stipulated explicitly in the agreement, and they will prevail if there is no agreed provision on a

7. *Id.* at 3

8. *Id.* at 4.

9. MOSES, *supra* note 1, at 4, 5.

10. *Id.* at 9.

11. *Id.* at 10.

12. *Id.*

13. *Id.* at 6.

particular issue. Then, Moses highlights the importance of the *lex arbitri*—the law of the place where the arbitration is being held—because it will complement other choices made by the parties. Most countries have adopted as their arbitration law the UNCITRAL Model Law on International Commercial Arbitration.¹⁴ Moses contends that this uniformity “tend[s] to create a relatively coherent system of procedures.”¹⁵ In addition, international treaties such as: the New York Convention, the ICSID Convention, the Inter-American Convention on International Commercial Arbitration (Panama Convention), and the European Convention on International Commercial Arbitration contribute to such harmonization.¹⁶

Another important topic is the use of alternative methods of dispute resolution to resolve international disagreements. Mediation, conciliation, neutral evaluation, expert determination, mini-trials, and last-offer arbitration (baseball arbitration) are alternatives that parties can take into consideration when a dispute arises.¹⁷ These methods of alternative dispute resolution (ADR) provide the parties an opportunity to avoid the length and costs of arbitration and litigation. However, Moses points out that most of them provide non-binding opinions—a crucial difference from international commercial arbitration. This conclusion leads Moses to refer to international commercial arbitration as the “‘least ineffective’ method of resolving international disputes.”¹⁸ Moses notes that some U.S. arbitrators prefer arbitration due to the possibility to “take the best practices from civil and common law, use them in arbitration, and keep improving the process.”¹⁹

Regarding the arbitration agreement, Moses points out that the agreement itself is the source giving the power to arbitrators to decide the dispute.²⁰ She suggests that, although the New York Convention promotes enforcement and recognition of arbitral awards and arbitration agreements, the arbitration agreement should be drafted in such way to avoid the grounds for invalidation.²¹ She then contends that the arbitration clause should be short and simple to prevent “pathological clauses.”²² She notes that even if the main contract is invalidated, the arbitration clause may still survive due to the separability (separate agreements) characteristic of the arbitration agreement.²³

14. *Id.*

15. *Id.* at 8.

16. *Id.*

17. *Id.* at 14.

18. *Id.* at 16.

19. *Id.* at 16, 17.

20. *Id.* at 43.

21. *Id.*

22. *Id.* at 45.

23. *Id.* at 19.

Considering the importance of avoiding unenforceable arbitration agreements or clauses, Moses highlights the importance of selecting an adequate legal framework for the arbitration. In her book, the reader may find certain guidelines enacted by different institutions;²⁴ for example, the International Bar Association (IBA) promulgated the IBA Guidelines for Drafting International Arbitration Clauses, and the ICDR issued its Guide to Drafting International Dispute Resolution Clauses. These guidelines provide that the parties should include some important elements in the agreement, such as the number of arbitrators (usually one or three depending on the complexity of the dispute), and the place of arbitration. Moses suggests that these decisions, particularly the place of arbitration, should not be left to the discretion of the tribunal or institution because the law of the seat of arbitration will be the law that governs the arbitration, arbitrability, and possibly the arbitration agreement.²⁵ The guidelines also provide that the parties may include additional stipulations in the agreement, such as the language of arbitration, the substantive law to govern the dispute, confidentiality, legal fees and costs, issues regarding evidence, and technical expertise, among others. However, if the parties have chosen a specific arbitral institution, these provisions might not be necessary. If they have opted for *ad hoc* arbitration, Moses suggests the UNCITRAL Arbitration Rules to set the procedure that the arbitrators should follow. The purpose of choosing an adequate legal framework, she argues, is to avoid disputes about the framework itself, which could invalidate the arbitration agreement.²⁶

One important argument that Moses underlines is that, because arbitration is a private system, the quality of the tribunal is what makes parties confident in arbitration.²⁷ For this reason, the parties should bear in mind the number and quality of arbitrators that their dispute requires. Parties should balance the decreased costs and time-saving that one arbitrator provides with the additional experience, better understandings, certainty and knowledge that three arbitrators may bring to the table.²⁸ Once this decision is made, Moses suggests that the parties take into consideration knowledge or experience, professional background, language fluency, availability, and reputation when composing the tribunal. For most parties, the ideal arbitrator is one who is bright and knowledgeable, impartial, has common sense, has a lot of authority but not too much, who listens carefully, is thoughtful but able to decide, available, not self-conscious, not arrogant, and “who will draft a beautiful award.”²⁹

24. *Id.* at 49.

