



Newsletter



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SAARC Arbitration Council

SAARC Arbitration Council (SARCO) is one of the Specialized Bodies of South Asian Association for Regional Co-operation (SAARC), comprising the Member States of Islamic Republic of Afghanistan, People's Republic of Bangladesh, The Kingdom of Bhutan, Republic of India, Republic of Maldives, Federal Democratic Republic of Nepal, Islamic Republic of Pakistan and the Democratic Socialist Republic of Sri Lanka.

It is an inter-governmental body mandated to provide a legal framework/forum within the region for fair and efficient settlement of commercial, industrial, trade, banking, investment and such other disputes, as may be referred to it by the member states and their people.

With these objectives in mind, SARCO aims to establish a quality alternative dispute resolution forum, that would act on behalf of 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 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.

SARCO enables the parties to a dispute from different legal and cultural backgrounds to resolve their disputes, without the formalities of going through a judicial process. The South Asian States met in Dhaka Bangladesh in 1985, and decided to establish South Asian Association for Regional Cooperation (SAARC) in order to foster closer relationship among the member nations and also to assist each others in their development strategies. Having studied the importance of alternate dispute resolution mechanisms available in the world, in 2004 the Council of Ministers, at its 24th session held in Islamabad Pakistan, decided to establish Conciliation and Arbitration mechanism for the region under the auspices of SAARC. Hence in 2005 the Agreement for Establishment of SAARC Arbitration Council was signed at the summit in Dhaka, Bangladesh.

VISION:

To be the most sought Arbitration Forum in the region, by becoming a centre of excellence for Alternate Dispute Resolution.

MISSION:

To provide fair, inexpensive, expeditious and high quality arbitral and conciliatory services to resolve trade, commercial, investment and disputes of similar nature in order to facilitate the expansion of business activities in the region.

OBJECTIVES AND FUNCTIONS:

- Provide a legal framework within the region for 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;
- Carry out such other activities as are conducive or incidental to its functions.

SAARC ARBITRATION COUNCIL'S OVERVIEW

SARCO offers a fair, efficient and cost-effective arbitration procedure for the settlement of disputes in commerce, trade and investment.

The dispute may be solved by one or three arbitrators, depending on the choice of the parties. If the Arbitral Tribunal shall consist of three arbitrators, each party appoints one arbitrator who in-turn appoint the third arbitrator. SARCO can also appoint the panel of arbitrators on the request of the parties. If the Arbitral Tribunal shall consist of one arbitrator the parties will be given an opportunity to jointly appoint the arbitrator.

We recommend that the parties are represented by their legal counsel(s) during the arbitration.

A final award shall be made within 6-12 months under the SAARC Arbitration Rules.

The arbitration costs (i.e. the fees to the arbitrators and the administrative fee) is based on the amount in dispute consisting of the total value of all claims, counterclaims and set-offs.

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Director General's Message



Dear Readers,

I am pleased to present the 4th Issue of the SARCO Newsletter for the year 2018.

Since our previous issue, there have been numerous activities that have been held with our valued partners in the SAARC member countries. Our program of activities' includes more collaborations and initiatives by SARCO to meet the objectives laid out in our mandate.

Since its creation, this Council has embarked to pursue the objectives mandated by the member countries. The Council has created a viable working relationship between the national arbitral institutions in the region, the apex trading bodies of member countries and is also organizing and coordinating the Alternate Dispute Resolution (ADR) activities in the member states, especially related to arbitration. The Council is now receiving fresh nominations to the list of arbitrators from the member countries, which consists of professional arbitrators who will be performing independently of their national nominations when engaged for an arbitral proceeding by the parties to a commercial dispute.

We are robustly pursuing the objective of promoting arbitration and conciliation in the region through dissemination seminars, publications and technical outreach activities. This publication is also part of the same endeavor, which informs our valued readers including the national trading communities and relevant professional bodies that a mechanism is in place to resolve

commercial disputes within the SAARC region which is mutually beneficial to all. The need to use this Council as the dispute resolution mechanism has never been higher, keeping in view the huge trade and investment spectrum of the SAARC region.

