Book Review

The Idea of Arbitration (Clarendon Law Series) *by* JAN PAULSSON. Published by Oxford University Press, Oxford, 2013, Hardback, ISBN 9780199564163 (336 pp.)

I.

In his satirical work, *The Dictionary of Received Ideas* (*Le Dictionnaire des idées reçues*), which was posthumously published in 1913, Gustave Flaubert famously challenged the clichés of his day, the platitudes to which people automatically resorted as a substitute for actual thought. In his new book, *The Idea of Arbitration* (Oxford 2013), Jan Paulsson does something similar to the platitudes of legal practice.

Take that oldest of chestnuts about the importance of justice being seen to be done. Paulsson writes: 'Not only must Justice be done', it is said, 'it must be seen to be done' – and all heads nod gravely. But why is that so? If injustice may be corrected, is that not enough? Why deprive a litigant of a deserved outcome because of the mere appearance of unfairness?' (91).[1] While Paulsson ultimately concludes that there is some merit to the familiar adage, this is the result of analysis rather than presumption. Or take that worn out expression about public policy being an unruly horse. Quoting *Richard v. Melish* [1824-34] All ER 258, at 266, in which Lord Burroughs wrote the often-quoted passage, Paulsson writes: 'This passage is endlessly repeated but hardly ever examined in context.' (130). And, following such an examination, Paulsson argues that the case 'tells us nothing about what it would actually take for a contract to be held to contravene public policy'. (131). Or take the common opening of many books about arbitration – the search for reassurance in historical antecedents. Paulsson does not let this slide either. 'These references, standard fare in the opening pages of books about arbitration have more than a whiff of propaganda about them'. (9). Paulsson goes on to assert that 'modern arbitration cannot persuasively claim a lineage in classical Islamic law. This example should make us wary of others as well'. (*Id.*) I highlight this aspect of Paulsson's new book because it underscores one of its central features – it is analytical and rigorous in its approach, rather than anecdotal and platitudinous.

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[1] All page numbers alone in round parentheses are to *The Idea of Arbitration.*

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The last few years have seen several books by leading practitioners in the field. Gary Born's remarkable book, *International Commercial Arbitration* – now in its second edition and three volumes – is primarily a book for practitioners. I use it almost daily and am constantly amazed to find that it consistently and coherently addresses every issue on which I've had occasion to consult it. Think of the most obscure issue that may arise in practice, chances are that Born's book has something illuminating to say about it. On the other end of the spectrum is Emmanuel Gaillard's seminal and insightful book, *Legal Theory of International Arbitration* (originally published in French under the title, *Aspects philosophiques du droit de l'abitrage international*). This book is primarily theoretical, focusing on several different theories about the legal foundations of international arbitration, and discussing them by reference to their implications for various different issues that arise in the field, such as whether a court in another country should give effect to an award set aside in the country of the seat.

Paulsson's new book, *The Idea of Arbitration,* stands somewhere between Born's and Gaillard's. It is not purely a book for practitioners, but a practitioner will find much of use it in. Thus, it contains one of the clearest discussions of the separability doctrine that I have ever read (60–72). Nor it is purely theoretical, although there is much theory in it. Thus, Paulsson draws on Italian legal philosopher Santi Romano's theory, set forth in *L'ordinamento giurdico* (*The Legal Order*) (published in 1918 but never translated into English), to offer a legal foundation for arbitration that is, at its heart pluralistic, and that views arbitration as somewhat autonomous from and transcendent of the legal order of any particular jurisdiction. (46–48, 187–188, 195–197).

But regardless of whether it is characterized as theoretical or practical, if the measure of any book is whether it is rigorous in approach, illuminates its subject with fresh ideas, and compels you to re-examine what you took for granted, then this gracefully written book is exemplary.

II.

Paulsson's book takes as its point of departure a single idea about arbitration: 'that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers'. (1). He begins with the assertion that 'arbitration is a matter of political philosophy', and that '[t]he argument for arbitration begins with respect for private arrangements . . . The philosophical premise is that people are free to arrange their affairs as they see fit, provided that they do not offend public policy or mandatory law'. (2).

