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Pedro J. Martinez-Fraga
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THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS

This text traces the contours of U.S. doctrinal developments concerning international commercial arbitration. It explores international commercial arbitration as a bridge that creates symmetry between what the author perceives as an anomaly arising from the disparities between the monolithic framework arising from economic globalization and a fragmented global judicial counterpart. Specifically, American common law discovery precepts are analyzed through the prism of the fundamental precepts of party-autonomy, predictability, uniformity, and transparency of spender, which the author contends to be the rudimentary tenets of both the American common law procedural rubric and the principles that international commercial arbitration seeks not only to preserve but to enhance. Therefore, as the author asserts, the discovery process endemic to American common law comports more closely with international commercial arbitration both procedurally and theoretically than with those of the "taking of evidence" methodology commonly used in international commercial arbitrations held under the auspices of arbitral institutional bodies.

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Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521765886

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First published 2009

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Martínez-Fraga, Pedro J.
The American influence on international commercial arbitration : doctrinal developments and discovery methods / Pedro J. Martínez-Fraga.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-521-76588-6 (hardback : alk. paper)
1. Arbitration and award, International. 2. Discovery (Law) 3. Arbitration and award – United States. 4. Law – American influences. I. Title
K2400.M37 2009
347′.09–dc22 2009000342

ISBN 978-0-521-76588-6 hardback

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To Ana Julieta Martínez-Fraga, who taught the meaning of courage to her siblings – Maria Eugenia and me.

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"As GREGOR SAMSA awoke one morning from uneasy dreams he found himself transformed in his bed into a gigantic insect."

The Metamorphosis, Franz Kafka (1915)[1]

[1] "Als Gregor Samsa eines Morgens aus unruhigen Träumen erwachte, fand er sich in seinem Bett zu einem ungeheueren Ungeziefer verwandelt." *Die Verwandlung*, Franz Kafka (1915).

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Acknowledgments

Succinct acknowledgments are compelled. The thoughts and contributions of my students have played a decisive role in the authorship of this text. It is important, however, to add a disclaimer. Whatsoever inconsistencies or ill-witted propositions may be present are all of my doing and have nothing to do with their valuable input. Professor Michael H. Graham, Professor of Law at the University of Miami, was sufficiently gracious and generous to accept my invitation to write a foreword. The foreword, without more, justified the writing of the book. I appreciate his contribution and ubiquitous insight. My father, Pedro J. Martinez-Fraga, whose name I share, offered extremely meaningful and invaluable observations on both form and substance. Professor Dr. Rafael Domingo Oslé, former Dean of the Universidad de Navarra Law School, currently professor of law of the Universidad of Navarra and President of the Maiestas Foundation, was mercifully relentless in his review of the text and critical analysis. C. Ryan Reetz, my friend and law partner of sixteen years, significantly improved the text. John Berger, Senior Editor of Cambridge University Press, was instrumental in the text's improvement. Harout Samra, a promising lawyer and at the time of this publication an excellent law student, worked tirelessly on my less than reasonable research demands. Finally, a rosary of young colleagues at Squire, Sanders & Dempsey, starting with Raúl Mañón, Tania Cruz, Leah Storie, and Carolina Latour, were particularly helpful and unswerving in their work ethic. My secretary Ericka García certainly deserves recognition.

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Foreword*

In his exceedingly thoughtful, thorough, and provocative work, Pedro J. Martinez-Fraga has drawn upon his many years as a very successful litigator and academic concentrating in international commercial dispute resolution including, but clearly not limited to, international commercial arbitration. Martinez-Fraga challenges others to see for the first time the contributions that doctrines developed in the United States, principally but not solely pretrial discovery, have had and will continue to have in the worldwide process of creating a comprehensive approach to international commercial arbitration.

The approach taken is historical, descriptive, analytical, critical, optimistic, perceptive, and, most important, realistic.

Martinez-Fraga begins with a comprehensive historical analysis clearly depicting the shift in attitude of the United States from antagonism toward commercial international arbitration to what one might call euphoric adulation. He outlines four specific factors that contributed to this change: (1) the United States Supreme Court's interpretation of "international contracts" as a normative basis for according special deference to international commercial arbitrations; (2) a perceived need for specialization akin to the creation of unique subject matter tribunals; (3) recognition that only international commercial arbitration can serve as the conceptual historical dispute resolution bridge until such time as international commercial tribunals come into existence; and (4) recognition that in an era of extensive economic globalization only international commercial arbitration today provides a methodology for dispute resolution that comports with the parties' expectations concerning the fair administration of justice as well as application of their respective judicial cultures.

Martinez-Fraga opines that it is now accepted in the United States that commercial arbitration is a flexible, reliable, transparent, uniform, and predictable methodology for resolving international disputes. Even more importantly, international commercial arbitration is presented and defended as uniquely capable of doing so while fostering party-autonomy and at the same time preserving the party's cultural and juridic expectations.

