

BOOK REVIEW

Commercial Arbitration: International Trends and Practices, Edited by Prof. Chirag Balyan and Yashraj Samant, Advocate; Foreword by Gary. B. Born (Published by Thomson Reuters, Legal 2021, ISBN: 978-93-90673-79-7), pp Ixxiii + 371; Price INR 1200, \$ 17.00

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The book which forms the subject matter of this review is an unconventional piece of writing. It delivers an assortment of widespread experiences from a plethora of eminent authors, thereby facilitating a refreshing read. A perusal of the foreword – penned by none other than the legendry Gary B. Born – and last page of the book – titled ‘About The Book’ – is a testament to the undried nature of the book. Further, it is an intelligible mix of an academic treatise as well as the standard practitioners’ treatment of the subject, resulting in the deliverance of extremely useful insights on the latest trends and evolving practices vis-à-vis key issues in international arbitration. The text is a very useful reference for practitioners of International Commercial Arbitration because it captures the procedural as well as the practical nuances of commercial arbitration as a popular method of Alternate Dispute Resolution. A general understanding of arbitration lends insight into its practice-driven nature, which translates into an inadequacy stemming from a mere theoretical understanding. While the entire architecture and process of arbitration is structured within the umbrella of general laws, its method, procedure and skill, require an in-depth understanding. This becomes particularly important in the international context where an array of theories, laws, rules, exceptions, etc. need to be applied collectively alongside international laws, conventions etc. Keeping this in mind, the efficacy of the book is validated in that it provides a blend of law, practice, and the trends of arbitration in various international jurisdictions.

This edited volume has been fractioned into twenty chapters, each dealing with a specific aspect of the subject matter. A tabular list of cases enshrined in the nascent pages of the book is a helpful and efficient guide to existing judicial precedents. Since the book is an edited version with multiple contributors, the two segments, namely, the ‘Notes on Editors’ and ‘Notes on Contributors’, are a thoughtful inclusion that apprises the reader with the authors and acts as a

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catalyst in generating familiarity between the reader and the authors. Yet another prominent feature of the book is the elaborate 'Introduction'. It is not a mere summary or short write-up. Rather, it digresses from the norm and is a continuous piece of writing flowing throughout the book, with the objective of acquainting the reader with the various chapters, contents, and the authors' take on them. Further, it is replete with a multitude of footnote references, akin to a research paper. The introduction provides a crisp summary and a clerestory window to the book, and is, in my opinion, a must-read as it swiftly glides the reader into the book.

Chapter 1 authored by *Justice Kaushal J. Thaker* provides riveting insights into the existing alternate dispute resolution mechanisms and their developments in Indian jurisprudence. The author's vast experience and resultant expertise in the field are well-reflected through the contents of this chapter. The first paragraph of this chapter is used by the author to examine and uncover areas and inroads made by said dispute resolution mechanisms in India. The principal focus of the author lies in an examination of the latest trends and new vistas in alternate dispute resolution mechanisms as generated by courts, including applications to criminal and civil litigation. The author provides an informative commentary on the concept of alternate dispute resolution, The Code of Civil Procedure, 1908, the role of legal service authorities and courts in the aforementioned dispute resolution mechanisms, the applicability of these mechanisms in specialized cases, tort law, etc. Captivating areas such as plea bargaining and mediation have also been included vis-à-vis legal, policy and judicial interventions. In conclusion, Justice K.J. Thaker articulates, and rightly so, that alternate dispute resolution can significantly reduce the injustice faced by Indian people due to a delay in the disposal of court cases.

Chapter 2 by *Dr. Akhil Prasad* is the narrative of a General Counsel on alternate dispute resolution as a dispute management mechanism in the corporate world. The author's focus rests on how efficiently a dispute resolution mechanism can act as a business enabler in the corporate world and can expedite the process. The importance of choosing an appropriate dispute resolution mechanism including dispute assessment and negotiations as a part of business strategies and expectations has been duly highlighted.

Chapter 3 by *Sherina Petit & Maja Mazur* delineates the emerging trends in alternate dispute resolution in the Indian jurisdiction amid challenges such as a tedious backlog of cases in the Indian courts and the efforts of the country in its attempt to become a global arbitration hub.

The authors present a detailed overview of various alternate dispute resolution methods with a special focus on mediation.