The Council is also working with other SAARC bodies in relevant areas to strengthen the SAARC ADR regime and act in an advisory capacity in SAARC agreements. SAARC Arbitration Council is the dispute resolution forum for the SAARC Framework Agreement for Energy Cooperation (Electricity) and is aiding the development of a template for a dispute settlement mechanism between the SAARC Member States regarding the Interpretation and Implementation of the Agreement for Energy cooperation. A dissemination Workshop for this study will be held jointly in the later part of this year.

The Council has conducted dispute resolution proceedings, publishes relevant materials and circulates ADR information and activities regularly and is also working to further develop and strengthen the connectivity and synergy between SAARC dispute resolution system.

We have a long road ahead of us, but I am confident that our co-operation and joint efforts can help us realize the full potential of SAARC and its bodies.

Happy reading!

Zahidullah Jalali

8th Governing Board Meeting of SARCO

The 8th meeting of the Governing Board of the SAARC Arbitration Council (SARCO) was held on 21st and 22nd September in Colombo, Sri Lanka. Delegates from all eight member countries were present at the meeting. The delegate from Pakistan, Mr. Sheikh Sarfaraz, was elected as the new Chairperson of the Governing Board of SARCO, as Nepal had completed its term. During the meeting, the GB welcomed the Director General (Designate) of SARCO from Afghanistan Mr. Zahidullah Jalali, and wished him a fruitful tenure. GB reviewed the activities carried out by SARCO during the year 2016 and the proposed budget for the year 2017. Matters relating to administration and policy were discussed and the Governing Board adopted the final report to be presented to the Programming Committee. The Governing Board members thanked the outgoing Chairperson from Nepal, Mr. Toya Nath Adhikari, for conducting the Governing Board meetings efficiently during his tenure of office.



SARCO Seminar in Kandy on “Importance of Arbitration as a mechanism for the resolution of commercial disputes and the role played by SARCO in the region”



SARCO in collaboration with the Sinhaputhra Finance PLC organized this Seminar to discuss how to adopt arbitration as a litigation process for a speedier recovery method especially in debt recovery in the Banking and Finance sector and in any other sector which has debt recovery issues.

The distinguished speakers included Mr. Mohan Weerakon, Mr. K. Kanag-isvaran, President's Councils, Mr. Ravana Wijeyeratne, Managing Director, Sinhaputhra Finance PLC.

Interview with H. E. Mr. Amjad Hussain B. Sial, Secretary General SAARC



H. E. Mr. Amjad Hussain B. Sial, a Pakistani Career Foreign Service Officer since 1983, served at the Headquarters in different positions from Section Officer (1983) to Special Secretary (2015-2016). He was on deputation with the SAARC Secretariat, Kathmandu (2003-2006).

He held various diplomatic assignments in Pakistan Missions abroad: Vienna (1987-1990), Harare (1994-1996) and New York (1996-2000). He also served as Ambassador/Alternate Permanent Representative at the Pakistan Permanent Mission to the UN, New York (2009-2011).

He served as Ambassador of Pakistan to the Republic of Tajikistan (2011-2014).

H. E. Mr. Amjad Hussain B. Sial assumed charge as Secretary General of the South Asian Association for Regional Cooperation (SAARC) on 1st March 2017.

Q. Excellency, what are the prospects of the South Asian Association for Regional Cooperation (SAARC)?

A: SAARC is the manifestation of the determination of the countries of South Asia to promote peace, stability, amity and progress in the region through regional collaboration with due respect for the principles of sovereign equality, territorial integrity, national independence, non-use of force and non-interference in the internal affairs of other states and peaceful settlement of all disputes.

Though SAARC commenced regional collaboration in limited areas, its scope has widened over the decades. Today, SAARC pursues regional collaboration in many areas, such as, agriculture, connectivity, economy and trade, education, culture, energy, environment, natural disasters, health, people-to-people contacts, poverty alleviation, science and technology, security, social development, tourism, transport, women empowerment and youth development, besides several others.

Essentially, SAARC process is people-centric aimed at promoting the welfare of the peoples of South Asia, which is the cardinal objective of the SAARC Charter.

