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# ITA IN REVIEW

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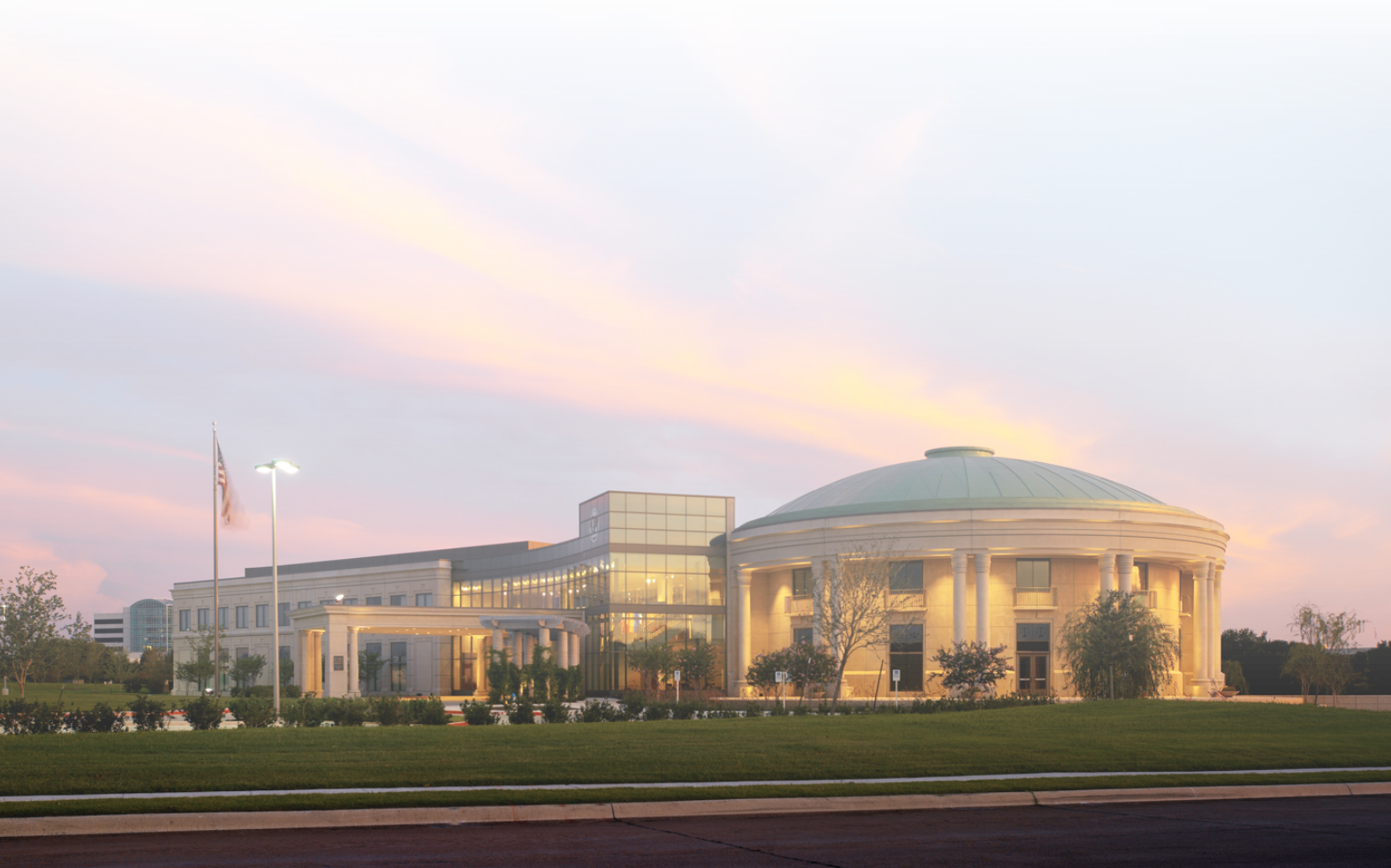

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# BOOK REVIEW:
# THE UNRULY NOTION OF ABUSE OF RIGHTS BY JAN PAULSSON

*Reviewed by* Sylvia Tonova

## I. INTRODUCTION

Jan Paulsson's book *The Unruly Notion of Abuse of Rights*[1] demystifies a seemingly universal concept, *viz.* abuse of rights. The book takes a clear view that the notion of abuse of rights cannot be deemed a general principle of law or an acceptable rule of decision on the international plane. It is uncontroversial that any legal right may, in some circumstances, be refused recognition on the ground that it has been abused. However, the theory of abuse of rights fails to identify the "circumstances" in question. Therefore, the theory is so nebulous that it invites arbitrariness and unpredictability, neither of which are the hallmarks of sound judicial decision-making.

Paulsson examines abuse of rights by reference to, *inter alia*, Bin Cheng's seminal treatise *General Principles of Law as Applied by International Courts and Tribunals*; the UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles); the Statute of the International Court of Justice (ICJ); a comparative law perspective; and the *Himpurna v. Indonesia* arbitration, in which he sat as an arbitrator. While this exercise spans numerous doctrinal considerations, it also successfully transposes them into everyday practice.

## II. THE BOOK

*The Unruly Notion of Abuse of Rights* comprises eight chapters which elaborate on Paulsson's thesis that "the notion of abuse of right . . . cannot be the foundation for a general principle of law or an acceptable rule of decision on the international plane."[2] The book starts with a helpful introduction to the nuanced distinctions between "concepts," "principles," and "rules" (*Chapter 1 Matters of Nomenclature*). This is

[1] JAN PAULSSON, THE UNRULY NOTION OF ABUSE OF RIGHTS (2020).