A question that runs through Paulsson's book is, indeed, one of political philosophy: the degree to which the private arrangements reflected arbitral agreements should be tolerated by the state. 'Arbitration provides an obvious alternative to state-administered courts, but to what extent will it be tolerated by the state?' (99, *see also* 30, 256-59 and 300). And, if it is to be tolerated at all, to what degree? This leads Paulsson to posit that free societies are more tolerant of

arbitration than authoritarian ones. 'The presumption in free societies is that citizens may arrange their affairs as they see fit. This includes the freedom to opt for arbitration instead of the courts.' (104). By contrast, '[a]uthoritarian states are jealous of all power, and so resist any dilution of the monopoly of their courts. They tolerate arbitration grudgingly, and even then contrive to suffocate the process with heavy formalism and nebulous exceptions . . . '. (105).

It is worth pausing to reflect on Paulsson's focus on the notion of state toleration of arbitration. It is a long detour, but I will rely on the ideas expressed in Part III below in returning to Paulsson's book in Parts IV and V.

III.

The American legal realists were not the first to make the point that mere toleration by the state of private contractual arrangements is insufficient for their efficacy. But the realists' approach to the issue is particularly illuminating. In his 1933 article in the Harvard Law Review, *The Basis of Contract*, Morris Cohen challenged a then-prevailing view of private contractual relations – that they reside in a private realm separate and apart from the state. Essential to the efficacy of contractual arrangements, Cohen insisted, was the ability of the non-breaching party, through the courts, to invoke the coercive power of the state to seek relief. State *tolerance* of contractual relations was not enough for their efficacy; more was needed – state *assistance* to enforce the bargain struck by the parties.

> It is an error then to speak of the law of contract as if it merely allows people to do things. The absence of criminal prohibition will do that much. The law of contract plays a more positive role in social life, and this is seen when the organized force of the state is brought into play to compel the loser of a suit to pay or to do something. . . . The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. It thus grants a limited sovereignty to the former.[2]

The same is true of arbitration agreements. While most parties may respect their agreements to arbitrate and comply with arbitral awards, a factor giving rise to this respect and compliance is precisely that the non-breaching party can seek relief from courts. As Cohen wrote:

> Doubtless most people live up to their promises or agreements either through force of custom or because it is in the long run more advantageous to do so. But there can be no doubt that the possibility of the law's being invoked against us if we fail to do so is an actual factor in the situation. Even if the transactions that come to be litigated are atypical, their judicial determination is still influential in molding the legal custom. For the ruling in a case that departs from the mode supports or opposes some direction of variation and thus fixes the direction of growth of what becomes customary. The fact, then, that in the general run of transactions people do not resort to actual litigation, is certainly in part due to the fact that they know in a general way what will be the outcome of that process.[3]

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[2] Morris Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 585-586 (1933).
[3] *Ibid.*

In the light of the fact that state coercive power is essential to the effectiveness of certain agreements, so it follows that its legislative and adjudicative institutions have some choice as to which private arrangements to lend their enforcement authority. 'If, then, the law of contract confers sovereignty on one party over another (by putting the state's forces at the disposal of the former), the question naturally arises: For what purposes and under what circumstances shall that power be conferred?'[4] In other words, state institutions have a choice; before enforcing a contract, they may look at the circumstances in which it was entered into (e.g., a party is a minor or was fraudulently induced to sign), may choose to enforce contracts not simply against signatories but also against those who did not sign (e.g., principals of a signatory agent, parents of signatory corporations, or third parties who benefited from the contract), or may choose not to enforce certain contracts at all (e.g., illegal or unconscionable contracts).

Cohen's notion that state coercive power is essential to the efficacy of certain types of contracts has three important implications for arbitration.

First, in the case of arbitration, the power of the state is doubly implicated. It is true of any contract that a party can go to court to enforce it. So it goes with arbitration agreements; a party can, for example, seek specific performance, ask a court to compel the other party to arbitrate. But an arbitration agreement differs from other contracts in that it contemplates a process (an arbitration proceeding) that ultimately may produce an arbitration award, which itself also requires for its effectiveness the assistance of the state. When it comes to arbitration, it is not sufficient that the courts enforce arbitration agreements. It is necessary that they also enforce the ultimate product of those agreements – the arbitration award. If arbitration awards were not enforceable in the courts, arbitration would be toothless.

But this double requirement for state support creates two occasions for legislative and adjudicative involvement and choice – with respect to the arbitration agreement and to the arbitration award. Take, first, arbitration agreements. In the United States, for example, the purpose of the Federal Arbitration Act (FAA) is often stated to be that of placing arbitration agreements on 'equal footing' with other contracts.[5] Section 2 of the FAA provides that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'. Thus, in the same way that the state need not lend its support to just any contract – that grounds may exist at law and equity for the revocation of *any* contract – so it goes for arbitration agreements.