Chapter 4 by *David Smith* is an engrossing write-up on mediation-arbitration as an alternate dispute resolution combination. The author sheds light on a series of other combinations including but not limited to arbitration-mediation, arbitration-mediation-arbitration, and mediation followed by last offer arbitration alongside describing their pros and cons. The author brings out the importance of combining said methods because of the consequent effectivity, economic viability, speedy dispensation and efficiency, while also taking cognizance of how mediation and arbitration are often perceived as uneasy bedfellows. The theme of the chapter is that alternate dispute resolution combination methods provide a solution to parties based on their necessity, in accordance with the doctrine of party autonomy.

Chapter 5 by *Prof. Chirag Balyan* examines the predominant concept of arbitrability, a concept which currently finds no legislative mention or definition. The author accentuates the inter-relation between arbitrability, public policy, jurisprudence, and tests of arbitrability laid out by Indian courts vis-à-vis judicial precedents. A cardinal point – particularly useful for practitioners – revolves around the question of who determines the arbitrability of a dispute. Section 4 of the Arbitration & Conciliation Act dictates the non-arbitrable disputes in India. The final sentence penned by the author adeptly necessitates the drafting of an arbitration agreement with due care to pre-empt problems with arbitrability post entering the contract. The chapter is characterized by the practical utility as well as an instrumentality to review statutory and policy provisions.

Chapter 6 by *Sheila Ahuja, Arun Mal, Deekshitha Swarna & Aditya Sarmah* cater to the concept of Interim Measures [“**IR**”] in arbitration, as well as the avenues to it and the authorities involved. The targeted discussion on IR under Indian and English laws and the various laws of leading arbitral institutions makes the chapter a quick reference guide for International Commercial Arbitration practitioners. Section 6.2 provides a very useful reference list of Arbitral Institutions allowing for provisions of Emergency Arbitration [“**EA**”].

Further, *Chapter 7* by *Sameer Jain & Jayashree Parihar* discuss the emerging concept of EA. Associated issues of procedure, recognition and enforcement of EA awards, security of costs, etc. are well explained. Section 7.4 of *Chapter 7* provides a ready reckoner on the Indian judicial rulings on the subject matter.

Chapter 8 by *Karishma Vora & Chinmayee Pendse* and *Chapter 9* by *Lomesh Kiran Nidumuri* delve into the foremost procedural aspects of Anti-Suit Injunctions and Anti-Arbitration Injunctions. These aspects are very crucial to International Commercial Arbitration where international and national laws align. Section 2.6 of *Chapter 8* discusses ‘Comity’ – court discretion, reciprocity between States, and dilemmas faced. While *Chapter 8* focuses on Anti-Suit Injunctions, *Chapter 9* traverses the development of Anti-Arbitration Injunctions in International Commercial Arbitration globally. These two chapters form an efficacious practical guide to advocates and arbitrators.

Chapter 10 by *Surjendu Sankar Das* delves into the journey of Section 11, as well as the relevant jurisprudence, of the Arbitration & Conciliation Act, 1996 [“A&CA”]. Section 11 has critical importance as it brings to prominence, the role of designated courts in the appointment of an arbitrator as the protector of the parties’ interests. The chapter tracks the progress made by legislative and judicial interventions in the application and efficacy of the section. Amendments to the A&CA in 2015 and 2019 in relation to the section are also discussed in detail.

Chapter 11 by *Stepan Puchkov* centres around subconscious biases in international arbitration – a topic of cognitive and social psychology. The theoretical aspects such as the *dual-process theory of thinking* as a part of legal practice and *strategic planning* of the case are very captivatingly presented. Similarly, the *two-systems theory of social behaviour and social economics* is explained in great depth to shed more light on its utility in understanding cognitive biases in arbitration. The author beautifully brings out *fascinating concepts of story-telling, narrative mediation, priming, halo effect, cognitive dissonance, ethics*, etc. in dispute resolution. The chapter provides guidance on a bias-free alternate dispute resolution process.

Chapter 12 by *Rafael Carlos Del Rosal Carmona* touches upon another important aspect – *Impartiality & Independence in International Commercial Arbitration*. The author examines said concept as an issue of personal as well as professional morality and ethics for the practitioners in arbitration as well as the arbitrators. These twin aspects also form the cornerstone of transparency and fairness in the arbitration process. The critically important role of *IBA guidelines* as a converging trendsetter is well highlighted. These issues along with disclosure requirements are discussed vis-à-vis the issue of enforcement, party autonomy, arbitrators’ and parties’ duty and the role of arbitral institutions.

