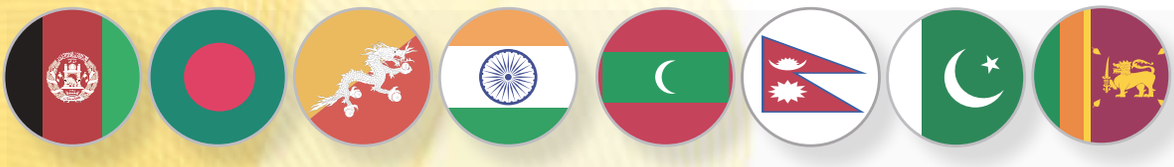

SAARC Arbitration Council

NEWSLETTER

11th Edition | February 2025

Contents

Message from the **Director General**

Dear readers,

Welcome to the 11th edition of the annual newsletter of the SAARC Arbitration Council (SARCO). As we continue our efforts to promote alternative dispute resolution (ADR) as a fundamental approach to resolving disputes in South Asia, we are excited to share our latest updates, insights, and initiatives.

Looking ahead, we will focus on two key areas: improving our performance in ADR services and rolling out tailored capacity development programs. We will implement multifaceted promotional strategies to enhance case referrals in order to bolster our ADR services, where our performance history is lacking. The long-term goal is to achieve financial sustainability for SARCO, thereby reducing financial burden on member states.

Regarding programs, we will shift from the existing approach of general program delivery to implementing tailored capacity development programs in accordance with our legal mandate to promote ADR institutions within member states, as requested by several arbitral institutions.

In this issue, we highlight key updates on our past initiatives and provide information about our future programs and collaborative efforts, aimed at promoting arbitral institutions in member states as well as enhancing our ADR services. Additionally, you will find a range of articles showcasing recent advancements in the field of ADR across several member states. Our goal is to ensure that member states are informed of our progress in fulfilling our mandates and to provide our stakeholders with information that deepens their understanding of ADR.

We value your continued support and engagement. As we embark on this progressive journey, we invite you to share your thoughts and feedback to enhance our initiatives, aimed at reinforcing the role of ADR not only as a means of resolving disputes but also as a tool for promoting sustainable economic development and regional cooperation within the SAARC region.

“Looking ahead, we will focus on two key areas: improving our performance in ADR services and rolling out tailored capacity development programs.”

Warm regards,

Choining Dorji

Director General

SAARC Arbitration Council

SAARC Secretary General Visits SARCO

H.E. Secretary General of the South Asian Association for Regional Cooperation (SAARC), Ambassador Md. Golam Sarwar, visited SARCO in Islamabad on 22 May 2024. This was his first visit since assuming office in October 2023. He was accompanied by Mr. Md. Waseem Shahzad Chaudhri, Director (Energy, Transport, Science & Technology), and Mr. Hari Prasad Odari, Director (Information & Poverty Alleviation) at the SAARC Secretariat in Kathmandu, Nepal.

He received a briefing on SARCO's activities, accomplishments, and future plans, including challenges and constraints. Following the briefing, H.E. Secretary General emphasized the vital role of SARCO in facilitating investment and commercial activities, as SAARC forges ahead with regional integration.

Commemorating the 40th SAARC Charter Day

SARCO organized a simple cake-cutting ceremony to commemorate the 40th SAARC Charter Day. SAARC was established on 8 December 1985. It was attended by Mr. Khurram Shahzad Mughal, the Governing Board member of SARCO from the Islamic Republic of Pakistan; Ms. Saadia Awan, Director in-charge of SAARC in the Ministry of Foreign Affairs, Islamic Republic of Pakistan; and Mr. Abdul Rasheed Jokhio, Director of the SAARC Energy Centre in Islamabad, Pakistan.

Constitutional Arbitrator

Late Dr. Munir Ahmad Mughal
Former Judge of the Lahore High Court

The concept of arbitration for resolution of disputes is not a new phenomenon in the sub-continent, as arbitration was covered by § 89 of the Civil Procedure Code 1908 (CPC). The Arbitration Act of 1940 (Act), a specific piece of legislation on arbitration, was enacted that repealed § 89 of the CPC, which still exists and provides a legal regime for arbitration in Pakistan. This Act deals with appointment, duties, functions and removal of arbitrators, as well as how they are appointed, either by the parties or with the intervention of the court. Under the Act, arbitrator can be appointed with or without intervention of the court. The Act is technical, and any violation thereof by the arbitrators may lead to the termination of proceedings through a court decree or order.

Notably, the Constitution of Pakistan 1973 also prescribes certain situations wherein arbitrators are to be appointed for the resolution of specific disputes without bringing the matter in controversy before ordinary courts of law. This article will highlight those areas where an arbitrator must be appointed under the authority of the Constitution. I will refer to the said arbitrator as the "constitutional arbitrator."

Let us take a look at a few constitutional provisions in this regard. In Art. 146(3), a specific dispute between the federation and provinces concerning administrative relations between them and some consequential financial obligations is anticipated. For the resolution of such a dispute, an arbitrator must be appointed by the Chief Justice of Pakistan. It reads as follows:

"*Where by virtue of this Article powers and duties have been conferred or imposed upon a Province or officers or authorities thereof, there shall be paid by the Federation to the Province such sum as may be agreed or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of Pakistan, in respect of any extra costs of administration incurred by the Province in connection with the exercise of those powers or the discharge of those duties.*"

The next anticipated dispute between the federation and provinces relates to the issue of acquisition of land for the federal purposes. Art. 152 is relevant, which reads as follows:

"The Federation may, if it deems necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which [Majlis-e-Shoora (Parliament)] has power to make laws, require the Province to acquire the land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation on such terms as may be agreed or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of Pakistan."

Another important area where a dispute between the federal and provincial governments is anticipated concerns broadcasting and telecasting, as described in Art. 159(4). To resolve such dispute, it is again the Chief Justice of Pakistan who must appoint an arbitrator. It reads as follows:

"If any question arises whether any conditions imposed on any Provincial Government are lawfully imposed, or whether any refusal by the Federal Government to entrust functions is unreasonable, the question shall be determined by an arbitrator appointed by the Chief Justice of Pakistan."