25. *Id.* at 47, 79.

26. *Id.* at 58.

27. *Id.* at 122.

28. *Id.* at 122-23.

29. *Id.* at 132.

When parties choose the place of arbitration, they are almost always choosing the law that governs the arbitral proceedings.³⁰ In this regard, Moses contends that, as a consequence of the territorial (localization) approach of arbitration, courts of the place of arbitration still retain some control to ensure that minimum standards of fairness are met.³¹ Court power plays an important role in various instances: as recourse if the award was improper, in the discovery process (coercive powers), emergency relief (interim measures), anti-suit injunctions, in the process of challenging arbitrators, and appointing arbitrators when parties have not done so. Moses then affirms that parties want to have recourse to court to seek assistance without waiving their right to arbitrate.³² In this context, if one of the parties initiates litigation, the New York Convention provides that courts should enforce arbitration agreements unless they are invalid.³³

Regarding the arbitral award, arbitrators not only have the obligation to remain impartial and independent throughout the arbitration proceedings, but they must render a final enforceable award (with *res judicata* effect).³⁴ While an award is rarely overturned by courts since it cannot be challenged on the merits, there are some grounds on which a party can base a motion to set aside, vacate, or annul an award.³⁵ Moses claims that “[m]ost arbitration laws provide that certain standards of due process must be met.”³⁶ As a result, each jurisdiction may impose its own grounds for challenging an award: either procedural challenges or based on the merits. For example, the Federal Arbitration Act in the United States provides such grounds. Additionally, the UNCITRAL Model Law includes its own grounds for challenge for those countries which have included it in their domestic legal systems.

While the New York Convention promotes enforcement of foreign arbitral awards, there are seven defenses that could be invoked to resist enforcement: incapacity and invalidity, lack of notice or fairness, an arbitrator acting in excess of authority, the tribunal or procedure not in accordance with the agreement, an award not yet binding or being set aside, lack of arbitrability, and violation of public policy.³⁷ Moses explains that the losing party may either try to set aside the award in the courts where the arbitration was held, or it may apply the defenses in the enforcement process.³⁸ However, Moses emphasizes that due to the limited grounds for challenge, defenses of enforcement, and the pro-

30. *Id.* at 59.

31. *Id.* at 87.

32. *Id.* at 61, 87-88.

33. *Id.* at 88.

34. *Id.* at 83, 122.

35. *Id.* at 203.

36. *Id.* at 206.

37. *Id.* at 217.

38. *Id.* at 69, 204.

enforcement effect of the New York Convention, most courts are reluctant to set aside, vacate, or annul the award, or to deny recognition and enforcement.³⁹

In the last part of her book, Moses provides the reader with a short understanding of investment arbitration. She notes that foreign investors are reluctant to litigate in the courts of the host country “for fear that they will not receive fair and equal treatment in those courts when the opposing party is the State or a State entity.”⁴⁰ Therefore, the International Centre for the Settlement of Investment Disputes (ICSID) works as a neutral forum for the resolution of investment disputes. She asserts that Bilateral Investment Treaties, Multilateral Treaties, investor protection legislation, and investment contracts are all sources of the right to arbitrate, fulfilling the three jurisdictional requirements for ICSID arbitration.⁴¹ Moses suggests that the counsel for an investor should read these provisions carefully to understand the steps to follow in order to accept the State’s offer to arbitrate.⁴²

There are some important differences, besides subject matter, between ICSID arbitration and international commercial arbitration. Moses contends that, because ICSID arbitration is entirely delocalized, court involvement is excluded until the execution of the award.⁴³ Therefore, the tribunal has to deal with any issue concerning the dispute, including interim measures. Moses notes that the constitution of the tribunal and corruption of its members is not usually challenged by the parties. When such rare cases occur, the procedure to challenge an ICSID award is submitted directly to an ad hoc committee appointed by ICSID, and not to the local courts of the state as in international commercial arbitration. Even though the arbitral awards do not create precedent, Moses argues, the ICSID tribunals tend to follow, or at least take into consideration, prior decisions when resolving a dispute.⁴⁴

Finally, Moses observes that the proliferation of Bilateral Investment Treaties (BITs) has increased ICSID arbitration.⁴⁵ BITs contain substantive rights for the protection of investors, which in turn increases the flow of investment. Also, the private entity and the State enter into a contract (investment agreement) establishing rights and obligations. The application of the BIT and the specific contract between the private entity and the State might create certain problems regarding interpretation of the contract, application of laws, and arbitration provisions. Moses suggests that, because investors cannot redraft the BITs, they “should be very careful in negotiating and drafting the disputes resolutions provisions in [their] investment contracts. . . . [They] should

39. *Id.* at 211.

