

IN THE NAME OF ARBITRATION: REFLECTING BACK AND LOOKING FORWARD*Akshil Raina* & Arundathi Venkataraman†*

One can think of several purposes for the editorial section of an academic journal. It could be said to be a place for silent reflection – of past achievements, aims and struggles. To go another way, perhaps one could say that it is a space to think about sincere acknowledgements and motivations. It could also be a combination of the two. Or perhaps neither of these really go to the heart of the real reason. For instance, it could simply serve to lay out the blueprint of the particular issue that it finds itself preceding. A good two and a half years after its first issue, it is perhaps time for IJAL to revisit this question. In the pursuit of the answer to this question, we sought assistance and guidance from the previous issues of our journal.

In the previous editions, we have taken a policy decision to primarily utilize the editorials for drawing attention to the growing phenomenon of India's integration into the field of international arbitration, identifying several thought-provoking reasons for the same.¹

This time however, we choose to tread a different, more experimental path- in tandem with the spirit of questioning that we have displayed above. We asked ourselves the obvious existential question - *why this journal at all?* The answer seems to lie in India's acceptance of international arbitration as an exceedingly attractive method of dispute resolution. This phenomenon has energized activity in the field and opened up several new questions. These range from questions of practical import to legal questions, arising from the development of rich arbitral jurisprudence. Additionally, there has been a renewed interaction of arbitration with other disciplines like sports law and copyright law. Thus, there exists a subsequent and natural need to, not only provide an avenue for academic writing but also to kindle an interest in the field in the minds of our readers. We find our *raison d'être* in the pursuit of this very goal.

But mere recognition of this goal, in itself, would do no good; simply being cognizant of our responsibilities should not be the extent of our duties. Over the course of the last four years, we have made a sizeable effort towards realizing and discharging these responsibilities.

In our maiden edition, Professor Martin Hunter refers to the practice of international arbitration as the "*only game in town*".² His argument is simple. With increased international commerce, he argues that there is great scope for disputes between parties of different nationalities. He emphasizes that choosing a national court or a court of a neutral third country are not always feasible solutions. He thereafter concludes with graceful simplicity, in an almost matter of fact fashion, that international arbitration is indeed the only way for resolution of disputes in a manner that will lead to an enforceable and binding result.

Taking cue from Prof. Hunter's words and understanding the truth in it, the Journal through its journey so far has focused on the explosion of international commerce and the palpable need to find a convenient and cost effective way of dealing with such disputes. The reality of the need

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¹ Martin J. Hunter, *Journey to the 'Only Game in Town'*, 1.1 INDIAN J. OF ARB. L. 1 (Sept., 2012). [hereinafter *Hunter*]; Gary B. Born & Suzanne A. Spears, *International Arbitration in India: "A Truly Excellent Judgement!"* 1.1 INDIAN J. OF ARB. L. 4 (Sept., 2012).

² *Hunter, supra* note 1.

for alternate dispute resolution mechanisms is particularly fascinating when viewed through the lenses of developing nations. In this regard, the Journal has recognized the commendable efforts of several developing nations such as India towards warming up to the idea of sourcing out of jurisdiction to arbitral tribunals. Such efforts are of course crucial to prevent unnecessary delays caused due to, at best overburdened, and at worst, corrupt court proceedings.

This leads us to an equally significant aspect of arbitration that the Journal has explored in great detail, that of the relationship between arbitration tribunals and national courts. Here, we have not restricted ourselves only to international arbitration but significant energy has also been devoted to analysing the landscape of domestic arbitration. The Indian legal regime is infamous for the impediments that it has created for arbitration, sometimes hitting at the very root of party autonomy. The Journal has paid close attention to the ambiguous tendencies of the higher courts which have caused confusion and difficulty in determining the Indian position. At the same time, our Journal has been generous in its applause for forward-looking judgments that have been doled out more frequently in the recent past. Where questions remained unanswered, attention has been drawn to some burning issues that deserve attention, thought and debate.

IJAL has also laid emphasis on covering lesser explored, niche areas, in great detail. Given the proliferation of arbitration as a more palatable dispute resolution mechanism in general, articles have discussed its implementation in specific industries such as e-commerce,³ intellectual property⁴ and sports.⁵ Additionally, aspects have not been debated upon only in theory or catered only to the academically-oriented; the perspective of practitioners has also been explained and elaborated upon and any scope for improvement has been highlighted.

