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Zachary Burley

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THE IDEA OF ARBITRATION

By
Zachary Burley *

I. INTRODUCTION

The Idea of Arbitration is authored by Jan Paulsson, the Michael Klein Distinguished Scholar Chair at the University of Miami School of Law.¹ Paulsson is an internationally recognized figure in the field of international arbitration. He is a former President of the International Council for Commercial Arbitration, immediate past President of the LCIA, a former Vice-President of the International Court of Arbitration of the International Chamber of Commerce, a member of the Permanent Court of Arbitration in The Hague, a board member of the American Arbitration Association, and a member of the Singapore International Arbitration Court.² He is President of the Administrative Tribunal of the European Bank for Reconstruction and Development, a Judge of the IMF Administrative Tribunal, and past President of the World Bank Administrative Tribunal.³ Paulsson is also a founding partner of Three Crowns LLP, a boutique international arbitration firm located in Washington DC, London, and Paris.⁴

Paulsson wrote this book to offer a theoretical foundation for understanding how arbitration functions in society.⁵ He poses fundamental questions such as, “what makes us confide in an arbitrator?” and “when arbitrators have been chosen, may their conduct or decisions be questioned?”⁶ It was Paulsson’s theoretical goal to examine whether the arbitral process, which has proven itself to be a “valuable social institution,” will continue to be valuable and adaptive to the many challenges it faces today.⁷ The methodological premise of this book is to present the materials of the book in a way that even readers with little to no arbitration knowledge will be stimulated and able to discuss the propositions within the book.

* Zachary Burley is an Associate Editor of *The Yearbook on Arbitration and Mediation* and a 2016 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ JAN PAULSSON, *THE IDEA OF ARBITRATION* (2013).

² See Jan Paulsson, <http://www.law.miami.edu/faculty-administration/jan-paulsson.php> (last visited Dec. 23, 2014).

³ *Id.*

⁴ *Id.*

⁵ PAULSSON, *supra* note 1, at vii.

⁶ *Id.*

⁷ *Id.*

This book is an excellent tool for law students, legal professors, and practitioners alike. It examines fundamental ideas relevant to arbitration that challenge any reader to think more profoundly and come to a better understanding of those ideas.

II. OVERVIEW

The Idea of Arbitration is comprised of nine chapters which can be grouped into three parts: the past, present, and future of arbitration. Part One, which includes Chapter One, speculates about the past and why we as a society choose to arbitrate. Part Two consists of seven chapters that attempt to look carefully at the present state of arbitration. Within Part Two, the chapters discuss topics such as the legal foundations of arbitration (Chapter Two), public policy limitations (Chapter Four), and even the inadequacies of arbitration (Chapter Five), just to name a few. Part Three, the final chapter, focuses on the future of arbitration.

III. PART ONE: CHAPTER ONE: THE IMPULSE TO ARBITRATE

“The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.”⁸ This is Paulsson’s thesis laid out in the first sentence of his book. What kind of entity can achieve this level of acceptance? Surely not courts, Paulsson suggests.⁹ Courts cannot achieve this goal because courts are forced to struggle with philosophical ideas of a “social contract” that often lacks any mooring to reality.¹⁰ Arbitration, on the other hand, can achieve that goal because arbitration is freedom reconciled with law.¹¹ Acceptance of arbitration is a distinguishing feature of free societies.¹² Paulsson hypothesizes this because most people find it demeaning to be told what to do and fear abuse from those in power.¹³

However, there is a paradox because people want freedom, yet they also want law.¹⁴ Generally, people are willing to give up some of their freedom for a bargain, such as avowing oneself to criminal laws so to obtain protection by those same laws.¹⁵ This

⁸ PAULSSON, *supra* note 1, at 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ PAULSSON, *supra* note 1, at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 2.

bargain also applies to reckless behavior in the hopes that society as a whole will behave more prudently and to contracts in that we accept a bad bargain because, on the whole, we want contracts to be final and binding.¹⁶ We accept the “rule of law,” yet there is a lot of hesitation to do so because each of us individuals have varying degrees of perceptions and interactions with the law.¹⁷ As Paulsson so eloquently puts it, “[w]e want the rule of law, not rule by law.”¹⁸ Beyond the rule of law, individuals want their own law.¹⁹ The idea of arbitration stems from this notion.²⁰

In this first chapter, Paulsson explores the history of the idea of arbitration and poses an important question of whether any common organizing principles remain to be kept for use in today’s society.²¹

The first historical principle explored is the arbitrator as archetype.²² Paulsson discusses the psychologist Carl Jung’s concept of psychological archetypes.²³ In Jung’s psychological context, archetypes are innate, universal prototypes for ideas and may be used to interpret observations.²⁴ When someone thinks of an ideal arbitrator it is suggested that maybe he or she thinks of an idealized form of himself or herself.²⁵

Next, Paulsson examines the attributes of the arbitrator as archetype: commitment, capability, concern, attentiveness to consequences, and condignity.²⁶

Commitment is summed up as the parties desire for an arbitrator who is personally and deeply engaged in the task at hand, which is resolving a dispute and preventing infectious conflict.²⁷ An arbitrator’s capability is based on his or her understanding of the debate.²⁸ Capability leads to the essential authority of the archetype

¹⁶ PAULSSON, *supra* note 1, at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ PAULSSON, *supra* note 1, at 2.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 4-5.

²⁴ *Id.* at 5;

²⁵ PAULSSON, *supra* note 1, at 5.

