FOREWORD

—Justice A.K. Sikri[1]

> *"It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to litigation — for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity."*
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> **—Aristotle, Rhetoric**[2]

These lines of the great Greek polymath Aristotle from his famous classic Rhetoric aptly depict the significance of arbitration in the settlement of commercial disputes. Talking about arbitration, he observes that it should be given preference over adversarial litigation as arbitration has not just been a method of resolving disputes amicably but has also been a tool for preserving equity—which is the touchstone of justice. Arbitration is perhaps the earliest method of peacefully resolving disputes among humans.[3] It existed *'far before law was formed, courts were structured, and judges formulated law'*.[4] In modern times too, arbitration is aiding globalization which has been a significant transformative force, bringing about an interconnected world defined by massively increased trade and cultural exchange. The contemporary significance of arbitral practice in a globalized world has amplified the significance of quality literature around the subjects governing the arbitral landscape.

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1. Justice Sikri is a Former Judge, Supreme Court of India; former Chief Justice of the Punjab and Haryana High Court; former Acting Chief Justice of the Delhi High Court; and former Judge of the Delhi High Court.
2. Aristotle, *Rhetoric* (Dover Publications 2004).
3. Derek Roebuck, *Disputes and Differences: Comparisons in Law*, *Language and History* (2002).
4. Frances Kellor, *American Arbitration: Its History, Functions and Achievements* 3 (1948).

We have seen that in recent years, arbitration has become the most favoured form of dispute settlement method for disputes arising out of global trade in tandem with the globalisation of law. It is regarded to be less time-consuming, and in many places, more private than court processes. The New York Agreement on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 ("New York Convention") makes it simpler for arbitral awards to be enforced in a foreign jurisdiction than court rulings. Moreover, it is now commonly recognised that arbitration is a neutral means for resolving commercial disputes between parties from different nations, allowing each party to bypass the *'home'* courts of their co-contractors. And most importantly, arbitration provides the parties the freedom to use the procedure of their convenience which can be irrespective of the procedural law of the state where it is seated.[5]

In this framework, contemporary arbitration is evolving towards a greater global synchronisation. Beginning with the New York Convention, the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law"), a series of national laws and institutional rules, as well as soft law texts such as the International Bar Association Rules on the Taking of Evidence, have been combined to form a transnational standard.[6] At the same time many distinct points of convergence also exist, including the separability of the arbitration agreement, *Kompetenz-Kompetenz* (the competence of an arbitral panel to determine its own jurisdiction), limited remedies against the verdict, and party autonomy. This tendency has been referred to as the formation of '*arbitral legal order*'[7] or the creation of '*transnational arbitration*'.[8]

5. Emmanuel Gaillard, John Savage (eds), *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (1999).
6. Gabrielle Kaufmann- Kohler, 'Globalization of Arbitral Procedures' (2003) 36 Vand J Transnat'l L, 1313.
7. Emmanuel Gaillard, *Aspects Philosophiques Du Droit De L'arbitrage International* (2008) 60-66.
8. Marc Blessing, 'Globalization (and Harmonization?) of Arbitration' (1992) 9 J Int'l Arb, 79; Fali Nariman, 'East Meets West: Tradition, Globalization and the Future of Arbitration' (2004) 20 Arb Int'l, 123.

The COVID-19 pandemic further gave the international dispute resolution community an opportune time to reflect upon the progress made and to shape the future of arbitration as a dispute resolution mechanism by using the strategies and tools that have been fashioned to overcome the travel, quarantine and other restrictions imposed all over the world as a result of the pandemic. In this regard, the foremost thing that comes to my mind is the way the pandemic has normalized the incorporation of technology into arbitral practice, which would otherwise have taken many more years. Notably, the pandemic has enlivened the debate about the effect of technology on procedures such as case management conferences, document production and cross-examination of witnesses, and it has become apparent that technology can supplement and even enhance existing procedural innovations in many respects. We have seen that the overall adoption of technology adds value and reduces inefficiencies in arbitrations and the benefits significantly outweigh the costs.

However, over the decades, it also appears that some cracks have begun to form in the façade. Just as arbitral practice has been instrumental in the rise of globalization, there is a sense that it has, at least partially, also been complicit in its fall. This has manifested in what seems a growing wave of discontent with various aspects of international commercial dispute resolution; from Investor-State dispute settlement to international commercial arbitration. There are now mounting concerns both within and outside the legal fraternity as to whether the legal processes by which justice is delivered remain fit for their purpose in terms of being accessible, efficient, and contextualized to the dispute. These concerns go directly to the legitimacy of the global institutions which depend upon these legal processes and indeed globalism as a whole. But how precisely should arbitrators, arbitral institutions and other stakeholders engaged in cross-border arbitration respond?

This takes me to the role that mediation can play in filling the cracks and addressing these issues. Mediation is, moreover, exceedingly flexible[9]

9. Richard Hill, 'Common Points and Differences Among Different Types of Mediation' (2000) ADRLJ, 95; Jeswald Salacuse, 'Direct Negotiation and Mediation in International Financial and Business Conflicts' in Norbert Horn and Joseph Norton

and thus it adapts to diverse legal cultures and can mesh with arbitration without either process being unduly disrupted.[10] Indeed, both the processes can make each other stronger when pursued in coordination. Introducing mediation and negotiation into a dispute resolution clause, using it when a dispute arises or providing for it in the rules of the arbitral institutions is important for the use of arbitration and its own development. When used before or after arbitration, mediation reassures and makes arbitration more approachable and less distant from ordinary business practices than conventional dispute resolution techniques. Arbitration can either be the ultimate recourse after exhausting all means of seeking a settlement or, conversely, the springboard for a settlement, because the parties are then in a position to have an enlightened discussion after clearing up the legal issues or gaining a better understanding of the facts.

The Indian Arbitration Law Review has proven to be a perfect stepping-stone in this journey where complex intricacies around the subject are collated in the form of lucid prose. Each essay in this volume ensues a discussion around the wide range of issues arising from the evolution of arbitral practice in the context of some of the larger themes of our time—the role that globalization of business and trade is playing in the increasing disparity between and within nations, and the significance of dispute resolution mechanisms in it. The assembled papers also examine the new developments around the field in order to assess the best practices which can be imbued in the arbitral landscape. The journal is, as a consequence, relevant, engaging and helpful to all the stakeholders including policymakers, lawyers, arbitrators, judges, academics and students.

It is encouraging to see that the authors have endeavoured to examine and explore the strengths and weaknesses of the status quo of the arbitral landscape while suggesting some pragmatic reforms that could be

(eds), *Non-Judicial Dispute Settlement in International Financial Transactions* (2000).

10. Robert Dobbins, 'The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity' (May 2000) 1 Hastings Bus L J 161; James T. Peter, 'Med-Arb in International Arbitration' (1997) 8 Am Rev Int'l Arb 83, 103-06; Haig Oghigian, 'Perspectives from Japan: A New Concept in Dispute Resolution— The Mediation-Arbitration Hybrid' (Spring 2009) 2 N Y Disp Resol Law 110.

implemented to enhance efficiency and reduce the concerns highlighted above. The essays in this volume of Indian Arbitration Law Review also evidence the cogency of the frame of reference around arbitration law and remind us how important it is to engage in an academic analysis of the substance of law and the processes we use in modern-day arbitration practice. I congratulate all the contributors of this volume for both the ambition of their project, and the quality of manuscripts that have been produced. The Editors of this Journal also deserve deep appreciation for the tireless efforts made by them, which has given this volume the present form.