Recently, the Centre for Advanced Research and Training in Arbitration Law, which includes members of the Editorial Board of IJAL, has organized several lectures by illustrious members of academia at National Law University, Jodhpur. The primary aim of these lectures has been to introduce younger minds to this field of law. In March 2015 a prominent figurehead in the area of investment law, Mr. Prabhash Ranjan, delivered a lecture on National Contestation of Investment Treaty Arbitration and International Rule of Law.

There have been substantial efforts by various Boards in the past to fulfil the aforesaid mandate of the Journal, give arbitration its due and help perfect it over time. This Board has attempted to do justice to that very mandate with this issue. In line with the same, we have a wide array of debates and deliberations for you to ponder upon.

In *Harmony: The Ship that Sailed*, Mr. Chakrapani Misra, Mr. Sairam Subramanian and Ms. Sanjna Pramod visit the recent decision of the Supreme Court of India in *Harmony Innovation Shipping Limited v. Gupta Coal India Limited*. The decision pertains to the important aspect of ‘intention’, and its role in multi-party agreements. The authors note that the case presented the Court with an opportunity to examine doctrines of contract law that are not used to their optimum. With the different ‘eras’ created by the Supreme Court in *BALCO*, this issue only becomes more important. While agreeing that the decision is reasoned and rational in its conclusion, the authors note that certain aspects shall remain ambiguous till the Supreme Court provides further clarification.

³ Ujjwal Kacker & Taranpreet Saluja, *Online Arbitration for Resolving e-commerce Disputes: Gateway to the Future*, 3.1 INDIAN J. OF ARB. L. 31 (Apr., 2014).

⁴ Meghna Agarwal & Nishtha Gupta, *The Scope of Copyright Arbitration in the Indian Film Industry*, 1.1 INDIAN J. OF ARB. L. 46 (Sept., 2012).

⁵ Devyani Jain, *Judicial Trend of Intervention in Sports Arbitration and its Future in India*, 1.1 INDIAN J. OF ARB. L. 37 (Sept., 2012).

Mr. Sujoy Chatterjee, in *Judicial Import of the Model Law: How Far is Too Far*, gives a refreshing perspective on how much reliance the Indian judiciary must place on the UNCITRAL Model Law on International Commercial Arbitration. The author identifies the scarcity of jurisprudence on the specific role of the Model Law in interpreting the Arbitration and Conciliation Act. This, in the opinion of the author, opens up a hoard of nuanced issues pertaining to international comity, legislative sovereignty and statutory interpretation. The analysis that follows is strongly focused on three decisions, one of the Delhi High Court in *Union of India v. East Coast Boat Builders*, and two of the Supreme Court in *BALCO* and *Bhatia*. The author concludes that the right way forward is to maintain a balance, to respect the sovereign will of the Indian Legislature and have measured enthusiasm in the efforts to make India a hub of international arbitration.

In *Increased Efficiency and Lower Cost in Arbitration: Sole Member Tribunal*, Mr. Michael Dunmore utilizes a cost-benefit analysis to suggest that arbitral tribunals should be composed of a sole-member, appointed by an arbitration institution, rather than three members selected by the parties. He argues, with sound logic, that while parties perceive their appointed arbitrators as increasing their chances of success, the additional cost far outweighs the illusive benefit. This article will be of particular interest to practitioners and users of arbitration.

Finally, Mr. Nikhil J. Variyar in *Tribunal Ordered Interim Measure and Emergency Arbitrators: Recent Developments Across the World and in India*, examines the nature of interim measures in two contexts- arbitral tribunals internationally and the narrower Indian scenario. The author attempts to determine the minimum standard that has to be met in such situations. The author critically analyzes the deficiencies of the Arbitration and Conciliation Act, noting the lack of judicial exposition in this regard, but for the Bombay High Court decision in *HSBC Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.* The Note ends with a final discussion on the amendments suggested by the 246th Law Commission Report to Sections 2(d) and 17 of the Act.

In the end, it is necessary to acknowledge the importance of having distinguished members of the arbitration profession to guide and steer the board. We are glad to have on board Mr. Harisankar KS as the Founding Executive Director and Consulting Member of CARTAL. Additionally, we are pleased to announce the joining of Mr. Kartikey Mahajan as a Visiting Fellow of the Centre. We sincerely hope you like what you find in our issue this time.