Q: What are the major contributions that SAARC has made towards the welfare and economic empowerment of the South Asian people?

A: Promoting regional economic integration is a priority for SAARC. In realizing this objective, we are making concerted efforts in bringing down tariffs, eliminating NTBs/PTBs, reducing sensitive lists, introducing trade facilitation measures and harmonizing standards. These measures will facilitate effective implementation of the Agreement on the South Asian Free Trade Area (SAFTA). We are also in the process of operationalizing the SAARC Agreement on Trade in Services (SATIS). There is also a pressing need to finalize soon the SAARC Agreement on Promotion and Protection of Investments. Our ultimate objective is to achieve the South Asian Economic Union (SAEU) in a phased and planned manner through Free Trade Area, Customs Union, Common Market, and Common Economic and Monetary Union, as envisioned by the leaders of SAARC.

In order to achieve regional economic integration, improved intra-regional connectivity is very important. To achieve this objective, SAARC Motor Vehicles Agreement, SAARC Railways Agreement and SAARC Air Services Agreement are under consideration. The SAARC Passenger and Cargo Ferry Service is likely to commence soon between India and Sri Lanka, which will be extended to connect Bangladesh, the Maldives and Pakistan.

Fully cognizant that sub-regional and regional projects bring dividends to our peoples, we are making concerted endeavours to intensify project-based collaboration through the SAARC Development Fund.

Quality education spurs speedy social, cultural and economic development, which is one of the objectives of SAARC. The establishment of the South Asian University is considered as one of the major accomplishments of SAARC in imparting quality education to our students and scholars.

Besides Charter Body mechanisms, we have been able to establish five Centres of Excellence in the fields of Agriculture, TB & HIV/AIDS, Energy, Culture and Disaster Management. Likewise, in addition to the SAARC Development Fund and South Asian University, SAARC Arbitration Council and SAARC Regional Standards Organization are important mechanisms of the SAARC process.

Q. How do you view the role of the SAARC Arbitration Council in providing a legal framework within the region for fair and efficient settlement through arbitration and conciliation of commercial, investment disputes and beyond?

A: During the Thirteenth SAARC Summit in Dhaka in November 2005, our leaders signed the Agreement to Establish the SAARC Arbitration Council in order to provide a regional legal framework for fair and efficient settlement of commercial, industrial, trade, banking, investment and other such disputes. Since its inception, the Council has very efficiently pursued its objectives. As a result, it has been able to create a viable working relationship among the national arbitral institutions and the apex trading bodies of the Member States. It has also organized and at times coordinated the Alternate Dispute Resolution activities in the Member States. More importantly, the Council has been able to establish itself as an efficient regional Alternate Dispute Resolution (ADR) mechanism, enabling the traders to resolve their disputes without having to go through a judicial process, which is both expensive and time-consuming.

It is also heartening to note that the SAARC Arbitration Council has been designated as the dispute resolution forum for the SAARC Framework Agreement for Energy Cooperation (Electricity).

Q. How can SARCO contribute to the region's goal of attracting foreign direct investment and arbitral work to the SAARC region?

A: SAARC represents the largest geo-economic block of the world, as nearly one quarter of the world population lives in South Asia. Its combined average GDP growth is over 7% and consumer base is over 800 million people in the middle class bracket. South Asia, therefore, bears tremendous potential for regional and global economy.

In view of fast growing economies of the countries in the region, it is crucially important to put in place an efficient mechanism for resolution of trade disputes. As we all know, efficient legal services for trade arbitration espouse greater trade and investment, both intra-regionally and globally, and also attract foreign direct investment.

Our region has a vast pool of arbitrators and young budding professionals working towards creating a modern and sustainable trading environment, including a system to efficiently resolve regional and international commercial disputes within the SAARC region. This potential can be harnessed to attract arbitral assignments to our region.