²⁶ *Id.* at 8-9.

²⁷ *Id.* at 8.

²⁸ *Id.*

and gains the respect of arbitrants.²⁹ Paulsson discusses concern for the arbitrants as an vital attribute much like the skills and attitudes of good parents.³⁰ He says that the archetype does not “anesthetize his heart,” but has personal and benign interest in the parties.³¹

Of all the attributes, attentiveness to consequences presents an interesting difficulty for an arbitrator because there is a tension between deciding every case as though it were the arbitrator’s last and thinking about arbitrating future disputes.³² How an arbitrator is perceived affects the ideal of an arbitrator’s individualized approach to every dispute.³³

Lastly, condignity means that the arbitrator issues awards or punishments that are merited or warranted, and are not the product of the arbitrators disposition, favor, or generosity, but of a just awareness of the appropriate consequences of the parties’ conduct.³⁴ All of these attributes show that the idea of arbitration is above all a transformation from some features of the imagined “judicial temperament,” such as an impersonal attitude and an indifference to the parties.³⁵

Following the discussion of the archetype arbitrator’s attributes, Paulsson discusses the uncertain historical parallels stating that it is usual for advocates of any institution to invoke historical pedigree in an attempt to demonstrate that their institution echoes the wisdom of the ages.³⁶ Through his example of ancient Islamic law traditions of arbitration, Paulsson questions such historic parallels and states, “there is, in sum, nothing eternal or inevitable about arbitration; it must find its meaning and its acceptance in the modern world it purports to serve. It cannot be static.”³⁷

Next, Chapter One focuses on ambivalence towards law.³⁸ The idea of arbitration looks to a decision viewed by the parties and their peers as in agreement with legitimate expectations, with no thirst for legal convention or modification beyond that of a fair hearing.³⁹ Paulsson posits that arbitration is a quest for civilized closure.⁴⁰

²⁹ PAULSSON, *supra* note 1, at 8.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 8-9.

³³ PAULSSON, *supra* note 1, at 9.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 10.

³⁷ *Id.* at 13.

³⁸ PAULSSON, *supra* note 1, at 13.

³⁹ *Id.*

To bring Chapter One to a close there is discussion of messy realities and the quest for a more noble court system.⁴¹ Paulsson explains that the presumption in a free society should be that citizens may develop ways to resolve their disputes by means they find attractive and particularly suited to their activity and character, even if those approaches bear little similarity to procedures which a legislature might develop for general use.⁴² Arbitration will better succeed and the best results will be achieved in societies where judges and arbitrators (courts and arbitration) see themselves as engaged in a collaborative undertaking in the interest of justice because common sense tells us that a place where the courts perform poorly is not likely to be good for arbitration, nor is a place where arbitration is dominated by never-ending judicial corrections one where the courts are to be admired.⁴³

Chapter One is vital to the understanding of *The Idea of Arbitration*. As it explores arbitration's past it sets the important foundation for every chapter that follows. Chapter One establishes the roots of society's current perceptions and views about arbitration and arbitrators. It accurately sets the stage for the rest of the book in a very user-friendly form that readers will find inviting and educational.

IV. PART THREE: CHAPTERS TWO THROUGH EIGHT: THE PRESENT STATE OF ARBITRATION

A. Chapter Two: The Legal Foundation of Arbitration

Chapter Two focuses on the specifically legal foundations of arbitration, rather than philosophical or political.⁴⁴ “The law applicable to arbitration is not the law applicable in arbitration.”⁴⁵ The law applicable in arbitration offers standards to guide arbitrators decisions whereas the law applicable to arbitration refers to the basis of arbitrators authority and of the status of their decision.⁴⁶

This chapter begins by displaying the “great paradox of arbitration” which is that arbitration seeks assistance of the very public authorities from which it wants to free

⁴⁰ PAULSSON, *supra* note 1, at 13.

⁴¹ *Id.* at 18-28

⁴² *Id.* at 23.

⁴³ *Id.* at 28.

⁴⁴ PAULSSON, *supra* note 1, at 4.

⁴⁵ *Id.* at 29.

⁴⁶ *Id.*

itself.⁴⁷ Paulsson asks several questions relating to this paradox such as what will courts tolerate and to what will they offer their authority and supremacy?⁴⁸

These questions are examined through four competing proposals. The first is referred to as territorial thesis which holds that any arbitration is unavoidably national, its functions according to the law of the place of arbitration.⁴⁹ The second is called the pluralistic thesis which holds that arbitration may be given influence by more than one legal state, none of them inevitably crucial.⁵⁰ The third proposal is that arbitration is the creation of an autonomous legal order accepted as such by arbitrators and judges.⁵¹ The fourth and final proposition is that arbitration may be effective under provisions that do not depend on national law or judges at all.⁵² Paulsson concludes that the fourth proposition ultimately merges with the pluralistic thesis and expands it: it accounts for a feature of pluralism in the domination.⁵³ Chapter Two focuses a majority of its pages on the territorial thesis and the pluralistic thesis.

