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Book Review

The American Influence on International Commercial Arbitration

By Pedro J Martinez-Fraga

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Pedro J. Martinez-Fraga is as passionate and knowledgeable about art as he is about arbitration. It is therefore no coincidence that the cover of the second edition of his book, *The American Influence on International Commercial Arbitration*, features Francisco de Goya's compelling *Duelo a Garrotazos* ("Duel with Clubs") which hangs in the Museo del Prado. Through this imagery, Martinez-Fraga draws parallels between de Goya's duel and arbitration as it once used to be perceived in the United States in the days of *Wilko v Swan*: both provided a "blunt and imprecise methodology for dispute resolution," albeit one that afforded "efficiency, expediency, and, most of all, finality."[1]

The contrast with the current status that arbitration enjoys in the United States could not be starker – gone are the days of *laissez-faire*, duel-style confrontations. Martinez-Fraga identifies four main factors that have contributed to the current recognition of arbitration as being *in pari materia* with judicial courts. First, the U.S. Supreme Court's interpretation of the "international contract" as a normative basis for according special deference to arbitral proceedings in an international context. Second, the shift from consideration of arbitration as an imprecise instrument, unfit for complex subject-matter proceedings, to the perceived need for specialisation and the subsequent rise of a great number of uniquely tailored institutional arbitral proceedings in domestic arbitration. Third, the pragmatic need for filling the void left by the absence of civil and commercial transnational courts. Fourth, the fast advancement of economic globalisation and the subsequent role of arbitration as the only dispute resolution method capable of satisfying users' expectations of expediency and economic efficiency in a complex multi-jurisdictional context.

This second edition of the book builds on the core tenets of arbitration, still in place in the U.S., that featured in the first edition. Written in the author's distinctive style, this edition provides a thorough historical, jurisprudential and conceptual underpinning and contextualization to the modern practical challenges faced by the arbitral process. The book begins by examining the formation and transformation of the status of international arbitration in the U.S. (Chapters 1 and 2). It contrasts the taking of evidence in the civil law with the common law practice of discovery, reviewing the role of 28 U.S.C. §1782 in international commercial arbitration (Chapters 4 and 6). Martinez-Fraga also examines the understudied issue of perjury in arbitration and ponders the need to adapt the process to accommodate the prominence afforded to live testimony (Chapter 7). Detailed and nuanced commentary on U.S. case law underpins the study of the doctrines of severability and arbitrability as

1 Pedro J Martinez-Fraga, *The American influence on international arbitration: doctrinal developments and discovery methods*, 2nd ed (Cambridge, United Kingdom; New York, NY: Cambridge University Press, 2020) at 1[*Martinez-Fraga*] (referring to *Wilko v Swan* 346 US 427 (1953) [*Wilko v Swan*]).

a gateway issue (Chapter 8). Chapter 9 concludes the book by probing the dialogue between U.S. arbitration law and the New York Convention, with reference to the U.S. doctrines on non-signatories to agreement to arbitrate, jurisdiction to enforce over an arbitral award debtor, *forum non conveniens*, and confirmation of an award annulled at the seat.

In two chapters new to the second edition, Martinez-Fraga turns his attention to areas deeply woven into the very fabric of arbitration, for which he advocates reform.

On the important topic of arbitrator immunity (Chapter 3), the author compares the U.S. common law conception of arbitrator immunity as being absolute to the contractual model in civil law jurisdictions. He notes that:

> "It is in here that the majesty of the U.S. common law plays a protagonistic role. The common law's very fiber is one of flexibility that allows for the introspection of own normative based and soundness of reason. Its ability to admit of improvement is a source of strength and legitimacy rather than debility. A compromise hybrid judicial-contractual standard for arbitrator immunity comports not only with the common law's ability to grow from self-critical dialectical development, but also happens to further the correct use of precedent that is based on subtle variations arising from much less subtle distinguishing propositions. The moment is ripe for the development of a new doctrine."[2]

In the second chapter new to this edition (Chapter 5, The New Unorthodox Conception of Common Law Transparency in International Arbitration Through Evidence Gathering and Orality), Martinez-Fraga prompts the reader to wonder how far arbitration has really moved away from the "blunt and imprecise methodology" of the duel given the field's insistence on an ubiquitous feature of the process: the exercise of arbitrator discretion.[3]

Arbitrators are bestowed – notably by the rules of arbitral institutions and by the IBA Rules on the Taking of Evidence,[4] of which the book provides

2 Martinez-Fraga, *supra* note 1 at 140.

3 For the proposition that arbitral discretion as presently exercised unsettles the legitimacy of arbitration as a tool of global governance, see Sophie Nappert, "International Arbitration as a Tool of Global Governance: The Use (and Abuse) of Discretion" in Eric Brousseau, Jean-Michel Glachant & Jérôme Sgard, eds, *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (New York, NY: Oxford University Press, 2019) [unpublished, archived at Oxford Handbooks Online].