Q. Which role can SARCO take in order to advance the regional integration process?

A: During the Eighteenth SAARC Summit in Kathmandu in November 2014, our leaders renewed their commitment to achieve South Asian Economic Union (SAEU) in a phased and planned manner through a Free Trade Area, a Customs Union, a Common Market, and a Common Economic and Monetary Union. As a specialized regional arbitral mechanism, SARCO

can facilitate the attainment of the vision of SAEU. Continuation of the provision of expert arbitral and conciliatory services; and engaging with the trading community of the region and enhancing collaboration among trading bodies, arbitral institutions and SAARC bodies will eventually facilitate realization of this vision.

Q. Based on your experience with SAARC, how would you envision the SAARC integration process in the next decade?

A: Regular holding of meetings of Charter bodies is crucially important. It is hoped that the Member States will soon agree on a set of dates for the Nineteenth SAARC Summit to be hosted by Pakistan. Summits provide renewed impetus and vision to the process of regional integration. To make the process of regional integration effective, it is also necessary to regularly hold sectoral Ministerial Meetings in order to formulate policy guidelines in the identified areas.

In the next decade and beyond, our focus should be on effective implementation of the decisions taken by the Member States rather than on proliferation of institutions and mechanisms. In the meanwhile, we should ensure effective implementation of the Agreement on the South Asian Free Trade Area (SAFTA) to boost intra-regional trade. We should work strenuously towards strengthening intra-regional connectivity, which is key to the process of regional integration. Likewise, we should strive to enhance project-based collaboration to deliver dividends of regional cooperation to our peoples. It is also equally important for us to initiate project-based collaboration with our Observers in the identified areas, such as, communication, connectivity, agriculture, public health, energy, environment, and economic cooperation. More importantly, our efforts should be geared towards implementing the decisions taken by our leaders in the realization of the eventual goal of South Asian Economic Union.

Q. What message would you like to convey to the South Asian people through this newsletter?

A: I wish to call upon all SAARC nationals to have faith in the SAARC process and make concerted efforts to build a South Asian identity. As South Asians, we should live and work together for our common destiny. SAARC is the only vehicle not only to promote the welfare of the peoples of South Asia, but also to maintain peace and harmony in the region.

SARCO Seminar in Kabul – “Arbitration – A Mechanism to Resolve Trade Disputes and to Ease Business transaction within the SAARC Region”

SARCO conducted its maiden Seminar in Afghanistan. Mr. Muzamil Shinwari, Advisor on trade & private sector to the Chief Executive of the Government of the Islamic Republic of Afghanistan, graced the event as Guest of Honor. The Seminar was held in collaboration with the Afghanistan Chamber of Commerce & Industries and Afghanistan Women Chamber of Commerce & Industries. Members of the business community, Chambers, Young Arbitrators' Forum, Ministry of Commerce & Industries, Supreme Court of Afghanistan and the Ministry of Foreign Affairs of Afghanistan, participated in the Seminar. The Guest of Honor appreciated the efforts of SARCO and highlighted the need for more regional co-operation methods to be developed.



33rd SAARC Charter Day Celebrations



SAARC Charter Day was organized in collaboration with the Ministry of Foreign Affairs of the Islamic Republic of Pakistan and other SAARC Bodies in Islamabad. The event was graced by Ms. Tehmina Janjua, Foreign Secretary to the Government of Pakistan and attended by Heads as well as representatives of the Diplomatic Missions, business community and media persons. This celebration of this occasion was initiated by SARCO to celebrate the Charter Day jointly with SAARC Energy Centre and SAARC Chamber of Commerce & Industries in collaboration with the Ministry of Foreign Affairs of Pakistan.

SARCO Signed MoU with SAARC CCI

Director General, Mr. Zahidullah Jalali signed the Memorandum of Understanding (MoU) on behalf of the SAARC Arbitration Council while Mr. Suraj Vaidya, President represented SAARC Chamber of Commerce & Industry (SAARC CCI) at the 6th SAARC Business Leaders Conclave 2018 biennial event of the SAARC Chamber of Commerce & Industry (SAARC CCI).



Commercial Arbitration in Nepal: Issues and Challenges

Gyanendra P Kayastha, Secretary General, Nepal Council of Arbitration (NEPCA)



Introduction

Arbitration is a method of dispute resolution involving one or more parties. The term commercial arbitration is used to indicate the settlement of a dispute related to trade, industry and commerce.