The territorial thesis is summed up by Paulsson as follows, “Our planet is divided into plot, each attributed to a jealous state. What happens within that plot can have no legal significance if it is not given that effect by those who exercise power in the name of the state holding dominion there.”⁵⁴ This thesis is outdated, but its influence lingers.⁵⁵ Francis Mann is the leading advocate of the territorial thesis.⁵⁶ In his essay titled ‘*Lex Facit Arbitrum*’⁵⁷ he focused on the law applied by arbitrators and not the legal foundation of arbitration.⁵⁸ The central principle of his essay was that arbitrators must obey the private international law of the seat of arbitration.⁵⁹

⁴⁷ PAULSSON, *supra* note 1, at 30; see also Alan Scott Rau, *Arbitration and National Courts: Conflict and Cooperation: Understanding (And Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT’L ARB. 47 (2010) (discussing both the vertical and horizontal relationships between courts and arbitration).

⁴⁸ PAULSSON, *supra* note 1, at 30.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ PAULSSON, *supra* note 1, at 30.

⁵⁴ *Id.* at 32.

⁵⁵ *Id.* at 33.

⁵⁶ *Id.*

⁵⁷ ‘the law makes the arbitrator’

⁵⁸ PAULSSON, *supra* note 1, at 33.

⁵⁹ *Id.*

Paulsson criticizes Mann and the territorial thesis because it is not apt in today's world.⁶⁰ He cites examples such as how Switzerland allows parties to opt out of any judicial review of awards involving only foreign interests and, more fundamentally, that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards mandates enforcement of arbitral awards without the need for any manifestation of approval of the courts of the place of arbitration.⁶¹ The territorial thesis simply does not fit with the realities of today's international society that is no longer constrained within national units.⁶²

The pluralistic thesis contends that the forces of internationalization have now fashioned awards which do not owe their power to the law of the place of arbitration.⁶³ Paulsson gives an example of what he refers to as a "delocalized award" where arbitration takes place in Country A and an award is rendered there subject to court appeal.⁶⁴ Normally, other countries are prepared to enforce this foreign award only if they are satisfied that the award is binding.⁶⁵ Country A may have laws that determine if an award is binding perhaps if that award has resisted appeal or no appeal has been final.⁶⁶ Country B, however, can legislate a rule that an award, wherever rendered, is binding for the enforcement in B at the moment it is pronounced.⁶⁷

This "delocalization," or as Paulsson calls it "plurilocalization," refers to the possibility that an award may be accepted by the legal order of an enforcement jurisdiction whether or not the legal order of its country of origin has also embraced it.⁶⁸ National legal orders assert supremacy in their national space, and they may decree that the same facts command different results.⁶⁹

Chapter Two's focus on the legal foundation for arbitration, namely the territorial and pluralistic approaches, is concise and straightforwardly explained through the use of simple examples that help flesh out these propositions. After reading this chapter, readers will have a much better understanding of where arbitration grew its legal roots.

⁶⁰ PAULSSON, *supra* note 1, at 35.

⁶¹ *Id.*

⁶² *Id.*

⁶³ PAULSSON, *supra* note 1, at 36.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ PAULSSON, *supra* note 1, at 36.

⁶⁹ *Id.* at 37.

B. Chapter Three: Private Challenges

Chapter Three concentrates on what happens when private parties challenge the arbitral process.⁷⁰ The chapter opens with discussion of front-end and back-end challenges to arbitration through court intervention and how if this is allowed arbitration loses its appeal.⁷¹ Protests to arbitration can arise at the outset, when respondents protest their alleged obligation to submit to the process, during the process, when either party may complain about how arbitration is being conducted, or after the arbitration, when one of the parties may ask a court to set aside the arbitral award.⁷²

A significant amount of Chapter Three focuses on the front-end protest.⁷³ There are four common initial challenges to arbitration: (i) the party never consented to give the supposed arbitrator any authority of any kind; or that although it did agree to arbitration: (ii) the law prohibits arbitration of the exact claim raised; (iii) the claim falls outside the scope of agreement to arbitrate; or (iv) the claim should be dismissed without substantive examination because liability is in any event barred by some legal or contractual impediment.⁷⁴

The first of these objections is a jurisdictional challenge that Paulsson discusses at some length.⁷⁵ When is a controversy about the arbitrator's authority to be decided and by whom?⁷⁶ Paulsson suggests that the words "I challenge the tribunal's authority" must not be an "abracadabra" that allows arbitration disappear lest arbitration lose its allure.⁷⁷

Paulsson posits that arbitrators must have the authority to decide whether or not they have jurisdiction to hear a particular case.⁷⁸ This is known as *kompetenz-kompetenz*.⁷⁹ Without this fundamental principle, the weakest challenge would stop the arbitration, and parties to entirely legitimate arbitration agreements would be thrust into the courts when that is exactly against their bargain in the first place.⁸⁰ Paulsson uses a

⁷⁰ PAULSSON, *supra* note 1, at 4.

⁷¹ *Id.* at 51.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ PAULSSON, *supra* note 1, at 51.

⁷⁵ *Id.* at 53.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ PAULSSON, *supra* note 1, at 54.

⁷⁹ *Id.*; see generally Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 PEPP. L. REV. 17 (2014) (analyzing different views and approaches to *kompetenz-kompetenz*).