An Executive Body for Dispute Resolution Between Governments

The Council of Common Interests is also assigned a role as a dispute resolution body in certain situations. Art. 157(3), thus, reads:

"In case of any dispute between the Federal Government and a Provincial Government in respect of any matter under this Article, any of the said Governments may move the Council of Common Interests for resolution of the dispute."

Supreme Court as an Arbiter Between Governments

Art. 184(1) and (2) address general disputes between any two governments, i.e., federal to provincial, provincial to federal, or provincial to provincial, etc. It states that the Supreme Court will serve as the dispute resolution body in this context. Its specific wording is as follows:

"*(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.*

Explanation. —In this clause, "Governments" means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgements only."

Some Constitutional Questions of Jurisprudential Significance

The readers of this Article may engage in legal discourse on the following:

- What may be the qualifications of a constitutional arbitrator?
- Which law governs the proceedings before a constitutional arbitrator?
- Is an award made by a constitutional arbitrator challengeable before a civil court?
- How and through what procedure can a constitutional arbitrator be removed?
- Who will propose a person to be appointed by the Chief Justice of Pakistan for such a position?
- Is such award subject to the writ jurisdiction of the High Courts?
- Does the Arbitration Act of 1940 apply to constitutional arbitrator?
- Can the order to appoint constitutional arbitrator by the Chief Justice of Pakistan be challenged before a court of law – the High Court, or Supreme Court itself under their writ/original jurisdiction?
- Do the above constitutional provisions raise questions about the independence of the judiciary and challenge the concept of separation of powers?
- What is the difference between the Chief Justice of Pakistan as a sole authority to appoint constitutional arbitrator and the Supreme Court of Pakistan as an institution in the context of the above constitutional provisions?

Conclusion

In this writing, I have merely attempted to provide food for thought for law students, law teachers, lawyers, judges, jurists, and legal philosophers, as well as arbitration and mediation associations, to consider these questions of constitutional significance. If these matters are debated and deliberated, they will foster a high-quality interpretation of the above-referred constitutional provisions. As a result, the "constitutional arbitrator" will become more empowered and effective.

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* Due permission was obtained from Judge Amir Munir, son of the late Author, and its original publication is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770337 (last visited 10 January 2025)

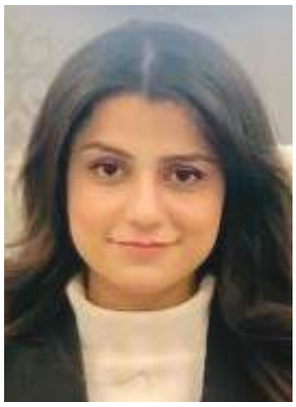
Mapping Out Future Paths: SARCO's 13th Governing Board Meeting

The 13th annual meeting of SARCO's Governing Board took place in Colombo, Sri Lanka, on 12-13 December 2024. Setting the tone from the top, the meeting established the overall direction by outlining its future paths. Firstly, attention must be directed towards improving SARCO's ADR services through various promotional strategies to increase case referrals. Secondly, SARCO should move away from the current approach of general program delivery to implementing tailored capacity development programs to foster the growth and efficient operation of arbitral institutions. This is a long-term goal aimed at achieving financial sustainability for SARCO, thereby reducing financial burdens on member states.

New Director General Assumes Charge

Mr. Choining Dorji joined the SAARC Arbitration Council in late June 2024 as its fifth Director General. He succeeded Mr. Md. Helal Chaudhary. Prior to his current assignment, Mr. Dorji was a member of Parliament in the National Council of Bhutan and then a practicing lawyer. He joined the Bhutanese civil service in 2000 and served in various offices in different capacities. Mr. Dorji also worked in the corporate sector for several years after leaving the civil service and practice law.

The Role of Arbitration in Environmental Disputes: Perspective of Pakistan



Warda Kazmi
Co-President, Vis Alumni Network, Pakistan

Introduction

Environmental deterioration presents a substantial obstacle to Pakistan's sustainable development.

Issues, including industrial pollution, deforestation, and water scarcity necessitate prompt and effective remedies. However, these issues have resulted in environmental disputes. Due to the traditional judicial system's challenges with delays, exorbitant expenses, and insufficient technical proficiency; arbitration can be integrated into Pakistan's legal system to address these disputes effectively and promptly.

Environmental Challenges in Pakistan

Pakistan's population is projected to reach 380 million by 2050, putting pressure on its natural resources and creating environmental and climate-related challenges. The country ranks fourth in the world for air pollution, with Karachi being the world's fourth most polluted city. Water scarcity is at a "frightening" level, ranking 14 out of 17 of the extremely high water-risk countries. Despite this, the situation has received little media attention.

Pakistan's per capita emissions are among the lowest in the world, but it ranks among the top 10 most affected by climate change in the last 20 years. In June 2022, Pakistan experienced record monsoonal rainfall and flooding, affecting 33 million people, killing 1,739, and injuring 12,867. Flooding damaged over 13,000 kilometers of roads, 400 bridges, two million houses, and a million livestock. An estimated five million people remain exposed to or living close to flooded areas in January 2022, and eight million people are homeless.

Agriculture, which contributes to 23% to Pakistan's GDP, employs 43% of its labor force and is an important source of foreign exchange earnings. The 27th session of the United Nations Climate Change Conference (COP27) in November 2022 raised the question of who will pay for the alarming, manifold, and disproportionate impact of climate change on countries in the Global South. The deal to establish a Loss and Damage Fund aimed at providing financial assistance to countries on the frontlines of climate disasters has been labeled as 'modest,' and important questions about how the assistance will be operationalized remain unsettled.

In Pakistan, the issue of climate change has gained increasing prominence in public and political discourse, with numerous government initiatives proposed. However, the Asghar Leghari v. Pakistan case revealed government inaction and failures in coordination and implementation.

Moreover, Pakistan faces a multitude of other environmental issues as well that threaten its socio-economic structure. Deforestation, untreated wastewater discharge, and industrial air pollution are significant concerns. These problems not only impair public health but also impede economic progress and exacerbate climate vulnerability.

Traditional Mechanisms for Environmental Dispute Resolution

Pakistan's legal framework for resolving environmental disputes is primarily governed by the Pakistan Environmental Protection Ordinance (PEPO) of 1983 and the Pakistan Environmental Protection

Act (PEPA) of 1997. The PEPO was the first comprehensive environmental law in Pakistan, but it has faced criticism for its lack of enforcement mechanisms and for being largely unimplemented.