Accordingly, commercial arbitration is being used as an alternative means of private dispute settlement to provide an expeditious, expert and civilized forum for resolving many differences of opinion which may arise as a normal incident of commercial life. As a result, the concept of commercial arbitration has been growing in Nepal.

Concept

It is an alternative mechanism for resolving disputes different from the traditional and established judicial system. It is a process of resolving disputes that arise between two or more parties to an agreement or a contract in which a neutral third party called the arbitrator renders an enforceable decision.

All parties of any agreement or contract, who agree to settle the dispute through arbitration, should agree to appoint the arbitrator to whom they submit their dispute for settlement. During the arbitration process there is a possibility that the parties will compromise and the dispute will be solved, but if no such solution is found, the arbitrators can render an award of binding nature.

Historical Evolution

Arbitration can be traced back to the system of 'Panchayat' in Nepal long before the codified judicial system developed. Panchayat was an informal tribunal of five gentlemen chosen from among the villagers to render an impartial decision in the settlement of disputes between the members of villages. Since early times the decisions of Panchayats were acceptable and binding on the parties. Panchayat as private tribunal was a different system of arbitration and was subordinate to a regular court of law. In the Lichhavi era, the Panchali which was also known as Pancha Sava, was empowered to decide disputes at the local level. This form of dispute settlement mechanism that was practiced for a long period should be considered as the foundation of the concept of arbitration in Nepal's context, but not the same as the modern notion of arbitration. In Nepal, the concept of arbitration in its

modern sense was first found in government contracts.

The history of the modern notion of commercial arbitration in Nepal is brief. Before the enactment of general legislation on commercial arbitration in 1981, statutory provisions of commercial arbitration were found in a scattered form in different legislation with different purposes.

Such a provision first appeared in section 9 of the current Development Board Act 1957 which provided for the resolution of a dispute under a contract to which the Board is a party.

This type of arbitration is termed compulsory arbitration. Therefore parties are forced to follow the rules set out in the statute. The objective behind introducing such an arbitral process may be looked at in the context of inviting foreign capital and technology for economic enhancement and fostering development plans and industrialization in the country.

The Arbitration Act of 1981 was superseded by the Arbitration Act of 1999 and is the prevailing general law on commercial arbitration. Furthermore, it was made in line with the UNCITRAL Model law. On the basis of this new act, the Supreme Court of Nepal has promulgated the Arbitration (Court Procedure) Rules, 2002 relating to court procedure in order to promote arbitration in Nepal. Despite the above legal framework promoting and facilitating arbitration in Nepal, there are still many remaining challenges.

Basic Aspects of Arbitration

- Arbitration Tribunal: A panel of arbitrators appointed to hear and decide a dispute according to the rules of arbitration.
- Arbitration clause: A contractual provision mandating arbitration and thereby avoiding litigation of disputes about the contracting parties' rights, duties, and liabilities.
- Arbitrator: A neutral person who resolves disputes between parties, especially by means of formal arbitration. An arbitrator can also be termed an impartial chair.

Submissions/Arbitration

Clause/Arbitration Agreements

A written agreement is required to submit present or future disputes to the arbitrators, whether or not the legal relationship is contractual. It does not make any difference whether or not the name of an arbitrator is named therein. Furthermore an arbitration agreement must be made. This bilateral nature is necessary because a "unilateral" arbitration clause did not provide an arbitration agreement but only an option. An arbitration agreement must be in writing if it is to come within the Arbitration Act, 1999. Otherwise, no particular form is necessary. A valid arbitration agreement may be contained in a clause quite collateral to the main purpose of an agreement.

Appointment of Arbitrators and Third/Presiding Arbitrator

An arbitrator is appointed generally by the parties, but if one party fails to make an appointment, the court is

empowered to make the appointment. The third/presiding arbitrator is generally appointed by the arbitrators. Again, if arbitrators fail to appoint the third/presiding arbitrator, the court may make an appointment by default. Section 5(1) and (2) of the Arbitration Act, 1999 are related to the appointment of both arbitrators and the provisions of law are less clear in regard to the court's appointment of third arbitrator.