Similarly, it was for a time settled that United States courts would not enforce arbitration agreements that implicated considerations of public policy.[6] This position was later reversed; in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[7]

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4 *Ibid.*, at 587.
5 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).
6 *Wilco v. Swan*, 346 U.S. 427 (1953) (claims arising under federal securities laws held not to be arbitrable).
7 473 U.S. 614 (1985).

the Supreme Court rejected the notion that claims under the United States antitrust laws were not arbitrable as a result of the 'pervasive public interest in enforcement' of such laws.[8]

The same goes for an arbitration award. Precisely because the enforcement of an arbitration award implicates the coercive power of the state, so its legislative and adjudicative institutions may choose not to lend their support to *just any* award. Again, United States law furnishes an example. While the Supreme Court held in *Mitsubishi* that the public policy embodied in the United States antitrust laws is no defense to the enforcement of an arbitration *agreement,* it took a different view when it came to the arbitration *award. Mitsubishi* held that a court would 'have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed', and could refuse to recognize an award on the basis of public policy.[9]

In another case, a United States court refused to permit parties to an arbitration agreement to eliminate the narrow statutory grounds for setting aside an arbitral award in section 10(a) of the FAA precisely on the ground that the enforcement of an arbitration award involves the coercive power of the state:

> An agreement that contemplates confirmation but bars all judicial review presents serious concerns. *Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors*. In enacting §10(a) [of the FAA], Congress impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct. This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts. Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with §10(a).[10]

A second implication of Cohen's insight stems from the fact that, under the New York Convention, arbitration agreements are enforceable internationally to a degree that no other contract is and arbitration awards are enforceable internationally to a degree that no court judgment is. The result is that arbitration agreements and awards can routinely implicate the coercive power of more than one state, with different cultures, policies, and laws from the country of any particular party to the arbitration, or where the arbitration was seated, or the law of which governs the contract. This, of course, can lead to conflicts, raising questions such as whether a court in one country might refuse to lend its

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8 *Ibid*., at 629. *See also Scherk v. Alberto-Culver Co*., 417 U.S. 506, 519 (1974) (finding no basis to refuse to compel arbitration of US securities law claims since to decline to enforce an arbitration agreement based on local public policy 'would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts . . . ').

9 *Mitsubishi*, 473 U.S. at 638.

10 *Hoeft v. MVL Group, Inc*., 343 F.3d 57, 64 (2003) (emphasis added).

enforcement authority to arbitration agreements or awards that a court in another country might choose to enforce.

Third, the fact that judicial assistance is essential to the efficacy of arbitration creates for it a very particular predicament. One way of understanding an arbitration clause is as an agreement by which parties renounce a right they would otherwise have to resolve particular disputes (typically those arising out of a larger agreement containing the arbitration clause) in court; their intent is to resolve that dispute by arbitration *instead of* in the courts. Yet if one party does not live up to its obligation to arbitrate – if it initiates litigation despite its arbitration agreement or refuses to comply with an award – sometimes the only solution is for the other party to invoke the very judicial process it sought to avoid by agreeing to arbitrate in the first place.

In this way an arbitration agreement is, again, different from other contracts. While I may wish to avoid the expense and inconvenience of court proceedings to enforce a contract when someone fails to deliver goods for which I have paid or when someone fails to repay a loan, my seeking judicial assistance is not fundamentally inconsistent with the bargain I struck. But when I go to court to enforce an arbitration agreement or award, it is. And herein lies the predicament. On the one hand, I may have no choice but to go to court to compel a party to comply with its obligations under an arbitration agreement. On the other, my invocation of the judicial process to enforce my arbitration rights is fundamentally at odds with my rationale for entering into an arbitration agreement in the first place.

This point can be put another way. When it comes to disputes about a contract, assuming the proper formalities are met and the circumstances in which it was executed and subject matter proper, the fundamental aim of a court is to identify and give effect to the intent of the parties. But when the intent of the parties in entering an arbitration agreement was to resolve particular disputes in arbitration *instead of in the courts,* the precise court involvement required to give effect to the parties' intent in some fundamental sense subverts it.

One extreme solution to this predicament would be to require courts to lend their enforcement authority to arbitration based on one party's bare allegation that a dispute belongs in arbitration. A court could compel party A to arbitrate a dispute with party B based simply on party B's mere claim that the parties agreed to arbitrate that dispute, leaving it to the arbitrators to resolve party A's objections to arbitration. While this may guarantee arbitration its efficacy, it does so at the expense of its legitimacy.