Chapter 13 by *Shashank Garg & Divya Behl* provides insight into an arbitrator's duty to raise public policy issues in International Arbitration *ex-officio*. This topic explores the reason and process behind the moral duty of an arbitrator towards national laws despite being party-appointed to resolve their private dispute. The State subject of public policy and case laws across various international jurisdictions have been discussed. The authors elaborate on the duty of arbitrators to care for national laws *ex-officio*, namely how it is tested in the enforcement of awards and hence, is not averse to the party autonomy though it may appear otherwise.

Chapter 14 by *Manavendra Mishra & Akash Karmarkar* talks about the consolidations and composite references as a novel enabling legal mechanism in multi-party, multi-contract arbitrations to deal with the *Dutco Dilemma* (as per the famous *Siemens – Dutco case*) where existing conventional laws, rules, etc. do not suffice to deal with multi-party arbitration scenarios. Consolidation under the national laws of India, the USA, and the UK, as well as some of the leading arbitral institutions, has also been discussed. Section 4 covers the theoretical framework for consolidations, trends, practice and procedure in International Commercial Arbitration.

Chapter 15 by *Sneha Jaisingh* takes on *Third Party Funding in India* as an enabler of unhinged access to justice by levelling the playing field between parties. Questions pandering to ethics, limitations, and legal concerns regarding third party funding are duly examined by the author. She studies the hurdles to third party funding such as *maintenance and champerty* and notes how its treatment as a criminal offence in common law crosses swords with the very purpose of justice for those who cannot afford it. She further opines that this is where third party funding can provide great help. The query about the enforceability of third party funded agreements also finds an answer here.

Chapter 16 by *Sherlin Tung, Alex Ye & Kelly Tan* traverses through the doctrine of separability of an arbitration agreement insofar as governing law versus the law underlying the contract is concerned. This dichotomy in drafting the arbitration agreement has been discussed with an aim of educating readers on the need to obviate avoidable procedural tangles. Approaches to the issue in England, Singapore and Hong Kong are covered in Sections 2 to 4.

Chapter 17 by *Montek Mayal* involves a discussion on the niche aspect of experts' role and calculation of economic damages in commercial disputes. Detailing of a framework and

approaches to damages' calculation, as well as an overview of valuation approaches, prove fruitful for experts in arbitrations as well as for arbitrators, lawyers, etc.

Chapter 18 by Thomas R. Snider & Aiman Kler on Expedited Procedures in International Commercial Arbitration and Chapter 19 on Summary Procedures by Dilber Devitre & Mariella Orelli provide answers to questions that practitioners may have on key aspects of modern-day arbitrations as rising business stakes and the expectation of expedited results by parties. These chapters also pander to gateway issues, clashes with due process and efficiency issues. Key concerns of legal tests on applicability, and adoption of these fast-track approaches, are handled well by the authors. Both the chapters make for very useful practical references and are a need of the hour for contemporary International Commercial Arbitration.

Chapter 20 by Gourab Banerji discusses the recent developments in the enforcement of foreign arbitral awards in India. A dissection of the provisions of the A&CA, procedural formalities for enforcement of foreign awards, grounds for refusal and some leading case laws give a sound understanding of the topic. In conclusion, the author aptly highlights the need for India to become a pro-arbitration jurisdiction in furtherance of realizing its dream of becoming a hub of International Arbitration.

In conclusion, the book is a salient piece of writing which focuses on recent and evolving trends and practices in International Commercial Arbitration. The practical treatment accorded to this vast and intriguing subject is of immense utility as a manual since various key issues are given topical coverage for focused reading and reference. The plethora of case laws embedded in the topics lend a high degree of utility to the text as a ready reckoner and wealth of knowledge to anyone engaged in teaching, learning, or practicing commercial arbitration across the globe. The book is a fresh breath of air and deserves a definitive place in all reference stacks, courts, institutions, libraries, lawyers' and judges' desks as well as personal collections.

Leaving the reader with a coveted thirst for more knowledge on the subject, the book assuages the reader with an announcement, embedded in the final part of the introduction by the editors, that the **sequel to the book is forthcoming**. I am positive that the twin book set is going to be a welcome addition to libraries and reference desks across the globe. Last but not the least, the book reflects an immense value for money in that it is a nicely packaged, and elegantly bound edition.