Evolution of the General Law of Commercial Arbitration in Nepal

7.1 Arbitration Act, 1981

The general law of domestic commercial arbitration originated in Nepal with the Arbitration Act, 1981 (2038). Under this act, any disputes of a commercial nature arising out of agreements may be settled by arbitration as provided for in such agreements. If the agreement that provided for arbitration fails to provide rules to determine the number of arbitrators or to provide the rules governing substantive or procedural law, the provisions of the Arbitration Act, 1981 would apply as default legal rules. To understand the arbitration process, it is necessary to know about the "default rule."

The default rule provides an option to the contracting party to make or choose their own rules to settle the dispute that are not contrary with the law. Otherwise the general rules of the act will be implemented. This act provided that if the parties to the agreement fail to appoint an arbitrator under the agreement or the arbitration agreement is silent in this regard, any party is empowered to file an application at the District Court asking for the appointment of an arbitrator.

7.2 Arbitration Act, 1999

"There are various reasons for the replacement of the old Arbitration Act, 1981: the fundamental reason was its ineffectiveness. Other reasons include: incompleteness and inadequacy of the act, by which the defaulters benefited; unnecessary delays and interferences made by the courts in the arbitration process; appointment of inefficient arbitrators lacking knowledge of arbitration processes and procedures who often favored their nominators; a lack of institutions supporting arbitrations; a paucity of literature relating to arbitration; drafting of defective arbitration clauses in contracts; lack of law providing action against the biased arbitrators.

The 1999 act is the prevailing law of the land and is mostly influenced by UNCITRAL Model Law. An arbitration agreement is defined as "an agreement between the parties to refer present or future disputes arising in respect of a defined legal relationship whether it is contractual or not".

An award given by an arbitrator that is produced through fraud, bribery or other malpractice provides an appropriate reason to make the award universally void by the court but the new law is directly silent in this regard. Though, there are other sections of this legislation to curb this problem. Section 30 (3)(b) of this Act provides that to protect the public interest and public policy, the court has the power to quash the award. Fraud or bribery or other malpractices are such phenomena which directly hamper public morality as well as breach public policy. The term, "public policy" is defined as "broad, principles and standards regarded by the legislature or by the courts as being a fundamental concern to the state and the whole of

society...More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large." So, in this regard, we can conclude that the court has been given the duty by legislation to control such misconduct in the name of public policy if the arbitrator's decision appeared so, but up until this date no such interpretation has been evinced in Nepal.

Arbitral Institutions in Nepal

The Nepal Council of Arbitration (NEPCA) was established in 1991 to facilitate arbitration in Nepal, but is yet to be recognized by the law. Yet, the court has already impliedly recognized it because the court has heard a petition after NEPCA's panel award. This is the only institution working on a permanent basis which provides rules (NEPCA Rules of Arbitral Proceedings, 2003, NEPCA Arbitration Rules, 2016 made in line with Arbitration Act, 1999), venues and a panel of arbitrators to conduct arbitration process. NEPCA is a non-profit institution.

Issues and Challenges

The following issues/challenges are required to be addressed properly to ensure that the goal of successful arbitration is obtained. These issues and challenges are discussed below.

9.1 Delay

Delay on the finality of an arbitral award by entertaining writ jurisdiction must be curbed. Delay on appointment of an arbitrator is also a great issue. It contradicts the concept of arbitration.

9.2 Cost

The cost of the arbitration process is being increased day by day which may prevent the business sector from choosing arbitration as a form of ADR.

9.3 Definition

The term 'commercial arbitration' is not defined by law which is very uncertain.

9.4 Award by Fraud or Corruption

What will happen if the award is given by fraud or corruption? It is internationally recognized that an award by fraud or corruption not only provides grounds to remove arbitrators but also provides grounds to invalidate awards in a court of law.

9.5 Code of Conduct

Till this date, Nepal has no code of conduct for an arbitrator. There is a real need in Nepal for arbitral jurisprudence.