The PEPA 1997 aimed to strengthen environmental governance by establishing environmental tribunals to adjudicate disputes related to environmental protection. However, the effectiveness of these tribunals has been questioned due to their limited jurisdiction and operational challenges. Provincial environmental protection laws have also been enacted, creating separate legal regimes, which lead to procedural difficulties and interprovincial conflicts.

Specialized environmental tribunals, established under the PEPA 1997, are being criticized for a lack of reported judgments and limited engagement with significant environmental issues. Furthermore, due to a lack of funding from the government, these tribunals are also criticized for malfunctions. The effectiveness of these tribunals has been further questioned because of their limited jurisdiction and operational challenges. The members of environmental tribunals have not received adequate training, which has led to criticism regarding their performance. As a result of these shortcomings, they are perceived as ineffectual, making it difficult for them to resolve environmental issues.

Public interest litigation, such as landmark cases like Shehla Zia v. WAPDA, has also played a crucial role in environmental law. However, the reliance on higher courts indicates a gap in the effectiveness of environmental tribunals. Green benches at the High Court level and Green Courts at the district level have also been established in Pakistan. Yet, cases like Rabia v. Federation of Pakistan remain pending since 2016, demonstrating the need for an alternative dispute resolution for the immediate resolution of disputes. Moreover, access to environmental justice is primarily restricted by the current environmental legislation to "aggrieved persons," which prohibits NGOs and concerned citizens from filing complaints. This restriction severely compromises the function of these courts in addressing broader environmental matters.

In conclusion, Pakistan's environmental laws and the effectiveness of environmental courts in resolving disputes are severely hampered by their shortcomings, which calls for extensive revisions to enhance their capability and accessibility.

Potential of Arbitration to Resolve Environmental Disputes

Arbitration has the potential to address the complexities of environmental disputes by providing specialized, timely, and inclusive solutions. It can adapt to the intricacies of environmental conflicts, which involves multiple stakeholders and complex legal issues, making it a more effective alternative to traditional legal mechanisms. Specialized experts in arbitration can enhance the quality of decisions, providing valuable knowledge and insights for understanding environmental law and the specific context of each dispute.

Timeliness and efficiency are significant advantages of arbitration, as it facilitates faster outcomes compared to conventional court processes. Arbitration can accommodate a diverse range of stakeholders, ensuring all relevant voices are heard for fair and balanced resolutions in environmental matters, which is a major deficiency Pakistan's environmental laws, as they do not allow NGOs and various stakeholders to bring complaints.

Customizable processes are also available within the arbitration framework, which is particularly beneficial in environmental disputes where the circumstances and interests of parties can vary widely. With the right support and commitment to practical solutions, arbitration could emerge as the principal forum for resolving environmental disputes, thereby enhancing the overall effectiveness of environmental governance and conflict resolution strategies.

Legal Framework for Arbitration in Pakistan

The primary legislation that governs arbitration processes in Pakistan is the Arbitration Act of 1940. It provides the foundational legal structure for arbitration and outlines the framework for conducting arbitration, including the appointment of arbitrators, the conduct of proceedings, and the enforcement of arbitral awards.

Moreover, the Recognition and Enforcement Act of 2011 implements the New York Convention in Pakistan. It specifically deals with the recognition and enforcement of international arbitral awards, providing a legal basis for the parties to enforce such awards in Pakistani courts. This act is crucial for facilitating international trade and investment by ensuring that foreign arbitral awards are recognized and enforced in Pakistan.

Arbitration for Environmental Disputes in Pakistan

There are numerous conflicts and disputes that demonstrate the need for neutral and specialized forums for the resolution of environmental disputes and immediate solutions. The most prominent example is the case of Rabia Ali v. Federation of Pakistan, which has been pending in the Supreme Court since 2016. Moreover, internationally, arbitration can serve as a beneficial forum as well; for example, resolving the conflict over water between Pakistan and India. It is the need of the time because the concept of environmental tribunals has failed, and public interest litigation further results in the delaying of such concerning disputes.

Furthermore, the Arbitration Act of 1940 faces considerable criticism, which is the ruling law of arbitration in Pakistan, for allowing excessive intervention by the courts and being insufficient to meet the contemporary standards and criteria. Thus, this Act should be modernized to align with contemporary needs, including environmental disputes. Environmental legislation like PEPA 1997 could be amended to explicitly incorporate arbitration as a dispute resolution mechanism. This will also encourage fulfilling our international obligations under the UNFCCC, the Paris Agreement, and the Kyoto Protocol.

Recommendations

In order to incorporate arbitration for the resolution of environmental disputes, the following recommendations are proposed:

- Modernize the Arbitration Act of 1940 to align with standards for resolving environmental disputes or enact separate legislation exclusive to the resolution of environmental disputes.
- Amend PEPA 1997 to explicitly incorporate arbitration as a dispute resolution mechanism.
- Invest in capacity-building in order to fully realize the potential of arbitration in settling environmental conflicts.
- Implement training programs for policymakers, attorneys, and arbitrators in order to fill in knowledge gaps.
- Create specialized arbitration institutions focused on environmental issues in order to provide them institutional support and legitimacy.
- Foster innovation and cooperation in settling environmental disputes by promoting public-private partnerships.

Conclusion

Arbitration offers a promising pathway to effectively address Pakistan's environmental challenges. By leveraging arbitration's flexibility, technical focus, and efficiency, Pakistan can overcome the limitations of traditional litigation and enhance its environmental governance. However, realizing this potential requires concerted efforts, including legal reforms, capacity building, and stakeholder engagement. Embracing arbitration is not just a legal innovation, it is a necessity for a sustainable and resilient Pakistan.

Highlights of Key Events in 2024

Strengthening Legal Framework for Arbitration and Mediation

To keep pace with changing arbitration and mediation practices over time, substantial revisions have been made to both the Rules of Procedure for Arbitration, as well as the Rules of Procedure for Mediation. While preserving the fundamental original frameworks, the revisions address contemporary matters such as electronic commerce, emergency interim relief, and the necessity for enhanced clarity on specific aspects like arbitrator selection, the extent of arbitrable disputes, and procedures for annulling awards. These revisions seek to ensure that the procedural rules remain relevant and adaptable to changing trade practices.