Take, for example, a case where party A forged party B's signature on an arbitration agreement. Imagine that a court allowed that case to skate into arbitration based simply on party A's mere declaration that it had an arbitration agreement with party B, on the theory that the arbitral tribunal would determine whether that agreement was forged. The tribunal, in such a case, would lack the authority to make the precise determination it has been asked to make since a forged agreement could not supply that authority.

Of course, legitimacy could be ensured if courts were required to undertake a full hearing on the merits (with appropriate appellate review) of even the barest of objections to an arbitration agreement. While this might bestow on arbitration legitimacy – any and all objections would have been scrupulously addressed by the courts before an arbitration proceeding could even get going – the effect would be to render arbitration futile.

No single value animates arbitration. Crosscurrents abound. While arbitral efficacy is essential, so is its legitimacy.[11] But that arbitration is at the same time dependent upon and incompatible with the enforcement mechanisms of the state, that it must strike a balance between efficacy and legitimacy, and that its international character may result in conflicts raise intractable questions. Should state institutions lend their enforcement authority to arbitration? And can they provide that assistance without subverting arbitration altogether? What degree of scrutiny should courts give to any particular challenge to an arbitration agreement? And when? And how should a court deal with the fact that it may be called upon to enforce an arbitral award that is offensive to its laws and policies?

Much as we may be unsure about the right the answer to these questions, one thing is clear – every country, through its arbitration laws and judicial decisions, lives *some* answer to these questions all the time. And if we are to be able to undertake any critique of the arbitration law or judicial practices of any particular country, or if, as countries consider revising their arbitration laws, we are to offer suggestions about the right way forward, we need to address them.

One way of reading Paulsson's book is as an attempt to do just that, and I will discuss only a few of the many answers he offers in his rich book below. But Paulsson's book also does more than that. He offers a vision of arbitration as a legal order somewhat autonomous and independent of the state. I argue in Part V that this vision is unconvincing.

IV.

Paulsson seeks to address the intractable questions that arise from the fact that arbitration at the same time both rejects the state yet requires it for its survival. 'The great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself. The "law of arbitration" as rationally conceived, that is to say the law applicable to the arbitration process, is the manifestation of this tension. What will the state tolerate? To what will it lend its authority and power? Are arbitrations perforce legally connected to a particular jurisdiction? If so, is it correct to say that only the law of that single jurisdiction may

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[11] I borrow the terminology to express these dueling ideals from Professor George Bermann. See, e.g., George A. Bermann, *Forum Shopping at the 'Gateway' to International Commercial Arbitration*, in *Forum Shopping in the International Commercial Arbitration Context* 71 (Franco Ferrari ed.) ('legal systems have a serious enough interest in properly reconciling the values of efficacy and legitimacy at the outset of arbitration to warrant their developing an adequate framework of analysis, as well as articulating that framework in a clear, coherent, and workable fashion').

give effect to awards? Can arbitration function without the support of the law of a particular state? These questions become more tangible when they arise in an international context.' (30).

In a chapter called 'Private Challenges' (Chapter 3), Paulsson addresses the objections that private parties might make in the arbitration context, either to the agreement to arbitrate (e.g., the agreement is forged or the dispute is outside the scope of the arbitration agreement) or to an award (e.g., the arbitrators did not accord due process to a party). And while private challenges to arbitration are inevitable, Paulsson points out that if those challenges are always to be resolved in the courts, arbitration would become undesirable. 'If endless squabbles in court about the accessibility of arbitration were allowed to derail the process, it would lose its allure. And if similar disputation before judges arises in the wake of awards, the effect may be worse than futility, given the wasted time and treasure' (51). Central to the efficacy of arbitration, therefore, is some account of the appropriate relationship between the courts and the arbitrators. Who as between the court and an arbitrator should resolve a particular challenge to arbitral authority? And, if a court is to resolve an issue, when – the beginning of the arbitral process, during, or the end?