40. *Id.* at 230-31.

41. *Id.* at 239-245.

42. *Id.* at 233.

43. *Id.* at 236.

44. *Id.* at 238, 250.

45. *Id.* at 232, 239.

avoid agreeing to settle contract disputes in the local courts and try to provide for an international arbitration, preferably tracking the arbitration provisions found in the applicable BIT.”⁴⁶

ANALYSIS

What makes *The Principles and Practice of International Commercial Arbitration* remarkable is the wide variety of topics it includes as it comprehensively addresses commercial arbitration. Moses demonstrates her wealth of experience and knowledge in international commercial arbitration as well as her ability to explain each one of the topics in a simple, but comprehensible, manner. Her book presents each one of the steps to follow before, during and after arbitration, in a very organized way that is easily understandable. Moses’ work is a very practical tool that takes the reader into the great world of international commercial arbitration. It provides introductory elements for students, as well as important rules, laws, sources, websites, and tips for practitioners.

International commercial arbitration, as an “international private justice [system],”⁴⁷ provides the parties with great flexibility when creating their method of dispute resolution. As a consequence, the arbitral proceedings may vary according to particular parties’ expectations. However, Moses perceptively identifies the common aspects that any party in a dispute should take into consideration when choosing arbitration. In this context, one of the strengths of Moses’ work is the recognition of different methods of resolving disputes, as well as their advantages and disadvantages. As a result, the reader will be able to identify the methods that are available, and which one best fits a particular dispute.

Moses’ proposals and suggestions throughout the book seem to be in accordance with most scholars’ opinions, which strengthen her arguments. However, while most scholars tend to limit their work to a particular law in a particular country, Moses offers an international perspective that could be used by private parties doing business all over the world. And the authors who have actually included an international perspective have done so in so much depth that it may be confusing or incomprehensible for readers with little or no experience in the field. In addition, many books on this topic are based only on the results of academic research; Moses’ contentions are supported by her academic background as well as her experience as an arbitrator, which adds more reliability to her conclusions.

46. *Id.* at 251.

47. See Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 *LAW & SOCIETY REVIEW* 27, 27-64 (1995).

The Principles and Practice of International Commercial Arbitration offers very useful guidelines to draft arbitration agreements. The inclusion of practical examples of arbitration clauses and Moses' identification of the important elements that must be observed when drafting a clause is one of the most attractive aspects of her book. Her perspective is well founded on the interpretation of general rules, treaties, laws, and case law. This tool helps the reader recognize the essential elements of arbitration clauses, and to understand internationally recognized models of clauses that guarantee a valid agreement. Therefore, Moses perfectly points out what to look for and where to look when drafting an arbitration clause.

Another fascinating subject in Moses' work is the identification and explanation of laws and rules applicable to the arbitration proceeding. Conflict of laws is an important factor to consider when dealing with international transactions, especially with international commercial arbitration. For this reason, Moses is undoubtedly helpful in showing the reader the relevant laws that may govern the arbitral proceedings, the arbitration agreement, arbitrability, and the contract, as well as their role in arbitration. By briefly summarizing the importance of each law, Moses makes the reader feel more comfortable when making decisions, with additional advice to carefully read the laws that may interfere in party autonomy. Other books address this topic in such a complex and deep way that a newcomer may feel confused and would need to look for supplementary sources. Moses uses a textbook format that allows any reader to understand from the beginning to the end of the book.

International commercial arbitration does not exclude judicial courts completely. In this context, Moses has clearly identified the important arguments both in favor and against delocalization of arbitration. By highlighting and exploring this topic, Moses has made the reader question whether the territorial approach of arbitration is significant for arbitration, or if delocalization would improve the arbitration system. When Moses discusses the decision of Belgium to completely exclude interference from courts in arbitration and the subsequent reaction of the parties, Moses allows the reader to identify the kind of arbitration that is pursued in different countries, and the way it affects the preferences of the parties. Therefore, the reader will be intrigued to explore the local laws of a given country, and will analyze the type of arbitration that will be held if that place is chosen. This chapter fulfills the needs of both practitioners and scholars since it provides a controversial topic for a research project, and something to consider when choosing the seat of arbitration.