9.6 Judicial Review of Awards

What sort of judicial review of arbitral awards is necessary for Nepal's legal system? The grounds provided for judicial review in section 30 of 1999 Act may be adequate or not? The ground to make void an award on the basis of damage to the "public interest" is absolutely vague.

9.7 Recognition

Whether or not NEPCA or other institutional arbitral organizations should be recognized by the law itself is a matter that must be dealt with.

9.8 Substantive Law

Which substantive law applies to arbitrators? Section 18 of the Arbitration Act, 1999 has provided the default rules. Parties are free to make agreements on this matter. If an arbitration agreement is silent in this regard the Nepali substantive law will prevail. But, here in this section a rule has ignored the principle of natural justice which stated that arbitrators are not free to follow the doctrine of *ex aequo et bono* and *amiable compositor*.

9.9 Arbitral Immunity

In the USA, both state and federal courts recognize that arbitrators enjoy quasi-judicial immunity from legal liability for actions taken in their arbitral capacity. This principle has also been observed in the international commercial setting. There is a sufficient rationale to do so. The rationale behind this immunity was observed by the court and “continues to influence the courts today.” But Nepal’s scenario is different from the above explanation. It is found that in an *ad hoc* arbitration process after the arbitrators have given an award, they are often personally defending their position in a writ petition. Arbitrators are made a party to litigation which is not a good practice. If it is continuously happening nobody will be ready to be an arbitrator in a commercial dispute because of their fear of further litigation.

Suggestions

- Delay on the finality of an arbitration award made by an arbitrator should be avoided. For this, writ jurisdiction should not be entertained by the Supreme Court in the name of an alternative remedy in all cases, but instead specifically address genuine issues of law and not fact.
- Delay itself produces cost. It can be reduced by speedy proceedings and a schedule for the hearing. Arbitrators are engaged in their own profession and their business may postpone the date of arbitral hearing. So, it should be managed accordingly.
- The term ‘commercial arbitration’ is not defined by law which produces uncertainty. So, it needs to be defined by law itself in line with the UNCITRAL Model Law.
- An award given by fraud or corruption can be controlled under the “public policy” clause as provided in section 30 (3)(B) of the Arbitration Act, 1999 though it seems quite unclear what public policy actually is. This clause provides grounds to the court of law to invalidate an award. But it should be better to add one sub-clause in the legislation that expressly invalidates the award if the arbitrator gives an award by fraud or corruption.
- A code of conduct should be made in line with internationally accepted standards.
- The term ‘public interest’ needs to be defined appropriately. It is a very difficult task. Therefore, if no definition is possible, it is better to remove this term from the law and only include the ‘public policy’ term contained in the UNCITRAL Model Law 1985. Doing so provides certainty and reduces the court intervention in the award.
- It is not necessary to recognize any particular arbitral organization by the Arbitration Act because there can be numerous such organizations for the facilitation of arbitration. Up to this date, the court does not seem reluctant to hear petitions upon voluntary arbitration

awards.

- When making contracts, every factual situation that may arise in the future cannot be incorporated. This indicates that parties must be aware in the making of the subject of the contract and the arbitration clause. Otherwise, one party may become vulnerable.
- Both, arbitral and testimonial immunities are necessary for arbitrators. For this, certain rules or standards need to be developed which may enable the arbitrators to think that they are protected when they are acting in a fair manner.
- The almost established ‘Commercial Bench’ of the Appellate Court should hear arbitration related disputes.
- The arbitration law should expressly state which arbitral panel should rehear matters returned to the arbitral level. In this case, until the law is reformed, the Appellate Court should have the discretionary power to choose on a case by case basis the makeup of the arbitral panel.

Conclusion

The number of construction disputes is increasing day by day. Similarly, the volume of private business tremendously expanding as part of accelerated development goal. Accordingly more infrastructures, more contracts and more disputes. Settling these commercial disputes by the private means of commercial arbitration is an effective method but not the solution. Commercial mediation is also increasingly being used now as a form of ADR for commercial disputes. Once the arbitration method is adopted in an arbitration agreement or clause, there is no flexibility to undertake other methods of dispute settlement unless both or all parties give their consent. Despite the few drawbacks of commercial arbitration, it is a widely popular tool for domestic as well as international commercial dispute resolution. It would be better to adopt harmonized arbitration standards and enforcement procedures to facilitate the growing transnational nature of business activity and construction activity.