⁸⁰ PAULSSON, *supra* note 1, at 54.

very simple, logical example to further explain why arbitrators must have this authority to decide jurisdiction: without it, he states, the party which rightfully invokes a valid arbitration agreement might have to spend a lot of time and resources, including money, in court, including various appeals, only to be told after the long judicial process that it was correct from the outset, has now been exposed to courts when the avoidance of courts was the very reason for their arbitration agreement, and must now start from the beginning with a stale case or an impoverished opponent.⁸¹ This example illustrates why kompetenz-kompetenz, “jurisdiction to decide jurisdiction,” is such a fundamental feature of modern arbitration.⁸²

The French take what they term competence-competence a step further by not only empowering the arbitrators to rule on their own jurisdiction, but also by prohibiting the courts in the meantime from determining disputes feasibly covered by arbitration agreements.⁸³

American courts have really grappled and struggled with the idea of arbitrability.⁸⁴ Paulsson goes as far as to propose courts struggle with the use of the word arbitrability.⁸⁵ He lobbies for a more limited definition of the word so as to not include all kinds of threshold issues.⁸⁶ “If the definition of flying is broadened to include jumping, kangaroos will be birds. Greater mental discipline is needed.”⁸⁷ Landmark cases such as *First Options of Chicago v. Kaplan*,⁸⁸ *Howsam v. Dean Witter Reynolds*,⁸⁹ and *Green Tree*

⁸¹ PAULSSON, *supra* note 1, at 55.

⁸² *Id.*

⁸³ *Id.* at 58.; *see also* CODE DE PROCEDURE CIVILE [C.P.C.] art. 1448 (Fr.) (“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not been seised of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction of its own motion.”).

⁸⁴ PAULSSON, *supra* note 1, at 72.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *First Options of Chicago, Inc. v. Kaplan*, 514 US 938 (1995) (holding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts and that, rather than a special abuse of discretion standard, courts of appeals should apply ordinary standards when reviewing district court decisions upholding arbitration awards).

⁸⁹ *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002) (holding that the applicability of the National Association of Securities Dealers’ time-limit rule is a matter presumptively for the arbitrator).

*Financial Corp. v. Bazzle*⁹⁰ are discussed at length to further develop the concept of arbitrability.⁹¹

A fundamental concept that is present when discussing authority to rule on jurisdiction is the idea of separability.⁹² Separability is of great importance to the effectiveness of the arbitration process and can be summarized by the example of a respondent arguing that a contract as a whole is invalid; that this is automatically fatal to its arbitration clause as well; and that as a consequence there can be no arbitration under that clause.⁹³ Arbitration would lose its function if courts accepted this logic.⁹⁴ Paulsson continues with a fascinating, in-depth analysis of separability with various examples and illustrations.⁹⁵

Chapter Three ends with considerations about why an arbitral tribunal's decision about the admissibility of a claim does not concern the tribunal's jurisdiction and is therefore final, and, finally, a discussion about post-award challenges.⁹⁶

This chapter is Paulsson's greatest triumph in *The Idea of Arbitration*. It is essential that law students studying arbitration read it because it discusses fundamental issues with great clarity. His section on separability alone lends great insight into a challenging topic. This chapter lays out important issues that law students and practitioners will be confronted with in the world of arbitration on a regular basis.

C. Chapter Four: The Public Challenge

This chapter introduces the reader to the public policy limitations on arbitration.⁹⁷ To what degree will arbitration be accepted by the State, in light of the fact that arbitration offers an obvious alternative to state-administered courts?⁹⁸

⁹⁰ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (holding that an arbitrator must determine whether the contracts forbid class arbitration).

⁹¹ PAULSSON, *supra* note 1, at 72-77; see also Natasha Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351 (1997) (discussing the United States Supreme Court recognition of the international doctrine of kompetenz-kompetenz in light of the Federal Arbitration Act and the implications of this landmark court decision).

⁹² PAULSSON, *supra* note 1, at 60; see also Tanya Monestier, "Nothing Comes of Nothing"...Or Does It??? A Critical Re-Examination of the Doctrine of Separability in American Arbitration, 12 AM. REV. INT'L ARB. 223 (2001) (discussing that a valid and severable arbitration provision can be contained within a contract that never legally materialized while also examining the current view of separability in American jurisprudence).

⁹³ PAULSSON, *supra* note 1, at 60.

⁹⁴ *Id.*

⁹⁵ *Id.* at 60-72.

⁹⁶ *Id.* at 82-98.

⁹⁷ *Id.* at 4.

In free societies, what is not explicitly prohibited is allowed.⁹⁹ Or at least that is the presumption.¹⁰⁰ Public officials must take the accountability for making their intent clear.¹⁰¹ Too many mandatory orders create public alienation and wear away the rule of law.¹⁰² However, arbitrators do not, unless they are ready to sacrifice the enforcement of their awards by State courts, have the authority to disregard the law.¹⁰³

Chapter Four begins with a discussion of the tension between public regulation and arbitration.¹⁰⁴ Some public officials are troubled by arbitration as a potential tool for regulatory disobedience.¹⁰⁵ One extreme view holds that arbitration shouldn't exist at all because the rule of law is the most fundamental public policy while Paulsson notes that the fact that an activity is regulated does not make it off-limits to arbitration.¹⁰⁶ However, some people believe that arbitration should be tolerated only with caution.¹⁰⁷

The next section of Chapter Four addresses the question "why should arbitration be allowed at all?"¹⁰⁸ Free societies allow citizens to arrange their affairs as they see fit including the freedom to opt for arbitration instead of court systems.¹⁰⁹ However, the law limits this freedom of contract, and disagreements often involve claims that those limits have been disobeyed.¹¹⁰ Arbitrators face a tension because they attempt to resolve

⁹⁸ PAULSSON, *supra* note 1, at 99.

⁹⁹ *Id.* at 100.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² PAULSSON, *supra* note 1, at 100; *see also* GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (Yale University Press, 1997) ("The better the society, the less law there will be...In hell there will be nothing but law, and due process will be meticulously observed.").