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Martinez-Fraga's unique perspective as an accomplished practitioner and academic fostered the development of this substantial work of compelling arguments establishing the significance of procedural changes in the conduct of international commercial arbitration with respect to the "taking and the gathering of evidence" as the concept is and more critically may be influenced in the future by the employment of American-style discovery devices. In particular, 28 U.S.C. §1782(a) is analyzed and evaluated in great depth. §1782(a) provides that a federal district court may order a resident of that district or person found therein to give testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, which includes international commercial arbitration, upon application of any interested person. Martinez-Fraga establishes that the purpose of Congress in modifying §1782 in 1964 was to facilitate the conduct of litigation in foreign tribunals, improve international cooperation in litigation, and put the United States into *the* leadership position among world nations in this respect. Congress hoped with §1782 to encourage foreign countries to revise their procedures similarly, that is, adopt pretrial discovery of a similar nature to that provided in the Federal Rules of Civil Procedure. It is here with respect to pretrial discovery that Martinez-Fraga stresses the importance of party-autonomy. He states:

> Providing parties with the normative ability to engage in discovery pursuant to known standards and rules that have benefited from exhaustive analysis and a plethora of jurisprudence stands as paradigmatic of the practical application of the principle of party-autonomy.

Insightfully, Martinez-Fraga forcefully, unapologetically, and, I would add, correctly and bravely asserts in the face of a universe of other commentators who stress harmonization even over achieving the best result that

> [T]he perception that discovery and that the Federal Rules of Civil Procedure are doctrinally and conceptually inimical to the tenets defining arbitration and that arbitration seeks to further is simply wrong, or at least, less than clear.

Martinez-Fraga is not content to stop at this junction but instead explores the potential consequences with respect to the recognition and enforceability of arbitration awards from tribunals hostile to §1782 discovery when it comes to recognition and enforcement of international commercial arbitration awards under Article V of the New York Convention.

Finally, this work tackles two important topical issues, that is, perjury in arbitration and the apportionment of jurisdiction between arbitrators and the courts concerning the validity of a contract containing an arbitration clause as well as developments concerning the severability doctrine and the common law doctrine of manifest disregard of the law.

Party-autonomy has over the years become more and more a staple of international commercial arbitration. The common law adversary system rather than the civil law system is slowly but surely becoming the dominant approach employed. Trial type hearings are being held. Attorneys are presenting witnesses before the tribunal. These witnesses are being subjected to cross-examination by opposing counsel. Under such circumstances, Martinez-Fraga's strong support for American-style pretrial discovery in aid of the arbitration process is reasonable. His arguments in

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support of pretrial discovery are powerful and persuasive. The obstacle to enhanced acceptance of pretrial §1782 type discovery is not utilitarian but perspective. Discovery is a uniquely American, not a common law invention. As such, it faces resistance from others neither familiar with its workings and merits nor particularly prone to seeing something so powerful and uniquely American universally incorporated into what is of course *international* commercial arbitration, not *American* commercial arbitration. As more and more foreign attorneys and arbitrators become familiar with American-style discovery, as has already happened with the common law–style adversary system stressing party-autonomy, greater acceptance and utilization of pretrial discovery in international commercial arbitration for the good will most likely follow. At such time, Pedro J. Martinez-Fraga could say, but won't: "Told you so!!!"

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Preface

Two separate and distinct phrases, each ascribed to a particular jurist, merit mention in a single sentence: *The law is a jealous mistress and a seamless web*. At first glance each clause on either side of the conjunctive appears unrelated to the other but for the common reference to "law." Their intimate connection, however, cannot be obviated. Because the law in its application and theoretical development (jurisprudence) purports to address some of the most delicate and difficult issues that pervade all societies, ranging from the imposition of a death penalty through the legal status of abortion, to equally important concerns in the realms of family law, international disputes, free speech, freedom of assembly, the separation of church and state, and the propriety of juridic entities and attendant liabilities of virtually every ilk (to name just a few), the law cannot help but be all-consuming and seductive because of the very nature of her transcendence subject matter. Similarly, it would be a misapprehension of the organizing principles that fashion legal subject matter to conclude that most of these issues indeed have "answers" that are certain, definitive, pristine, and universal: far from it. Hence, the "seamless web" envelops and enraptures both the practitioner and the theoretician. Like an encounter with infinity, the law has neither a beginning nor an end. It neither progresses nor degenerates but rather changes at times in fascinating ways that appear to defy man's wit. It is precisely the seductive charms of this change that best define the nature of this book.

This text does not purport to memorialize the history of arbitration. Instead, borrowing from Hegel's famous text – *The Philosophy of History* – it is really a kind of "arbitration of history" as it aspires, perhaps wrongfully and rife with flaws, to identify with precision the very essence of the different stages of *stare decisis* in the area of U.S. doctrinal developments in international commercial arbitration. At times these developments appear minute, virtually nonexistent 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 deserves and compels. Thus, this modest effort seeks to underscore the 180 degrees that underlie doctrinal developments that are diametrically opposite, one degree at a time. Only thus is it possible to witness the brilliance and majesty of the common law in its developmental splendor, and in so witnessing it perhaps even intuit how best to improve on what has been learned, in order to, one day, maybe, with fear and trembling, aspire to the law's perfect workings in the field of international commercial arbitration.

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