In this chapter, Paulsson discusses the doctrines by which the authority of courts and arbitrators has traditionally been allocated – the doctrines of Kompetenz-kompetenz and separability. He argues that these are ill-suited to the task of doing so, and proposes an alternative. 'For a half a century now, insightful commentators, no matter how they favour of Kompetenz-kompetenz and separability have observed that no answers come from dogmatic attachment to these figures of speech, but rather from attention to the objective they were intended to serve, namely the ascertainment of the intention of the parties.' (51). He, thus, offers 'an immodest proposal: an overarching presumption intended to solve most problems associated with the *who* and *when* issues'. (52). Long as it is, it is worth quoting in full:

> Provided that the proponent of arbitration makes a *prima facie* case (with the evidence being construed in its favour) to the effect that the objecting or defaulting party is bound to arbitration with respect to the subject matter at issue, courts shall presume that the agreement to arbitrate intends that an arbitral tribunal constituted in accordance therewith should be first to decide any controversy as to what parties are bound by the agreement, and as to its validity, as well as what claims and defences are covered by it. This presumption is reinforced in the context of international transactions or relationships. Although judicial review may be plenary with respect to the validity of the arbitration agreement, arbitrators' determinations as to the scope and timeliness of arbitrable claims should be presumed to be final (subject as always to judicial authority to determine whether the effect of enforcing an award would be contrary to public policy).

(81).

This proposal can be viewed as an attempt to balance the requirements of efficacy and legitimacy. It attempts to minimize court interference with arbitration; the party seeking to arbitrate need make only a *prima facie* case, with the evidence construed in its favor, for a case to be sent to an arbitrator. At the same time, it

seeks to foster the legitimacy of the process by requiring a court to undertake some level of inquiry and by reserving to court the authority to resolve certain objections in some circumstances – if the party seeking arbitration fails to make a *prima facie* case or the party resisting arbitration rebuts the presumption that those objections should be resolved by an arbitrator.

It is interesting to note that, under United States law, the presumption is the reverse of that posited by Paulsson. When it comes to the 'who decides' question, there is a presumption that courts, rather than arbitrators, have the authority to resolve disputes about arbitral jurisdiction unless there is clear and unmistakable evidence that the parties intended otherwise. *First Options of Chicago, Inc. v. Kaplan.*[12] However, the force of this presumption is severely diminished by the fact that it is often not hard to identify the clear and unmistakable evidence necessary to rebut it. Thus, courts have found the 'clear and unmistakable evidence' necessary in both the language of an arbitration clause and the rules under which the arbitration is to be conducted. Thus a clause providing that 'any and all controversies . . . shall be determined by arbitration' was found to be sufficient in some cases.[13] Similarly, some courts have found that an agreement to arbitrate under the rules of the ICC,[14] the AAA[15] and UNICTRAL,[16] each of which includes a specific rule giving a tribunal the authority to resolve certain challenges to its jurisdiction, constitute such clear and unmistakable evidence.

Paulsson's approach finds some support in U.S. law. In *Contec Corporation v. Remote Solution Co., Ltd.*,[17] Contec, a nonsignatory to an arbitration agreement, sought to compel arbitration with Remote Solution, a signatory, arguing that Remote Solution was estopped from avoiding arbitration. Because the arbitration agreement incorporated the AAA Rules, the court found the clear and unmistakable evidence necessary to satisfy the *First Options* test. Notwithstanding this, Remote Solution objected that it should not 'be compelled to arbitrate with a stranger to the 1999 Agreement because the contractual language is effective only between the contracting parties', such that the threshold issue of whether the dispute was arbitrable should be resolved by the courts rather than the arbitrator.[18]

The court rejected this argument. It held, in essence, that it need not itself resolve whether the dispute should be arbitrated. Rather, it need only make a *prima*

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12 514 U.S. 938, 942 (1995).

13 *Paine Webber, Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) ('The words "any and all" are elastic enough to encompass disputes over whether a claim . . . is within the scope of arbitration.'); see also *Smith Barney Shearson Inc. v. Sacharow,* 91 N.Y.2d 39, 46-47 (NY 1997) (holding that language providing for '[a]ny controversy' between the parties to be 'settled by arbitration' was sufficiently 'plain and sweeping' to indicate an intent to have arbitrability decided by the arbitrators).

14 See, e.g., *Shaw Group, Inc. v. Triplefine, Int'l,* 322 F.3d 115, 122 (2d Cir. 2003); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472-473 (1st Cir. 1989); *Daiei, Inc. v. United States Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991).

15 See, e.g., *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Qualcomm Inc. v Nokia Corp.*, 466 F.3d 1366, 1372-1373 (Fed. Cir. 2006); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327, 1332-1333 (11th Cir. 2005).

16 See, e.g., *Republic of Ecuador v. Chevron Corp.,* 638 F.3d 384 (2d Cir. 2011).

17 398 F.3d 205 (2d Cir. 2005).