Observer Status to UNCITRAL Working Groups

SAARC has now been added to the roster of intergovernmental organizations, granting an observer status to participate in the sessions of UNCITRAL Working Group II on Arbitration and Conciliation, as well as Working Group III on Investor-State Dispute Settlement. UNCITRAL stands for the United Nations Commission on International Trade Law. Observers are allowed to engage in discussions during sessions of UNCITRAL and its working groups to the same extent

UN Photo by Manuel Elias (https://uncitral.un.org/)

as members. This offers SARCO a chance to enhance knowledge, access, and participation in, and contribute to UNCITRAL's efforts, as it formulates and advocates for international trade law.

Establishing Young Arbitration Group

The Young Arbitration Group (Young SARCO) will be established in 2025 under the auspices of SARCO, a platform catering to arbitration and mediation practitioners under 40 years of age.

Young SARCO will bring together young lawyers, law students, and emerging professionals from the business community and government sectors to promote understanding and use of arbitration and mediation.

Young SARCO will assist SARCO in gaining fresh perspectives, connecting with future legal practitioners, and motivating younger legal practitioners to use arbitration and mediation. This initiative cultivates a robust network among younger legal community, guaranteeing SARCO's ongoing sustainability and expansion in the future.

Critical Analysis of the Draft Amendment to § 34 of the Arbitration & Conciliation Act, 1996

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Background

The Arbitration and Conciliation Act 1996 (ACA) defines the law relating to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards. Arbitration is an alternative to litigation in courts and is advantageous as it provides flexibility and confidentiality. § 34 of the ACA, provides the framework for setting aside an arbitral award under specific circumstances. It balances the need for finality in arbitration with the necessity of judicial oversight to prevent unjust outcomes. There is no existing provision in the ACA regarding the appellate arbitral tribunal.

On 18th October 2024, the Department of Legal Affairs invited comments on the draft amendment to the ACA, which has recommended a plethora of changes. One such significant change has been introduced to § 34, wherein an appellate arbitral tribunal has been proposed to be established, to which parties can challenge an arbitral award. As per the proposed amendment, parties choosing institutional arbitration would be allowed to choose between the court or the appellate arbitral tribunal for appeal.

This provision would be available for the arbitrations conducted under the aegis of institutional arbitration centres. It appears that appellate arbitral tribunals in ad hoc arbitrations are not permitted by the draft bill. Under § 34A of the proposed amendment, institutions may provide for an appellate arbitral tribunal to entertain applications under § 34 of the ACA.

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This article will first examine the status of appellate arbitral tribunals in India prior to the proposed amendment. Following this, the role of appellate arbitral tribunals and two-tier arbitration systems across various arbitration institutions, such as the Paris Arbitration Chambers, the London Court of International Arbitration, and the International Chambers of Commerce, will be explored by analyzing the challenges, advantages, and disadvantages associated with the proposed amendment. This article primarily focuses on how the proposed amendment limits the grounds available for the appellate arbitral tribunal to review an award.

Jurisprudence Related to the Appellate Arbitral Tribunal

There was no existing provision for the appellate arbitral tribunal in the ACA until this amendment, which allowed the parties to challenge the arbitral awards before an appellate arbitral tribunal. There have been several cases in the past where parties have inserted such clauses to enable them to have their arbitral awards reviewed by an appellate arbitral tribunal. Accordingly, Indian courts have addressed the validity of such clauses regarding the ACA.

The Calcutta High Court, in the case of Heeralal Agarawalla and Co. v. Joakin Nahapiet held that there is nothing that prevents the parties from agreeing to a clause for two-tier arbitration. Furthermore, this position was upheld by the Supreme Court in

the cases of Shri Lal Mahal Ltd. v. Progetto Grano Spa and Subhash Aggarwal Agencies v. Bhilwara Synthetics Ltd. based on party autonomy. The court further clarified that these clauses do not violate § 35 of the ACA, as it allows for a review, provided that the agreement between parties or statutory provisions permit such an appeal.

The validity of these clauses was ultimately established by the Supreme Court in the landmark case of Centrotrade Minerals & Metals v. Hindustan Copper Ltd., where the Hon'ble Court upheld prior decisions of various High Courts that deemed these clauses valid. It observed that although recourse to courts is available for challenging an arbitral award, this does not ipso facto prohibit the parties from mutually agreeing to a review of an arbitral award by an appellate arbitral tribunal. It also reaffirmed party autonomy as the foundation for allowing such an appeal. Moreover, it held that these clauses do not contravene public policy, as there is nothing in the ACA that prohibits the contracting parties from agreeing to such an appellate arbitration.

In light of the above cases, Indian courts have consistently validated the clauses for challenging an arbitral award in the appellate arbitral tribunal. This is seen as a valid extension of arbitration, reinforcing the principle of party autonomy in arbitration agreements.

International Perspective

Two-tier arbitration is widely recognized in many jurisdictions, such as Japan, the Netherlands, South Africa, Italy and Austria as well as by leading arbitral institutes. The UNCITRAL Model Law on International Commercial Arbitration also considers two-tier arbitration as a viable option. According to Rule A-10 of the Optional Appellate Tribunal Rules of the American Arbitration Association, a party is allowed to appeal to the appellate arbitral tribunal on two grounds, namely, an error of law that is material and prejudicial or a determination of facts that are clearly erroneous. Here, the second ground allows for a limited review of the merits of the case.

According to Rule XVII of the Paris Arbitration Chambers, any party to the arbitration involved in a claim exceeding € 30,000 may resort to a second-degree examination to hear the matter afresh after the final award is rendered by the first panel. The award of the second panel is final and binding on the parties, thereby providing satisfaction to the parties in case of an error by the first panel. Similarly, the rules of the European Court of Arbitration also provide for a fresh hearing during the stage of the second arbitration.

Leading arbitration practices often adopt an appellate mechanism for an arbitral award, significantly reducing the probability of risks, and providing "peace of mind" to the parties concerned. Likewise, the Grain and Feed Trade Association also allows for a new hearing on appeal, and the board of appeal may vary, amend, or set aside the arbitral award.

The majority of arbitration institutions worldwide permit two-tier arbitration and impose no bar on its application. For instance, the Singapore International Arbitration Centre, the London Court of International Arbitration, and the International Chambers of Commerce do not have two-tier arbitration but do not bar them as well.