¹⁰³ PAULSSON, *supra* note 1, at 100; *see* Kenneth Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49 (1997) (challenges the assumption that by submitting a dispute to arbitration the parties intend to relinquish judicial review of the award. Rather, this Article argues that contract analysis of party intent manifested in the arbitration agreement determines the scope of judicial review).

¹⁰⁴ PAULSSON, *supra* note 1, at 100.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ PAULSSON, *supra* note 1, at 104.

¹¹⁰ *Id.*

disputes without offending the rule of law while also respecting contract freedom.¹¹¹

Several public policy limitations are explored, such as how arbitration cannot protect conspiracies intended to avoid antitrust laws or the regulation of financial institutions and adhesionary arbitration agreements imposed on weaker parties of consumers should not be upheld.¹¹²

Most national laws declare agreements to arbitrate unenforceable with respect to certain matters.¹¹³ Status determinations, family relations, bankruptcy, intellectual property, and antitrust are a few of the areas that are off-limits, and while they may seem arbitrary there is a common thread of a state's interest in these matters.¹¹⁴ For example, it doesn't make sense to allow private arbitrators to make marital, retired, or disabled status determinations because those categories create entitlements against the state.¹¹⁵ Paulsson thinks that the reason for declaring some types of disputes as off-limits has more to do with "whether arbitration may significantly affect private or public interests which are manifestly unrepresented in an adequate way by the parties or the arbitrator" than the acumen level of the arbitrators.¹¹⁶

The remaining sections of this chapter examine whether parties may agree to be bound by arbitral determinations as to the effect of the law, whether it purports to complement or to alter their agreements and whether the rule in question is derived from ordinary law or from something more fundamental, said to be part of public policy.¹¹⁷

To end this chapter on public challenges, Paulsson summarizes the degrees of arbitral authority beginning with the types of legally important decisions arbitrators have clear and final authority to make and moving through decisions that public intervention is more and more likely.¹¹⁸

Chapter Four discusses many fundamental ideas that anyone in the field of arbitration needs to understand. Paulsson's analysis of arbitral authority in light of public policy considerations is expansive. The conclusion of this chapter with a concise summation of the degrees of arbitral authority ties this chapter together nicely.

¹¹¹ PAULSSON, *supra* note 1, at 104.

¹¹² *Id.* at 105.

¹¹³ *Id.* at 115.

¹¹⁴ *Id.* at 117.

¹¹⁵ *Id.*

¹¹⁶ PAULSSON, *supra* note 1, at 123.

¹¹⁷ *Id.* at 123-44.

¹¹⁸ *Id.* at 145.

D. Chapter Five: Ethical Challenges

The shortcomings of arbitration are the focus of Chapter Five.¹¹⁹ Arbitration's Achilles' heel, from Paulsson's perspective, is the lack of accountability of arbitrators.¹²⁰ Because arbitral awards are not generally subject to appeal, there is no accountability to tiered superiors, nor are arbitrators necessarily subject to discipline of a regulated profession.¹²¹ In Paulsson's eyes, confidence in the ethical standards of arbitrators and arbitral organizations is the "Alpha and the Omega" of the legitimacy of the process.¹²²

Sundaresh Menon, the then Attorney General of Singapore and soon to be Chief Justice of Singapore, delivered a keynote speech in May 2012 at a session of a Congress of the International Council for Commercial Arbitration addressing ethical issues facing arbitration today.¹²³ He questioned the sustainability of the success of arbitration unless the risks that stem from arbitral ambition are better controlled.¹²⁴ Menon explains that there are growing numbers of arbitrators who are "in essence business people in search of opportunities," creating a tension between the self-promoting and self-dealing of the arbitrators and their public duty to uphold justice.¹²⁵ He also addressed how arbitrators are invariably profit-driven and biased, or that they always act strategically so they can be repeat arbitrators.¹²⁶

This keynote address, more or less, sums up Chapter Five. How these ethical issues are addressed within the industry are also explored.¹²⁷ Paulsson thinks that self-regulation alone is not enough, that the stakes are too high in arbitration to simply allow self-appraisal, peer pressure, or other forms of self-regulation to be the only line of defense.¹²⁸ Arbitral institutions are better suited to meet these ethical challenges, but it is unclear if they have acceptable structures to do so.¹²⁹ If they do not rise to meet these

¹¹⁹ PAULSSON, *supra* note 1, at 4.

¹²⁰ *Id.* at 147; see also Cameron Sabin, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337 (2002) (argues that state oversight of arbitrators could begin to insure a level of fairness in arbitration, while preserving arbitration's economic benefits).

¹²¹ PAULSSON, *supra* note 1, at 147.

¹²² *Id.*

¹²³ *Id.*; see also Keynote Address, *ICCA Congress Series No. 17: International Arbitration: the Coming of a New Age for Asia (and Elsewhere)* 6 (2013).

¹²⁴ PAULSSON, *supra* note 1, at 147.

¹²⁵ *Id.* at 148.

¹²⁶ *Id.*

¹²⁷ *Id.* at 149.