[2] *Id.*

followed by a proper examination of Bin Cheng's familiar 1953 study *General Principles of Law* and the author's conclusion that Cheng's study cannot legitimize the notion of abuse of rights as a general principle of law (*Chapter 2 An Idealistic but Troublesome Impulse*). Chapter 3 (A *Cacophony of Criteria*) lists no less than 34 criteria that underpin the notion of abuse of rights across the civil codes of different countries, international and domestic case law, and the UNIDROIT Principles.

After setting the scene, Paulsson considers the topic under French and Louisiana law (*Chapter 4 A 'Principle' with No Rules?*) as well as by reference to Article 38(1) of the ICJ Statute (*Chapter 5 The Challenge of Establishing Universal Principles*). He notes that abuse of rights is not defined in the French Civil Code or recognized under the law of the State of Louisiana and has no firm foundation in the ICJ Statute. In Chapter 6 (*The Politis/Lauterpacht Quest to Elevate the Concept*), Paulsson examines the attempt by Nicolas Politis and Hersch Lauterpacht to make abuse of rights a part of international law in the wake of the horrors of World War I. The impetus for this attempt was idealistic: they wanted to use the concept "as a tool to overcome the refusal of states to yield sovereignty."[3] However, this attempt to elevate abuse of rights to the status of an internationally recognized principle of law failed to garner the consensus needed (*Chapter 7 Rejection and Retrenchment*). Finally, the author alerts adjudicators to the dangers of basing their decisions on "abstractions dressed up as 'principles' with the pretence that they are rules of decision,"[4] which would cause adjudicators to cross the line into arbitrariness (*Chapter 8 The Vanishing Prospect*).

While Paulsson deals with one main theme in each chapter, five key points are salient.

*First*, the author rightfully posits that the notion of abuse of rights cannot be used as an accepted rule of decision both as an analytical matter and as a matter of policy. As an analytical matter, the conclusion that there has been an abuse of right is either redundant because the claim is "invalid" under other rules of decision, or depends on

[3] *Id.* at 79.

[4] *Id.* at 133.

the "personal proclivities" of the decision-maker due to the "irremediable indeterminateness" of the notion of abuse of rights, which would favour "open-ended discretion and unpredictability."[5] As a matter of policy, "decisions that result in individual case-by-case rule-making by adjudicatory bodies often weaken general adherence to the law."[6]

*Second*, the prohibition of abuse of rights cannot be seen as a corollary of the principle of good faith. The affirmative obligation of good faith performance of obligations is more "determinate" than that of the prohibition against what is "to be established as an abuse of right."[7] Further, while good faith in the context of contractual performance manifests itself on the basis of a consensual relationship of trust and reliance between the parties, the "assertion" of abuse of rights is "unilateral" and thus of a different "genus."[8]

*Third*, to be elevated to the status of a "general principle of law," the notion of abuse of rights must first have "solid foundations in major national legal systems of law."[9] Absent these foundations in domestic law, abuse of rights cannot "be deemed of general applicability in the international community."[10] However, one of the difficulties in gaining the recognition of a general principle lies in the fact that abuse of rights is a concept foreign to common law legal systems.[11]

*Fourth*, Paulsson provides a helpful framework for elevating abuse of rights to a rule of decision. "An adequate rule can be generated only be a *lex specialis* that defines the abuse of the rights it creates by reference to circumstances established by law, whether a statute or a treaty, or explicitly accords adjudicatory discretion in a particular respect where it seems appropriate."[12] Arguably, the same effect can be

[5] *Id.* at 2.

[6] *Id.* at 95.

[7] *Id.* at 34.

[8] *Id.* at 35.

[9] *Id.* at 21.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 95.

achieved by establishing a *jurisprudence constante* over a significant period of time, but this seems unlikely to occur at the international level and the diverging positions on abuse of rights in individual domestic legal systems do not provide much promise either.[13]

*Fifth*, Paulsson re-evaluates his conclusion as an arbitrator in *Himpurna v. Indonesia* that "the principle of abuse of right is universal."[14] While this statement formed the basis of the majority's decision to limit the recovery of lost profits in that case, Paulsson re-evaluates "[w]hat did this statement mean" and "was it correct"?[15] Paulsson explains that the only cited authority for the proposition that "the principle of abuse of right is universal" is Bin Cheng's book.[16] Bin Cheng, however, clearly distinguished between the "principle" of good faith and the "theory" of abuse of right and did not condone the universality of the abuse of right concept.[17] Therefore, the claim to universality is "untenable."[18] Having said this, the outcome in *Himpurna* is correct as it is rooted in the contractual stipulation that "the Tribunal need not be bound by strict rules of law" and the fact that the arbitrators were authorized to exercise their judgment as to the "correct and just enforcement of th[e] agreement."[19] Consistent with the main thesis of Paulsson's book, the *Himpurna* tribunal's reliance on abuse of rights can be justified by reference to the *lex specialis* and the powers it conferred to the tribunal.

## III. CONCLUSION

*The Unruly Notion of Abuse of Rights* offers a fascinating and intricate analysis of the abuse of rights notion, its evolution as well as implications for the wider international dispute settlement system. The distilled nuances of the abuse of right notion will undoubtedly prove helpful to international arbitration practitioners and

[13] *Id.*

[14] *Id.* at 61.

[15] *Id.* at 62.

[16] *Id.* at 64.

[17] *Id.*

[18] *Id.* at 65.

[19] *Id.* at 63, 67.

academics alike. With this in mind, the publication of this incredibly helpful book may be complemented by an equally thorough guidance to legislators, including negotiators of bilateral and multilateral investment treaties, who wish to elevate abuse of rights to a rule of decision through a *lex specialis*.

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# INSTITUTE FOR TRANSNATIONAL ARBITRATION
# OF
# THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

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