The proposed amendment offers multiple benefits such as strengthening institutional arbitrations. Only parties to institutional arbitrations have the choice under § 34 of the act to challenge the arbitral award in the appellate arbitral tribunal apart from courts. Therefore, institutional arbitration is poised to become a lucrative option for parties in comparison to ad hoc arbitration. Further, as the proposed amendment provides options to parties to go to the appellate arbitral tribunal under § 34, this can potentially reduce the workload of the courts. Additionally,

the appellate arbitral tribunal, operating under Council-prescribed rule is something which will be agreed upon by the parties, its actions of setting aside or modifying awards would not undermine the principle of party autonomy rather it would seek to uphold it.

With several advantages, it also has some challenges which need to be addressed by the legislature. The jurisprudence of the appellate arbitral tribunal shows that parties prefer these clauses in their agreement to have 'peace of mind' i.e. these clauses are generally preferred by parties who prioritize the correctness of the award over time and money.

However, since the proposed amendment inserts the appellate arbitral tribunal under § 34, it ultimately limits the scope of the appellate arbitral tribunal to set aside or review the awards on procedural grounds or on the basis of violations of fundamental public policy of India. This restricts the basic purpose for which parties in many jurisdictions add these clauses, i.e., the review of the awards on merits. This can be appreciated by examining the arbitration rules of some institutions, such as the American Arbitration Association and the Paris Arbitration Chambers, related to appellate arbitral tribunals, where such review on merits is allowed wholly or on limited grounds.

Though one most prominent argument against the review of awards based on merits may be that it undermines the basic principle of arbitral awards, that is, of finality, it may be argued that each dispute differs, and each party has different expectations related to a dispute. Some parties may prefer quick and binding awards, but some parties value correctness over time or costs saved. Thus, this amendment, by restricting the option of the parties to challenge the award under § 34 on merits, creates a disadvantage for both the parties and arbitral institutions. Since some parties may choose not to conduct arbitration through such institutions because they do not allow a review on merits.

Conclusion

The proposed amendment is an encouraging step to strengthen institutional arbitration in India and to make India an arbitration hub for the world. It may also reduce the burden on the courts. On the other hand, it has some disadvantages as well, such as limiting the scope of the appellate arbitral tribunal on procedural grounds.

It restricts the power of the parties to submit their award to review on based merits. This not only limits the options of the parties but also makes the institutional arbitration less lucrative and hinders the goal for which the proposed amendment is to be made. Furthermore, the formation of an appellate arbitral tribunal adds an additional layer to the appeal mechanism, which may increase the cost and complexity of the arbitration and delay the adjudication process.

It is suggested that the legislature should introduce a proviso in § 34 that provides the parties with the option to have their awards reviewed on limited grounds under § 34 by either the courts or the appellate arbitral tribunal, or to have their awards reviewed on the basis of merit by the appellate arbitral tribunal, as they deem fit. Such a proviso will help address this dilemma that may arise upon the enforcement of the present proposed amendment and will thus effectively manage with complex situations that may occur thereafter.

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* Due permission was obtained from the Authors, and this Article was originally published on the Blog of the Centre for Business Laws and Taxation, Rajiv Gandhi National University of Law, Patiala, Punjab, India. Available at https://www.cbltrgnul.in/post/critical-analysis-of-the-draft-amendment-to-s-34-of-the-arbitration-conciliation-act-1996 (last visited 10 January 2025)

Promoting SARCO in High Commissions and Embassies

The Director General visited the High Commissions and the Embassies of all the SAARC member states residing in Islamabad, Pakistan. During these visits, SARCO briefed the diplomatic missions on its operations, achievements and upcoming initiatives, along with associated challenges it faces. Where applicable, the diplomatic missions were urged to adopt SARCO's model arbitration and mediation clauses, as well as to promote SARCO within their respective spheres of influence. The visits were aimed at reinforcing the role of ADR not only as a means of resolving disputes but also as a tool for promoting sustainable economic development and regional cooperation within the SAARC region.

Enhancing Collaborations within SAARC Entities

As part of its ongoing efforts to enhance collaboration among the SAARC entities, the SARCO team met with the Director General of the South Asian Regional Standards Organization in Dhaka, Bangladesh, and the Directors of several Regional Centers: the SAARC Agriculture Centre in Dhaka, Bangladesh; the SAARC Development Fund in Thimphu, Bhutan; the SAARC Energy Centre in Islamabad, Pakistan; and the SAARC Cultural Centre in Colombo, Sri Lanka. The visits were aimed at promoting SARCO's arbitration and mediation services through the adoption of its model arbitration and mediation clauses, whenever opportunities arise and to encourage these SAARC entities to promote SARCO within their respective spheres of influence. The long-term objective is to increase case referrals, as they significantly enhance the likelihood by many folds.

Capacity Development Programs

SARCO conducted a range of activities, both in-person and online, across several member states to foster the development and efficient operation of arbitral institutions. These activities also increase SARCO's outreach, greatly enhancing the likelihood of case referrals. The main activities are highlighted below.

SARCO's Seminar in Bangladesh

SARCO, in partnership with the Bangladesh International Arbitration Centre (BIAC), organized a one-day seminar on 26 October 2024 in Dhaka, themed "Elevating Bangladesh's Trade and Commerce: ADR's Role in Navigating Disputes and Strengthening SAARC Partnerships." The event attracted approximately 70 participants from various sectors, including distinguished guests such as former Supreme Court Justices and the Additional Attorney General of Bangladesh.

The seminar commenced with a welcome address by Mr. Muhammad A. (Rumee) Ali, Vice Chairman of BIAC, followed by a keynote speech from Chief Guest Hon'ble Mr. Justice Ahmed Sohel of the Supreme Court.

Two technical sessions were conducted during the seminar. The first panel, led by Mr. Saqeb Mahbub (Barrister-at-Law, Advocate, Supreme Court of Bangladesh (BSC)), focused on strengthening the ADR framework in Bangladesh. The other speakers included Ms. Anita Ghazi Rahman (Barrister-at-Law, Advocate, Appellate Division, BSC), Mr. Naser Ezaz Bijoy (CEO of the Standard Chartered Bank), Ms. Rashna Imam (Barrister-at-Law, Advocate, BSC), and Mr. Justice A.F.M. Abdur Rahman (former Justice, BSC). They discussed ADR's effectiveness in alleviating judicial backlogs.