¹²⁸ *Id.*

challenges it is only a matter of time before political actors will step in and regulate strictly on a process they do not fully understand which will result in undesirable bureaucratization and a gradual destruction of the utilities of arbitration.¹³⁰

Paulsson discusses an arbitrators “fitness to serve” at some length. He divides the criteria into two categories: integrity and aptitude.¹³¹ Integrity is absolutely paramount because even great ability can be corrupted which would irreparably flaw the whole process of arbitration.¹³² The integrity category is comprised of the traits of independence and impartiality.¹³³ The key issue of independence is whether the arbitrator has an interest in the outcome.¹³⁴ An arbitrator from a law firm which derives substantial revenue from one of the parties is a prime example of not being independent.¹³⁵ Impartiality involves examining the case with an open mind.¹³⁶

There are many reasons that lead to arbitrator bias such as friendship or professional relationships or the desire to please the appointing lawyer or party to gain future benefits such as repeat business.¹³⁷

At the conclusion of Chapter Five, Paulsson makes the case for an elitist approach to the ethical challenges of arbitration.¹³⁸ He feels that, given the large stakes involved in many arbitrations, there should be an elite corps of arbitrators.¹³⁹ By elite he means that of a “meritocracy in terms of substantive competence, procedural adroitness, and above all absolute impartiality.”¹⁴⁰ This elite corps needs to be several hundred “first-rate” commercial arbitrators that is an open shop that crosses cultures, genders, and nationalities in order to meet the needs of the international community.¹⁴¹

¹²⁹ PAULSSON, *supra* note 1, at 149.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ PAULSSON, *supra* note 1, at 149.

¹³⁵ *Id.*

¹³⁶ *Id.* at 150.

¹³⁷ *Id.* at 151.

¹³⁸ *Id.*

¹³⁹ PAULSSON, *supra* note 1, at 171.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Paulsson doesn't understand why or how it is good for the arbitral process if as many people as possible can be arbitrators.¹⁴² In his opinion, elitism is not a sin and the ambition to work at the most elite level is healthy for arbitration.¹⁴³ The reputation of arbitrators grow slowly over time with proof of independence and impartiality.¹⁴⁴

Chapter Five is a great critique of arbitration, namely arbitrators. Paulsson's fear of arbitrator independence and impartiality really shines through. At points, he dramatizes the "stakes" of arbitration and makes them feel like life or death matters. However, on the whole, this chapter is a strong example of the shortcomings of arbitration.

E. Chapters Six Through Eight: The International Sphere of Arbitration

Chapters Six through Eight deal with problems in the international sphere where arbitration has a unique and growing role to play in the absence of anything like a unified global political system.¹⁴⁵

Chapter Six discusses international challenges facing arbitration.¹⁴⁶ When it comes to resolving international commercial disputes, arbitration has a monopoly on the field.¹⁴⁷ As Paulsson so correctly puts it, "We could live without arbitration. But if international arbitration disappears, economic exchanges would face a legal void."¹⁴⁸ Why is this so?

Within a national setting, a plaintiff can depend on the jurisdiction of courts, which the defendant cannot resist.¹⁴⁹ But there are no international civil courts of required jurisdiction.¹⁵⁰ The defendant must consent to appear.¹⁵¹ Because it is extremely unusual for parties residing in two different nations to agree to the jurisdiction of the others national court system or even a neutral court system (with some exceptions depending on

¹⁴² PAULSSON, *supra* note 1, at 171.

¹⁴³ *Id.* at 173.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.* at 174.

¹⁴⁷ PAULSSON, *supra* note 1, at 174.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

the type of contract), international arbitration is the only vehicle to facilitate commercial dealings across national borders.¹⁵²

One might think that parties from different cultures and national backgrounds could clash during international arbitration, but Paulsson refutes that position by stating that all parties to any arbitration have the same expectations.¹⁵³ Parties clearly have a lack of appetite for disputes because they contracted away from courts.¹⁵⁴ Their expectations of arbitration are for justice to be served quickly, fairly, and effectively, at no cost to the deserving party.¹⁵⁵

Even though international arbitration is experiencing a golden age it is not without its criticisms. Paulsson discusses what he calls the inequality of arms within the realm of international arbitration.¹⁵⁶ While most people present the argument that the very cost of arbitration is a form of serious inequality when parties financial resources are at separate ends of the spectrum, Paulsson thinks that when compared to the cost of litigation, and due to lack of empirical studies to confirm, the cost of arbitration isn't a true inequality of arms.¹⁵⁷ For him, the real inequality, which is specific to arbitration, is the supposed disadvantages of being treated as an outsider.¹⁵⁸

Paulsson further discusses three factors that affect the challenges of the international environment. The first, a healthy challenge, is the evolution of new entrants are being absorbed by modern arbitral institutions.¹⁵⁹ Stable institutions accepting a new diversity of individuals into their decision-making organs has influenced other, newer institutions to do the same.¹⁶⁰ There is a current culture of inclusiveness that is diversifying arbitral institutions.¹⁶¹

The second factor that affects the international environment is the “[d]ogmatic resistance to the arbitral process.”¹⁶² Some decision-makers are stubborn and continue to

¹⁵² PAULSSON, *supra* note 1, at 174.

¹⁵³ *Id.* at 178.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 179.

¹⁵⁷ PAULSSON, *supra* note 1, at 180-81.

¹⁵⁸ *Id.* at 181.