18 *Ibid.*, at 209.

facie determination of whether there was a sufficient basis for the case to go to the arbitrator to determine whether Remote Solution was obligated to arbitrate. 'In the present case, neither we nor the district court must reach the question whether Remote Solution is estopped from avoiding arbitration with Contec Corporation. . . .' *Id.* Rather, the court undertook a minimal inquiry into whether there was a 'sufficient relationship' between the parties 'to permit Contec Corporation to compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable because Contec Corporation cannot claim rights under the 1999 Agreement'. *Id.* The court found three factors significant: 'First, there is or was an undisputed relationship between each corporate form of Contec and Remote Solution. Second, Remote Solution signed the 1999 Agreement. Finally, the dispute at issue arose because the parties apparently continued to conduct themselves as subject to the 1999 Agreement regardless of change in corporate form.' *Id.*

In Chapter 5, 'Ethical Challenges', Paulsson considers the issue of legitimacy – what he calls arbitration's Achilles Heel. 'Confidence in the ethical standards of arbitration and arbitral institutions is the Alpha and Omega of the legitimacy of the process.' (147).

Paulsson identifies the characteristics an arbitrator must have to be 'fit to serve' – 'integrity and aptitude'. (149). He asserts that 'the core components of integrity are independence and impartiality' and that aptitude itself has an ethical component, since '[i]t is dishonest to accept without a solid understanding of the relevant domain, or without a considered commitment to give the matter full and timely attention'. *Id.* Paulsson, however, believes that there are serious limits on the degree to which the ideals of independence and impartiality can be secured by disclosure. 'Disclosure is insufficient to cure all ills, and the answer cannot be more disclosure. It is an intrinsically limited tool.' (153).

Paulsson decries with some force a common feature of international arbitration – the party-appointed arbitrator. He writes that 'the practice is at odds with the very concept of arbitration. It touches on a simple but profound matter. The legitimacy of arbitration reposes on the parties' confidence in arbitrators, and there is no reason to believe that any party is willing to have its cases decided by its opponent's chosen arbitrator'. (156). Paulsson supports his objection with real life examples of party-appointed arbitrators who felt pressured to decide a case in favor of the party that appointed them and with studies showing that virtually all dissenting opinions are written by the arbitrator appointed by the losing party.

Paulsson asserts that '[t]he only justification for unilateral appointments is that they may avoid the risk of lapses on the part of institutions acting as appointing authorities. The goal should be to enhance parties' confidence in these institutions, to the point that the need for this unfortunate expedient disappears'. (163).

Paulsson's proposal to jettison the practice of unilateral arbitral appointments appeared prior to the publication of his book, having been advanced in his April 2010 inaugural lecture as holder of the Michael R. Klein chair at Miami University. And that proposal inspired a great deal of debate in the international arbitration community. One argument Paulsson's detractors often made in

opposition to his proposal was to invoke the ideal of party autonomy; abandoning the practice of unilateral appointments, they argued, undercut that ideal. Either a party has a say in the constitution of an arbitral tribunal through the practice of unilateral appointments, so this argument runs, or it has no say at all and the matter is left in the hands of an institution or appointing authority.

As someone who finds much to commend in Paulsson's proposal, I view this objection as resting on a false dichotomy. It is simply not the case that if the practice of unilateral appointments were abandoned, parties would have no say at all in the constitution of an arbitral tribunal. As an example of how some degree of party autonomy can exist without the practice of unilateral arbitral appointments, consider the default method of appointment used by the International Centre of Dispute Resolution (ICDR) (the international arm of the AAA) – the list method.[19]

The list method contemplates that the ICDR supplies the opposing sides to an arbitration proceeding the same list of 15 potential arbitrators (in the case of a three-person tribunal) from its roster of arbitrators, following a discussion with the parties about the qualifications or characteristics they would like to see in the members of the tribunal. Following receipt of this list, the parties are invited to attempt to agree on the constitution of the panel. Failing that, each side strikes from the list those whom it does not wish to see on a tribunal and ranks the remainder. And, without sharing this information with the other side, each side submits its rankings to the ICDR. The ICDR then selects the members of the tribunal based on a review of both sides' rankings of those remaining on the list. Typically, this method produces a three-person tribunal following the circulation of one or two lists. Significantly, the arbitrators ultimately selected have no knowledge of the rankings assigned by any party. The effect is that the parties have some say in the constitution of the tribunal – some degree of party autonomy is maintained – but no arbitrator considers herself to have been appointed by any particular party. It is a process that works.