The second session, moderated by Mr. Shafayat Ullah (Barrister-at-Law, Advocate, BSC), explored the role of ADR in facilitating trade and commerce, with presentations from experts like Dr. Khaled Hamid Chowdhury (Barrister-at-Law, Advocate, BSC), Mr. Ahsan Ullah (Independent Director, Meghna Bank PLC/former Executive Director of Bangladesh Bank), Mr. Forrukh Rahman

(Barrister-at-Law, Advocate, BSC), and Ms. Humaira Azam (MD, LankaBangla Finance PLC). They emphasized the importance of ADR in attracting foreign investments.

Concluding the seminar, Barrister Saquib Mangrio (Assistant Director (Law) at SARCO) presented on SARCO's contributions to enhancing ADR in South Asia, followed by closing remarks from Mr. Mahbubur Rahman, Chairman of BIAC, delivered virtually.

SARCO's Workshop in Bhutan

SARCO, in collaboration with the Bhutan Alternative Dispute Resolution Center (BADRC), held a two-day workshop in Thimphu on 21-22 October 2024, focusing on enhancing Bhutan's arbitration landscape. The workshop, themed "Strengthening Bhutan's ADR Landscape: Regional Collaboration and Professional Excellence," saw participation from around 35 registered arbitrators, including two virtual attendees from India's Ministry of External Affairs. Mr. Tenzin Leewan, BADRC Chief Administrator, welcomed participants, followed by Barrister Saquib Mangrio's opening remarks. Hon'ble Mr. Justice Dasho Norbu Tshering, the Supreme Court's senior most justice, delivered the keynote address. The event featured prominent guests from Bhutan's legal institutions.

Over the two days, 11 sessions were conducted, including tutorials and a special session. Ms. Amanda Lees (King & Wood Mallesons Law Firm in Singapore) introduced international arbitration's significance in the first session, while Mr. Jonathan Choo (Vantage Chamber LLC, Singapore) covered fundamental principles in the second session. Ms. Anne Secomb (Secomb Arbitration) presented on international arbitration laws (UNCITRAL Model Law, the New York Convention, Code of Ethics, etc.,) in the concluding session, followed by an interactive tutorial session that allowed for focused discussions.

The afternoon of the first day included discussions on the Arbitral Tribunal and its powers and jurisdiction, presented by Ms. Anne Secomb and Mr. Jonathan Choo. A tutorial session allowed for focused discussions before wrapping up the day with a recap by Ms. Amanda Lees, emphasizing collaborative learning in Bhutan's ADR landscape.

The second day of the workshop centered on sessions 6-11, which included a special session, a tutorial, and concluding remarks. Ms. Anne Secomb inaugurated the day by discussing "Case Management Conference and Procedural Order No 1," focusing on the initial meetings where parties and tribunals collaborate on case plans and procedural issues. Mr. Jonathan Choo examined "Written Statements" in arbitration, detailing the Statement of Claim and Defence. The two emphasized key "Procedural Issues and Hearings" related to arbitration before their presentation titled "Special Session on Arbitration under the ICC, SARCO and SIAC Rules," offering comparative insights. Following this, a tutorial on "the procedures" was conducted in three separate groups.

In the afternoon, Session 9 focused on "The Award," with Ms. Amanda Lees discussing the final award process. Session 10 covered "Interest and Costs," with Ms. Secomb explaining arbitration costs and their apportionment. The day included another interactive tutorial session, followed by a discussion on the next steps. The workshop featured a presentation by Barrister Saquib Mangrio on "SARCO's Collaborative Approach Towards Enhancing the Role of National Arbitration Institutions" before concluding with remarks by Mr. Tenzin Leewan and Barrister Saquib Mangrio.

SARCO's Webinar in Maldives

SARCO conducted a webinar on December 23, 2024, titled "Island Mediation: Tailoring ADR for Commercial Disputes in Maldives with a Focus on Tourism and Real Estate Sector." Mr. Choining Dorji, SARCO's Director General delivered the welcome address. The event was moderated by Barrister Saquib Mangrio, attracting a diverse audience from both public and private sectors.

The webinar featured four speakers. Mr. Shujau Shareef (Mooting Advocacy Director, the Maldives Moot Court Society) began with "Evolving ADR Framework of Maldives," outlining the existing ADR legal landscape. Barrister Vishal Shamsi (Co-Founder, Harmony Resolution Centre) followed, discussing "ADR in the Tourism and Real Estate Sector," which examined the application of ADR in these industries. Ms. Shafeea Riza (Managing Partner, RCo Lawyers) presented "Implementing Effective ADR Mechanisms," advocating for the incorporation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (often shortened to Singapore Convention on Mediation) into Maldivian law and the integration of technology in ADR processes. Lastly, Dr. Daksha Sharma (Assistant Professor, Faculty of Legal Studies, South

Asian University) addressed "Strengthening ADR Practices: Insights from the SAARC Region," focusing on public perceptions regarding SARCO. The session concluded with open discussions, a Q&A portion, and a closing vote of thanks from Barrister Saquib Mangrio.

SARCO's Webinar in Nepal

On 27 August 2024, SARCO conducted a webinar titled "SARCO and Nepal:

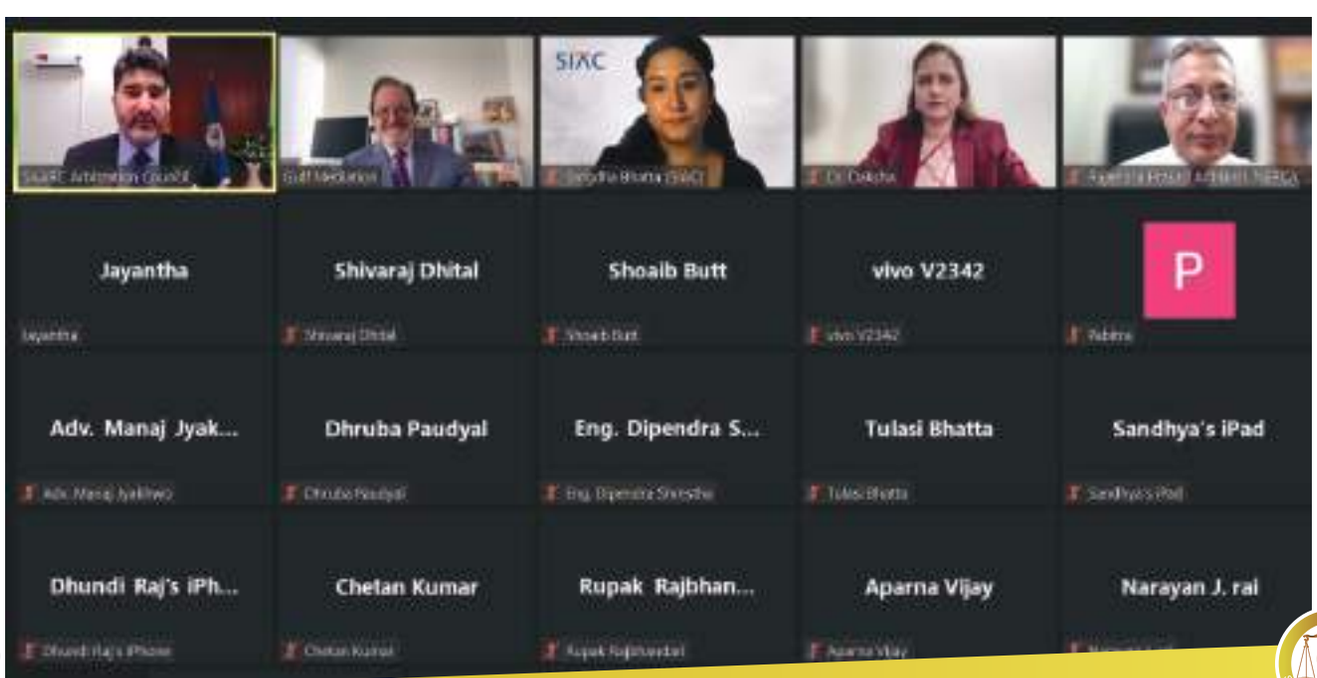
Collaborative Avenues in Enhancing South Asian Arbitration," with around 40 participants from various sectors. Barrister Saquib Mangrio served as the facilitator, while Mr. Choining Dorji delivered the welcome remarks. The event comprised four thematic sessions.

The first theme centered on Nepal's arbitration landscape, where Dr. Rajendra Prasad Adhikari (Chairperson, Nepal Council of Arbitration (NEPCA)) analyzed current arbitration laws and institutions. The second theme focused on SARCO's role in regional arbitration, with Barrister Mangrio discussing collaboration opportunities, and Dr. Daksha Sharma addressing public attitudes toward SARCO.

The third theme explored collaborative avenues between SARCO and Nepal, emphasizing the need for legal assistance and professional development programs. Dr. Adhikari highlighted the importance of standardizing arbitration laws through research to identify legal gaps.

The final theme presented future trends and global best practices in ADR. Ms. Snigdha Bhatta (Deputy Counsel, SIAC) shared insights from the Singapore International Arbitration Centre, stressing the best practices for the effectiveness of arbitral institutions. Meanwhile, Mr. James MacPherson (Special Counsel, Saudi Centre for Commercial Arbitration; International Dispute Resolution Specialist, IDRS; and International Mediator, Gulf Mediation) discussed innovative

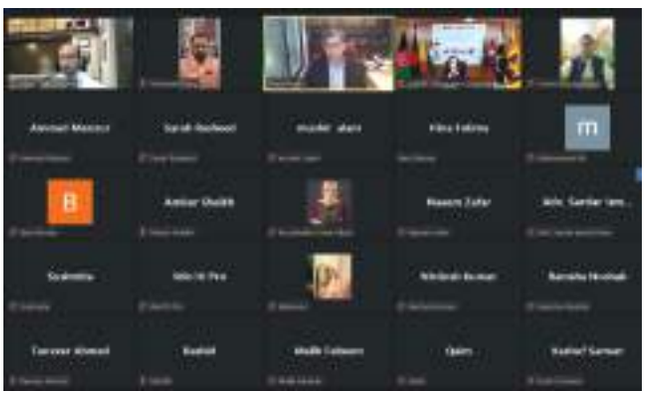
approaches transforming ADR in the Middle East. The session concluded with open discussions, a Q&A session, and a closing vote of thanks from SARCO's Director General.



SARCO's Webinar in Pakistan

On 30 July 2024, SARCO hosted a webinar titled "Navigating the Future: Analyzing the Implications of the Newly Proposed Arbitration Act of Pakistan," attended by around 30 participants from various fields. Barrister Saquib Mangrio moderated the session, while Mr. Choining Dorji delivered the welcome address.

The event included four key speakers. Mr. Feisal Naqvi (Senior Partner, Bhandari Naqvi Riaz Law Firm (BNR)) , presented an "Overview of the Newly Proposed Arbitration Act," focusing on its salient features and the drafting process, drawing insights from practices in other jurisdictions, including India. Mr. Mian Sami Ud Din, also a partner at BNR, discussed the "Potential Impact on Domestic and International Arbitration," highlighting significant changes introduced to address the limitations of the Arbitration Act of 1940. Mr. Shashank Garg (Secretary, Arbitration Bar of India), analyzed the "Role of ADR in Enhancing Economic and Trade Relations," discussing recent transformations



in India's arbitration landscape. Lastly, Ms. Sarha Rasheed (Co-founder and Senior Manager, Musaliha International Center for Arbitration and Dispute Resolution) emphasized the importance of mediation as a precursor to arbitration and advocated for Pakistan's endorsement of the Singapore Convention on Mediation. The session concluded with open discussions, a Q&A portion, and a vote of thanks from SARCO's Director General.

SARCO's Webinar in Sri Lanka

SARCO hosted a webinar titled "Beyond Aspirations: Implementing Best Practices for Sri Lanka's Alternative Dispute Resolution Landscape" on 12 August 2024, moderated by Barrister Saquib Mangrio, with around 30 attendees. Mr. Choining Dorji offered the welcome remarks. The event featured three thematic sessions.

In Theme I, titled Overview of Sri Lanka's ADR Landscape, the speakers included Mr. Amrit Rajapakse (Attorney-at-Law), who discussed the legal framework for arbitration, followed by Ms. Dhara Wijayatilake (Secretary General & Director, International DRC Center (IADRC)), who presented on mediation laws, and Ms. Shehara Varia (Director, IADRC), who outlined the role of local institutions in providing ADR services.