4 See *Rules on the Taking of Evidence in International Arbitration* (2010), International Bar

an enlightening review and critique - with significant power to exercise discretion in a number of procedural and substantive areas of decision-making. On the substantive side, the treatment of allegations of corruption and the financial outcome of the award, including the determination of interest rates and the allocation of costs, are prominent examples. The exercise of substantive discretion also includes what Martinez-Fraga pithily terms the multiple, *imperceptible* rulings material to the taking and presentation of evidence – from the form and substance of document disclosure and the scope of evidence gathering to cross-examination and adverse inferences.

Whereas arbitral awards may be challenged for lack of procedural fairness (derived notably from the poor exercise of procedural discretion), there is no basis for challenging an award for the poor exercise of substantive discretion, except insofar as its outcome offends public policy. This leads to the observation that, in its very essence, discretion is both the hallmark of free decision-making, as well as potentially its weakness.[5]

In the context of the taking of evidence as understood under the IBA Rules, Martinez-Fraga posits that arbitrator discretion tampers with the cornerstone of arbitration that is due process, a party's right to choose ***how*** to present their case, in the sense that arbitrator discretion over the presentation of evidence inevitably prevails over that choice and thereby affects process legitimacy. He also posits that the IBA Rules' broad-brush standard of relevancy "to the case and material to its outcome" affords no predictability and is, in and of itself, insufficient to justify the exercise of discretion in relation to the scope of document disclosure, still less its preponderance over the right of a party to choose how to present their case. Martinez-Fraga's proposition is that the exercise of arbitral discretion as to the taking and presentation of evidence is as conceptually and practically unchecked as it is unforeseeable, and that the subordination of party autonomy to arbitral discretion cannot be justified away by considerations of efficiency of process.

On this score, Martinez-Fraga will take no comfort from the 2020 review of the IBA Rules.[6] The IBA Rules 2020 leave arbitral discretion

Association, adopted by a resolution of the IBA Council 29 May 2010, online: *International Bar Association* <www.ibanet.org/resources> (the IBA published an updated version of the Rules on 17 February 2021 accessible on the same website).

5 See Samantha Besson, "Legal Philosophical Issues of International Adjudication: Getting Over the Amour *Impossible* Between International Law and Adjudication" in Cesare Romano, Karen Alter & Yuval Shany, eds, *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014) 413 at 426.

6 See 1999 IBA Working Party, 2010 IBA Rules of Evidence Review Subcommittee & 2020 IBA

undisturbed, with Article 9.8 specifically granting the tribunal discretion to sanction parties for breaches of the Preamble requirement to act "in good faith" in the taking of evidence pursuant to the Rules, notably by means of the apportionment of costs.[7] Referring to this aspect of the 2010 IBA Rules, Martinez-Fraga pointedly says:

> "Good faith and best efforts in the taking of evidence are inextricably intertwined with transparency and may perhaps find theoretical support and functional application when understood through the prism of a 'transparency' standard, as arbitral authority cannot be boundlessly enhanced as a consequence of uncertainty and lack of definition. Perhaps the experiment is one worth undertaking."[8]

The Prague Rules[9] are similarly assessed and, diplomatically, found wanting. Martinez-Fraga notes that they "do not purport to represent a hybrid formulation aspiring to establish equipoise between arbitrator discretion and party autonomy."[10] He rightly points out that some of the premises underlying the creation of the Prague Rules, such as the proposition that the current state of evidence taking (document production, cross-examination) in international arbitration is in part to blame for excessive time and costs, are advanced without supporting empirical bases or comparative studies. He singles out the Prague Rules' Article 7 (*Iura Novit Curia*) and Article 9 (Assistance in Amicable Settlement) as doing violence to the principle of party autonomy and questions whether the conferral of "initiative" to the tribunal, in the guise of the adoption of an inquisitorial approach, would redeem expediency and efficiency as "basic promises endemic to international arbitration."[11]

The author's stated aim is to trace doctrinal developments in the field of international commercial arbitration, one at a time; albeit these developments may "appear minute, virtually non-existent as the imperfections of language, made even worse by flaws in reasoning and the visceral application of doctrine (often dogmatically), without engaging in the introspection and reflection that the subject matter addressed very much

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Rules of Evidence Review Task Force, "Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration", Legislative Comment (January 2021), online: *International Bar Association* <www.ibanet.org/resources>.

7 See *ibid* at 31.

8 Martinez-Fraga, *supra* note 1 at 248.

9 See *Rules on the Efficient Conduct of Proceedings in International Arbitration 2018*, Prague Rules, released in December 2018, online: *Prague Rules* <praguerules.com/prague_rules/>.

10 Martinez-Fraga, *supra* note 1 at 230.

11 *Ibid* at 247.

deserves and compels."[12] The reader is left in no doubt of Martinez-Fraga's irresistible strength of conviction in the idea that international commercial arbitration, heady on its rise to prominence in modern times, runs the risk of cutting corners and manhandling "the brilliance and majesty of the common law in its developmental splendour."[13] This is, unmistakably, the book of a scholarly pragmatist, for whom the promise of international arbitration still holds resonance and who identifies the threats to its legitimacy with accuracy and intelligence.[14]

12 *Ibid* at xv.
13 *Ibid*.
14 Arbitrator, 3 Verulam Buildings, Gray's Inn, London. I am grateful to Carolina Mauro for her research assistance.