¹⁵⁹ *Id.* at 182.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² PAULSSON, *supra* note 1, at 182.

disrupt efforts to become more successful and integrated participants in international arbitration and this attitude can be costly.¹⁶³

The last factor is that modern international dealings are no longer the exclusive domain of professionals, whether in the public or private sectors, but also involve greater numbers of ordinary people like consumers, workers, and citizens.¹⁶⁴ This presents significant problems of unequal bargaining power and a lack of understanding between ordinary consumers, workers, and citizens and the usual predominant parties of commercial international arbitration such as businesses, investors, and public authorities.¹⁶⁵

Chapter Seven focuses on national public policy in the international environment.¹⁶⁶ The international environment adds layers of complexity to questions concerning whether the law displaces the contract.¹⁶⁷ Not only is choice of law more complex, but the actions of judges and arbitrators are more intricate.¹⁶⁸ For example, a judge might apply his or her own country's law and choose not to defer to arbitration conducted in a different country, even if the arbitrators are acting in accordance with the law of that other country and with the parties' agreement to arbitrate.¹⁶⁹ Sometimes these concepts are very abstract and hard to envision, but Paulsson gives an example of recurring problems and complexity in the international context of a country that prohibits professional boxing and the sale of alcoholic beverages.¹⁷⁰ This example is a brilliant discussion of just how involved arbitration can be in the international realm.

Paulsson goes on to discuss how this complexity is "precisely the kind of thing that explains the need for international arbitration."¹⁷¹ Because public policy is invoked in the face of an agreement signed by the parties, the issue arises whether or not a decision-maker should allow one of the parties to escape that contract.¹⁷² If neutral arbitrators are not allowed to decide whether a contract is to be altered or voided because

¹⁶³ PAULSSON, *supra* note 1, at 182-83.

¹⁶⁴ *Id.* at 183.

¹⁶⁵ *Id.* at 183; see also Donna Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT'L L.J.* 823 (discussing current consumer arbitration policies and analyzes whether traditional arbitration is adequate to address consumer disputes in the new cross-border shopping environment).

¹⁶⁶ PAULSSON, *supra* note 1, at 200.

¹⁶⁷ *Id.* at 200-01.

¹⁶⁸ *Id.* at 201.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 202-04.

¹⁷¹ PAULSSON, *supra* note 1, at 206.

¹⁷² *Id.*

of the alleged public policy of a home state of one of the parties the parties would get exactly what they did not bargain for, the courts.¹⁷³

The chapter then turns to what Paulsson refers to as “clumsy nomenclature” and a discussion of frequently cited phrases referencing public policy that tend to confuse rather than shed any light on the subject of international arbitration.¹⁷⁴ His discussion of “domestic”¹⁷⁵ (or “internal”) vs. “national international”¹⁷⁶ vs. “truly international”¹⁷⁷ public policy helps make these confusing terms less obscure.¹⁷⁸

Chapter Seven ends with various discussions of the potential effects of public policy as it generally arises in practice: before a judge who is requested by a disputant to hear the case and disregard the arbitrator; before a judge asked to set aside or refuse to enforce an arbitral award; and before the arbitrator who has a responsibility to contemplate the usefulness of the arbitral award and therefore to “glance both sideways and forward to the courts.”¹⁷⁹

Chapter Eight takes a theoretical approach in analyzing the seldom considered issue of arbitral authority to reject unlawful laws.¹⁸⁰ Paulsson refers to this chapter as possibly the least “necessary chapter in the book, but that it could appeal to the more thoughtful reader.”¹⁸¹ Legal philosophy is discussed at length throughout the chapter in an attempt to lay a foundation for Paulsson’s thought-provoking propositions at the conclusion of this chapter.¹⁸² Paulsson leaves the reader with ten “short” propositions based on the ideas presented in Chapter Eight.¹⁸³

Chapters Six through Eight probe the reader to think in ways he or she might not have up to this point in the book. Paulsson’s discussion and analysis of international

¹⁷³ PAULSSON, *supra* note 1, at 206.

¹⁷⁴ *Id.* at 207.

¹⁷⁵ Domestic public policy reflects whatever a national legal system considers intolerable at home, whether or not its boundaries of acceptability correspond to those of other legal systems.

¹⁷⁶ National international public policy reflects a national legal system’s acceptance that its domestic public policy is limited to some degree in the context of matters having international elements, where it may be inappropriate for individual legal systems to impose all of their particularities.

¹⁷⁷ Truly international public policy reflects an international community’s ideals and can be very narrow because it requires the acknowledgement of a rare degree of global consensus.

¹⁷⁸ PAULSSON, *supra* note 1, at 207-09.

¹⁷⁹ *Id.* at 209-29.

¹⁸⁰ *Id.* at 231.

¹⁸¹ *Id.*

¹⁸² *Id.* at 231-53.

¹⁸³ PAULSSON, *supra* note 1, at 254-55.

challenges to arbitration, national public policy in the international context, and arbitral authority is stimulating and forces the reader to delve more deeply into why international arbitration is all the more important to international actors. His analysis of key arbitration cases, as well as his ability to simplify the unclear is truly on display in these chapters focusing on international arbitration.