It is hard to do justice to all the topics addressed by Paulsson in his wide-ranging book. In addition to the matters discussed above, he also offers ruminations on arbitration's past (Chapter 1) and its future (Chapter 9); he also discusses the legal foundation of arbitration (Chapter 2), the question of why the state should tolerate arbitration at all (Chapter 4), the role of public policy in international arbitration (Chapter 7), and an arbitrator's authority to reject 'unlawful laws' (Chapter 8).

V.

Paulsson also offers a vision of arbitration as somewhat autonomous from the state and law. In outlining his views, as noted earlier, Paulsson relies upon Santi Romano's legal theory – a theory that sees 'every organized social group as a kind

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[19] The ICDR has long used this method in practice. In its most recent revisions to its International Arbitration Rules, the ICDR made this method of arbitrator selection explicit. See Art. 12(6), ICDR Arbitration Rules, effective 1 Jun. 2014.

of legal order' distinct from the nation state. (46). Paulsson elaborates on this theory as follows:

> Santi Romano perceived a legal order wherever one finds an 'institution' characterized by significant longevity, lack of dependence on any single individual, and the capacity for meaningful autonomy. Some such institutions are historical, such as family, church, and state. New ones arise: business entities, labour unions, economic cooperatives, sports federations, political parties, criminal associations. The common convictions and purposes of these groups transcend those of individual members. They are perfectly capable – this we need to see – of generating legal systems, be they admirable or grotesque. The state thus finds itself to be one among hundreds of institutions. Many of them will enjoy a greater allegiance of its members than they feel for an unresponsive state.

(195).

Romano's theory, Paulsson says, 'allows us to see the success of arbitration through the prism of legal order different from that of the nation state, and in some contexts more efficient than the latter'. (47). This vision is 'all-embracing . . . from the lofty formalism of grand tribunals established with pomp and circumstance to the most casual directive from a personage whose lifted eyebrow is all that is required in a particular milieu'. (188).

It is sometimes hard to understand the implications of this approach. There are times when Paulsson appears to offer a view of arbitration as entirely independent of the state; his vision is 'the most autonomous of all ways of perceiving arbitration, given that it does not depend on national law or courts'. (45). There are other times when Paulsson does not take such an absolute view. 'When this revised model of pluralism operates, arbitrators would no doubt on occasion be pleased to qualify for assistance from the machinery of the state. On occasion that same machinery may intervene to exclude the possibility of arbitration. *But the point is that this is a vision of arbitration which functions routinely without judicial assistance.*' (45) (emphasis added).

There are two ways to understand 'a vision of arbitration which functions routinely without judicial assistance'. (45). One is by reference to the discussion earlier in this piece that drew on Morris Cohen's analysis. That view begins with the premise that judicial assistance is indispensable to the efficacy of private contractual arrangements. And, as I have argued, in the case of arbitration, unlike other contractual arrangements, it is doubly essential; adjudicative support is necessary both for the enforcement of the arbitration agreement and the award. On this view, the fact that parties typically comply with their obligations under arbitration agreements (or contracts in general) – the fact that arbitration 'functions routinely without judicial assistance' – does not imply that adjudicative assistance is a dispensable trimming to arbitration. To the contrary, the availability of such assistance – the possibility of recourse to the courts – shapes the custom of compliance. It is essential to its efficacy, even if actual recourse to the courts is atypical. Thus, take away judicial support and, eventually, the practice of compliance would fade.

But if that is the way Paulsson understands the notion of arbitration routinely functioning without judicial assistance, he would hardly need to rely on a theory that views arbitration as autonomous from the law or the state in order to make the point, would not need to invoke Romano's theory at all. I understand Paulsson to mean something different when he offers a vision of arbitration that 'functions routinely without judicial assistance'; it does so not because courts are an essential but rarely used backstop to the effective functioning of arbitration, but, rather, because arbitration 'cut[s] across the horizontal lines of purported state authority', and, per Romano, is a legal order that is somewhat independent of and autonomous from the state. (50).