Party autonomy is one of the most attractive features of arbitration. It gives the disputing parties the opportunity to shape the proceeding. By providing advice regarding choices that parties should make and by explaining why decisions matter, Moses adds an attractive element to the book. The reader will be able to identify the important arguments proposed by Moses as well as the aspects that deserve more consideration. Preferable qualifications for arbitrators, institutional rules, and costs and fees, among others, are important aspects that

parties should know before initiating arbitration. For these reasons, Moses demonstrates a well-defined and universally-recognized notion of what arbitration is and how it works. Her identification of topics makes the analysis more understandable and allows the reader to go step-by-step through the decision process. The way she presents this topic could be used as a checklist format, which simplifies the task of a practitioner, and it facilitates the understanding for any person interested in commercial arbitration. Moses' suggestions on this subject are definitely something in which the reader will be interested, especially because her arguments are based on her practical experience. This element of subjectivity is the interesting aspect that Moses brings to the reader for discussion without losing easy perceptiveness, all the while maintaining a low degree of complexity. Other books deal with this topic as a complex treatise, and since they assume knowledge by the reader, the discussion becomes more philosophical rather than informative.

Regarding the arbitral award, Moses has done well in separating definition, challenge and enforcement. One of the most complex questions in commercial arbitration is what to do once you have an arbitral award. Moses addresses this question in a very deep, concise and understandable manner. In other words, the way she uses three chapters of her book to illustrate arbitral awards suggests that, if the reader is looking for advice regarding arbitral awards, he will definitely find it in Moses' work; but if one is only interested in the topic, there will be little trouble in understanding the key concepts. Moses' arguments on this subject are outstanding in the sense that they challenge the typical boring explanation of the arbitral award, presenting a practical and more attractive approach. Moses' conclusion that each jurisdiction deals with challenge, recognition, and enforcement of arbitral awards according to their domestic interpretations is well supported by most scholars' opinions. But, unlike other scholars' works, Moses does not focus exclusively on U.S. interpretations. Instead, she refers to other jurisdictions, as well as universal interpretations, which show the reader a broader and more interesting panorama.

One component of Moses' book that seems controversial is the inclusion of investment arbitration and ICSID into an international commercial arbitration compilation. Investment arbitration is a broader concept that deserves a more expansive analysis. ICSID arbitration is not only different in nature, but also in procedure, compared to international commercial arbitration. The participation of a sovereign state, or state entity, in the proceedings reaches notions of public international law in a deeper manner than in the transaction of two corporations. Therefore, the inclusion of this chapter in Moses' book conflates two very different areas of international alternative dispute resolution.

On the other hand, it is indisputable that the purpose of the book is to explain the breadth of notions within international arbitration. The terms and concepts of commercial arbitration and ICSID arbitration are already confusing and may indeed overlap at times. Moses introduces ICSID arbitration in a simple and understandable manner, allowing the reader to identify and

distinguish these two types of arbitration, their purposes, and their procedures. Her effort to include the basics of ICSID arbitration offers another reason to read the book, as it demonstrates her expertise in both areas while showing a unique element that distinguishes Moses' work from other books. By including this topic in the book, Moses focuses the attention of the reader into another interesting topic. However, because this topic is very extensive and the chapter very short, Moses only urges the reader to begin a deeper search in investment arbitration while considering the foundations and distinctions she has already established. Therefore, for those interested exclusively in investment arbitration this book may not be as useful as desired, since it does not explore the topic in greater detail.

CONCLUSION

International commercial arbitration is the leading method for resolution of transnational commercial disputes. As a private system, parties have marked autonomy, allowing them to manipulate the procedure and resulting in lack of uniformity. As arbitration is a relatively new, universally-recognized method, international treatises and studies are not abundant. Despite these limitations, Moses has done an amazing job in gathering and presenting all the useful information regarding commercial arbitration. *The Principles and Practice of International Commercial Arbitration* is a short but understandable compilation of what commercial arbitration is and how it works. The book is a useful tool for students beginning to study commercial arbitration, as well as for practitioners looking for an answer to a particular issue. Moses' work is distinguishable from other books in the sense that it covers a wide variety of topics, in a short format, with theoretical and practical examples that could illustrate how arbitration works in the real world. This book is not designed to embrace every single aspect of arbitration, or to address a particular subject in deep detail. Instead, its purpose is to offer the reader a general understanding of general concepts without leaving aside important aspects that the reader must know. Therefore, when exploring the underlined arguments and the key concepts, the reader will be able to begin a deeper search, knowing where to look and what to look for.