Theme II focused on Learning from Global Best Practices. Mr. Rajapakse highlighted the necessary reforms to improve arbitration efficiency in Sri Lanka, suggesting amendments to the Arbitration Act of 1995. Ms. Wijayatilake discussed the challenges in mediation and emphasized the need for a supportive ecosystem.

Theme III addressed Promoting Regional Cooperation, beginning with Ms. Varia's talk on the significance of regional collaboration in fostering ADR, particularly through SAARC. Barrister Mangrio spoke on SARCO's initiatives to enhance ADR's scope in South Asia, while Ms. Wijayatilake stressed the role of government support in sustaining quality ADR services.

The webinar concluded with discussions and a Q&A session, wrapping up with comments from Ms. Wijayatilake and a vote of thanks from Barrister Mangrio.

The Growth of ADR in Pakistan: A Solution to the Nation's Legal Gridlock

Hamda Ali Khan
Engagement Officer, MICADR

Pakistan's judicial system is at a tipping point. With over 2.4 million cases pending across the country's courts, justice has become a distant dream for many. Litigants endure years of delays, and businesses suffer from the uncertainty of prolonged legal battles. The resulting delays in justice not only affect litigants but also create uncertainty for businesses, impeding economic growth. Against this backdrop, ADR has emerged as a powerful and within-reach solution to address the inefficiencies of traditional litigation.

Recent legislative reforms, the judiciary's increasing endorsement of mediation, and the rise of private ADR centres in Islamabad, Lahore, and Karachi are ushering in a new era for dispute resolution. This article explores the key factors driving ADR's growth and its potential to reshape Pakistan's justice system by reducing the overwhelming backlog of cases.

Mediation, a core component of ADR, is gaining rapid acceptance within Pakistan's judiciary. The Honourable Supreme Court, Islamabad High Court, and Sindh High Court have embraced mediation as an effective tool for case resolution, leading to a notable increase in court-referred mediation cases. This shift is crucial in changing the traditional mindset of lawyers and litigants, who have long been hesitant to explore out-of-court settlements. Notably, the Pakistani judiciary has referred to ADR mechanisms as "Preferred Dispute Resolution" (PDR) in multiple judgments, highlighting the priority given to mediation and arbitration over litigation.

The judiciary's growing reliance on mediation reflects the recognition of its value, particularly in cases where both parties can reach mutually beneficial outcomes without the protracted delays of litigation. As Honourable Senior Puisne Judge, Justice Mansoor Ali Shah, has frequently emphasized, "Mediate, Arbitrate, and only then Litigate," underscoring the judiciary's focus on promoting mediation as the first step in dispute resolution. This approach is crucial to fostering a more collaborative and efficient justice system.

The private sector is playing a critical role in expanding ADR in Pakistan. The establishment of ADR centres in major cities highlights the growing demand for alternative methods to resolve disputes. Among these, the Musaliha International Centre for Arbitration and Dispute Resolution (MICADR) is leading the way with its multifaceted approach to ADR.

Through workshops, seminars, and specialized training sessions, MICADR is promoting the integration of ADR into Pakistan's legal and commercial frameworks, fostering a culture that values timely, fair, and efficient dispute resolution. Its work is essential for shaping the future of ADR in Pakistan by preparing key stakeholders to embrace these alternatives, thus reducing the burden on the formal court system.

The growing acceptance of ADR in Pakistan, supported by progressive legislation, judicial endorsement, and the rise of private ADR centres; offers hope for the country's overburdened legal system. By facilitating faster, fairer, and more efficient dispute resolution, ADR is paving the way for a more robust and accessible justice system.

As more disputes are resolved through mediation and arbitration, the judiciary's workload will lessen, and justice will be served more swiftly. The continued growth of ADR could indeed unlock the gridlock in Pakistan's courts, making way for a future where justice is no longer delayed or denied but delivered efficiently and equitably.

About SAARC Arbitration Council

The SAARC Arbitration Council is one of the specialized bodies of the South Asian Association for Regional Co-operation, comprising member states of the Islamic Republic of Afghanistan, the People's Republic of Bangladesh, the Kingdom of Bhutan, the Republic of India, the Republic of Maldives, the Federal Democratic Republic of Nepal, the Islamic Republic of Pakistan, and the Democratic Socialist Republic of Sri Lanka.

It is mandated to provide a legal framework/forum within the region for the fair and efficient settlement of commercial, industrial, trade, banking, investment, and such other disputesthat may be referred to it by member states and their people. With these objectives in mind, SARCO aims to establish a quality alternative dispute resolution forum that acts on behalf of the governments and the people of SAARC member states, having professionals, retired judges, and eminent lawyers from member states on its panel of arbitrators and conciliators for the out-of-court resolution of disputes, arising from commercial agreements, usually by including the SARCO model clause for the arbitration of future disputes in their contracts in domestic and international commercial trade, investment, transactions, and in similar other international relationships.

Vision

To become the most sought-after arbitration forum in the region by establishing ourselves as a centre of excellence for alternative dispute resolution.

Mission

To deliver fair, cost-effective, expeditious, and high-quality arbitral and conciliation services for the resolution of trade, commercial, investment, and similar disputes, thereby promoting business growth in the region.

Objectives and Functions

- Provide a legal framework within the region for the fair and efficient settlement through conciliation and arbitration of commercial, investment, and such other disputes as may be referred to the Council by agreement;
- Promote the growth and effective functioning of national arbitration institutions within the region;
- Provide fair, inexpensive, and expeditious arbitration in the region;
- Promote international conciliation and arbitration in the region;
- Provide facilities for conciliation and arbitration;
- Act as a coordinating agency in the SAARC dispute resolution system;
- Coordinate the activities of and assist existing institutions concerned with arbitration, particularly those in the region;
- Render assistance in the conduct of ad hoc arbitration proceedings;
- Assist in the enforcement of arbitral awards;
- Maintain registers/panels of: (i) expert witnesses, and (ii) suitably qualified persons to act as arbitrators as and when required; and
- Carry out such other activities as are conducive or incidental to its functions.

For more information, contact the SAARC Arbitration Council at **info@sarco-sec.org**

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