Indeed, Paulsson sometimes writes as if arbitration does not need the state at all, even for the imposition of sanctions for non-compliance. He writes: 'Santi Romano's insight is that other legal orders may function without intersecting with national orders at all . . . Such orders may fill the vacuum when public institutions fail. They may be a hallmark of a fluid legal universe, with significant elements of self-governance, *as the arbitrants themselves, replacing the legislative and executive arms of the state, create norms and ensure their sanctions*.' (48 (emphasis added)). This reading of Paulsson's approach is consistent with his focus on state toleration of arbitration; if arbitration has a life of its own 'outside the conventional statist model' (47), then it is sufficient that the state tolerate it. But if this is Paulsson's argument, I do not find it unconvincing.

What is at issue here, after all, is the efficacy of arbitration. I believe the possibility of relying upon state adjudicative institutions to enforce an arbitration agreement and award is indispensable to its effectiveness, even if it is not typically necessary actually to seek the relief of the courts. This view sees arbitration as taking place in the shadow of the courts at the place of arbitration and the longer shadow cast by courts at the place of likely enforcement. This view of arbitration is also consistent with the reality that practitioners always need to have some understanding of the law at each of those places properly to advise clients.

Paulsson offers a vision of arbitration modeled on the social groups that Romano characterized as legal orders independent of the state. 'Romano insisted that every social group perforce generates norms, whatever their quantity, scope and form. He therefore gave little important to the matter of sanctions, which others have considered to be the essence of a legal system but which Romano was prepared to see simply as a means of pressure inherent in the power of the social environment . . . ' (187–188).

But, a characteristic of the social groups that Romano has in mind – social orders where a sanction (e.g., state coercive power) is not essential to compliance – is that '[t]he common convictions and purposes of these groups transcend those of individual members'. (195). The examples Paulsson offers of such groups include the family, church, sports federations, or political parties. (*Id. See also* 46.)

But this very characteristic and these very examples highlight the inappropriateness of using Romano's approach as a foundation for a general

theory of arbitration.[20] At the base of any arbitration is a contract, often a contract between persons (or legal entities) who are strangers, and typically between persons without sufficiently strong ties of common conviction or purpose to transcend their individual interests with respect to the subject matter of that contract. The social orders that Romano has in mind are in some cases not based on contract at all; people are typically born into families or particular religions. In a family or religion, the allegiance of its members is based not on the terms of some contract they have signed, but on their shared way of life, and their common practices and convictions.

But even in those examples used by Paulsson where there is a choice and a contract – I choose to become a member of a political party— there is an antecedent commonality of conviction or purpose that, in most cases, transcends the formal contractual relationship that gives rise to my membership. I join a political party because I share the views of its members, not the other way around; the shared conviction precedes the contract. In such a context, it makes sense to assert that recourse to the coercive power of the state to enforce obligations is not essential for compliance, the commonality of purpose – the 'pressure inherent in the power of the social environment' – is sufficient. (188). Thus, in the context family, the 'lifted eyebrow' of a parent to a child may indeed 'be all that is required', to use Paulsson's example. (*Id.*). Or it may be that my desire to remain a member of a group that shares my convictions, interests or goals – a political party or religion or sports federation – is sufficient to ensure my compliance with its rules.[21] No adjudicative assistance is necessary.

But, when it comes to the typical arbitration agreement – one outside the context of a particular religion or family whose members share understandings and convictions – the parties are often strangers or, even where they are not (e.g., long-standing joint venture partners to a commercial contract), they share no commonality of purpose so strong that it transcends their individual self-interest when it comes to the subject matter of the contract. Unlike members of a family or religion, they have no shared way of life or convictions of such force that they override their particular desires when it comes to the area governed by their agreement. In the absence of such commonality of purpose or identity to ensure compliance, arbitration is dependent on adjudicative assistance; arbitration needs the law.

I advance this criticism of Paulsson's vision not to confute but rather in the hope that in the many future editions of his book Paulsson may be persuaded to elaborate upon his ideas. And I am conscious that my argument rests on a particular interpretation of Paulsson's views, and, therefore, would not be surprised

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[20] None of this is to question Romano's approach as such. Rather, it is to question whether it can be used as the foundation for a general theory of arbitration.

[21] The Beth Din arbitral tribunals in the Jewish religion illustrate the point. Arbitration can function effectively without recourse to the secular courts as a result of the shared religion of the participants. Indeed, as Paulsson notes, pursuing relief in the secular courts can result in excommunication. (114n.28). But this type of arbitration – where the shared understandings of the participants are sufficient to ensure compliance – is atypical, and can hardly be used as a model for a general theory of the foundation of arbitration.

if my criticism could be answered by some further explanation that he could supply.

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I highly recommend this important book. It is destined to be read and deliberated over for many years to come.

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