V. PART THREE: CHAPTER NINE: IMAGES IN A CRYSTAL BALL

Chapter Nine glances at the future of arbitration.¹⁸⁴ It begins by discussing the fundamental inquiry of whether arbitration may be viewed as a completely self-sufficient system needing no aid from the state, only tolerance.¹⁸⁵ The idea of arbitration is one of liberty because arbitration allows private parties to take their freedom of contract to the ultimate, final level to self-regulating said contract.¹⁸⁶ No matter where parties come from, they tend to be dissatisfied by court systems that are costly and waste valuable time.¹⁸⁷ Court systems, no matter where in the world, are stock full of critics that use examples of outright inequality, of genuine expectations being violated, and of hypocrisy to degrade these pillars of justice where any result less than perfect is unacceptable.¹⁸⁸

Clearly, arbitration seems like the logical counter to court systems because of cost savings, expertise, and efficiency, however those grand dreams often dissipate when claims actually arise and one party recoils.¹⁸⁹ The tension between the two systems, courts and arbitration, remain even though some may look for arbitration to become a champion over law.¹⁹⁰ However, Paulsson feels it would be a mistake to yield to the attraction of viewing arbitration as the victory for party autonomy over law because without paying regard to the law, decisions would not be final and courts would invalidate awards, making arbitration worthless.¹⁹¹

It is only through cooperation between courts and arbitration that parties can achieve their ultimate bargain.¹⁹² Arbitration must compliment rather than test court

¹⁸⁴ PAULSSON, *supra* note 1, at 4.

¹⁸⁵ *Id.* at 256.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 257.

¹⁸⁸ *Id.*

¹⁸⁹ PAULSSON, *supra* note 1, at 258.

¹⁹⁰ *Id.* at 258-59.

¹⁹¹ *Id.* at 259.

¹⁹² *Id.*

systems.¹⁹³ Paulsson examines this proposition under the lenses of the relationship between judges and arbitrators, the shared objectives of courts and arbitration (i.e., justice), and how complimenting each other is the best way to achieve that objective.¹⁹⁴ As Paulsson puts it, “a legal system is unlikely to function very long with ‘good arbitration’ and ‘bad courts’.”¹⁹⁵

Perhaps the most controversial suggestion by Paulsson is also discussed in this final chapter: unilateral appointment of arbitrators.¹⁹⁶ The ideal beginning of arbitration is the empanelling of a tribunal which is jointly agreed by the parties for reasons of fairness and justice.¹⁹⁷ He proposes a default rule to be applied whenever the parties have neither jointly nominated the entire tribunal nor expressly stipulated that there are to be unilateral appointments, should be that all arbitrators are appointed by the neutral appointing authority.¹⁹⁸ This has gained Paulsson many critics from arbitration academics to practitioners.¹⁹⁹ Paulsson ultimately thinks a party will insist upon the right to seek to appoint one’s own arbitrator because they hope that the arbitrator will share their viewpoint and values and not the overall picture and values of both parties.²⁰⁰

The Idea of Arbitration ends much as it began, with a story of freedom and the necessary analytical approach to understanding the limits placed upon it, ideas that are to be respected and explored, and balances that must be struck in order for arbitration to remain a valuable legal tool in our ever changing society.²⁰¹

Chapter Nine accomplishes its goal and then some. Paulsson looks to the future of arbitration and really rounds out many of the ideas he establishes in prior chapters. For example, his unique idea for unilateral appointment of arbitrators stirs much debate and engages the reader with ideas discussed early in the book. While his proposed default rule has pure intentions, this idea seems contradictory to the fundamental view of freedom of contract. Isn’t the parties bargain sacred? Unilateral appointment of arbitrators is

¹⁹³ PAULSSON, *supra* note 1, at 257.

¹⁹⁴ *Id.* at 259-68.

¹⁹⁵ *Id.* at 265.

¹⁹⁶ *Id.* at 276.

¹⁹⁷ *Id.*

¹⁹⁸ PAULSSON, *supra* note 1, at 276.

¹⁹⁹ See Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson’s Moral Hazard in International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 5, 2010), <http://kluwerarbitrationblog.com> (stating that unilateral appointments serve a broader purpose: by appointing an arbitrator, the parties – rightly or wrongly – get a sense of proximity with the process. Unilateral appointments give the parties the impression that they control the arbitration, and that is an important difference between arbitration and court litigation).

²⁰⁰ PAULSSON, *supra* note 1, at 277.

²⁰¹ *Id.* at 301.

something parties bargain for and should not be thrown away so easily. After all, there is no guarantee that institutionally-appointed arbitrators will lack the bias for which Paulsson is so adamantly opposed.

VI. CONCLUSION

The Idea of Arbitration offers a theoretical foundation for understanding how arbitration functions in the world today. It thoroughly examines the past, present, and future of arbitration by analyzing key, fundamental principles of arbitration. Paulsson is masterful at challenging the reader to think more deeply and possibly differently about well-known arbitral concepts. Through his use of questioning the reader is forced to confront ideas, and while Paulsson gives some background and guidance, it is ultimately the reader who arrives at their own answers.

Despite the book's length (301 pages), it feels less overwhelming because the organization was well thought out and planned. The structure of viewing arbitration in its past, present, and future makes this book even more readable. Concepts and ideas build throughout the book and a concept that is discussed in the last chapter, i.e., freedom of contract, is understood more fully because the reader has knowledge of its foundational importance to arbitration and how courts, legalists, and practitioners have and do view it.

If there is a slight critique to *The Idea of Arbitration* it is that sometimes Paulsson swings a little far into the theoretical aspects of arbitration without a proper foundation to escort the reader. However brief a reader might feel "lost," Paulsson generally quickly swings back to center and captures the readers thoughts and attention.

This book is an absolute must read for anyone and everyone in the law community. Arbitration is so prevalent in our society that every lawyer should have a working knowledge of it. To the law student with little to no knowledge of arbitration, this book will present all the fundamental concepts necessary to have a "working knowledge" of the subject (some cases are even analyzed and can act as a great supplement for an arbitration class in law school). To the seasoned lawyer that knows arbitration inside and out, this book will make you think about arbitration in ways you never have before.