References:

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2. Mr. Birendra Bahadur Deoja, “Future Arbitration in Nepal”
3. Arbitration Act 1981
4. Arbitration Act, 1999
5. UNCITRAL Model Law
6. NEPCA Rules of Arbitration 2016

SARCO in collaboration with SAARC Energy Centre (SEC) has conducted a Study to develop a dispute resolution mechanism for energy disputes entailing from the IGFA (Electricity) of 2014. The study was conducted due to inclusion of SARCO Model Clause in the IGFA (Electricity). A dissemination Workshop regarding this Study is scheduled to be held in Dhaka in the later part of 2018. The final report submitted by Consultant was reviewed by the Chairman of the Scottish Arbitration Centre, as Peer-Reviewer.

H V Perera QC Memorial Moot Competition

SAARC Arbitration Council was invited by the Chairman of the Victors Moot 2018 to participate in the Awards ceremony of the Moot. The Deputy Director participated at the event. This Moot Competition was funded by SARCO, after approval of the same by the 8th Governing Board Meeting held in Colombo in 2017. The Bar Council of Sri Lanka, Ministry of Foreign Affairs of Sri Lanka, Ministry of Justice of Sri Lanka were the other partial sponsors of the event. The Chairman and the President of the Moot thanked the SAARC Arbitration Council for funding the event and being the first ones to do so as well.



SARCO at the Global Cotton Summit 2018

The Deputy Director SAARC Arbitration Council participated at the Bangladesh Cotton Association on the Invitation of the Chairman of the Organization Committee of the Global Cotton Summit 2018 held in Dhaka on 22-23 February. He spoke on the profile of SARCO and introduced it to the cotton community of Bangladesh and the regional traders present there. The Deputy Director gave a presentation on the procedure and mechanism of arbitration and conciliation at SARCO. The speech was very well received and was responded by quite a few questions from the audience.

A one day Workshop on “The Role of Arbitrators in fostering efficient resolution of disputes” in Kathmandu

SARCO organized a one day Workshop on “The Role of Arbitrators in fostering efficient resolution of disputes” in collaboration with the Nepal Council of Arbitration (NEPCA) and Federation of Nepalese Chambers of Commerce and Industry (FNCCI) on 26th June 2018 in Kathmandu, Nepal. Chief Justice of Nepal Rt. Hon. Mr. Deepak Raj Joshee graced the Workshop as its Chief Guest. Special address were given by Honorable Mr. Sher Bahadur Tamang, Minister of Law, Justice & Parliamentary Affairs of Nepal and H.E. Mr. Amjad Hussain B. Sial, Secretary General of SAARC. The Workshop was very well received according to the response and views of the participants and the dignitaries.



ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO) Meeting



Director General SARCO, Mr. Zahidullah Jalali, paid a courtesy call on H.E. Prof. Dr. Kennedy Gastorn, Secretary General of Asian-African Legal Consultative Organization (AALCO) at the Secretariat in New Delhi. Various aspects of collaboration between the both were discussed and afterwards a detailed meeting was held with the Deputy Secretary Generals of AALCO and SARCO professionals, so as to carve a future path of co-operation for the regional institutions.

Investment Treaty Arbitration



Faazaan Mirza
Deputy Director
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Foreign investment is a vital aspect of the international political economy. Foreign investment has a critical impact on the world economy and development, and there is keen competition in the developed and developing world to attract investment. Traditional methods to lure foreign investment involve liberalizing an economic sector, providing tax incentives, and improving dispute resolution systems. Another potential method of promoting foreign investment involves signing an *investment treaty*. An *investment treaty* is an agreement between two or more governments that safeguards investments made by qualifying investors in the territory of other signatories.

Investment treaty arbitration sits on the border between public international law and private international law. At its heart, Investment Treaty Arbitration is concerned with the vindication of rights that derive their legitimacy from principles of public international law. The focal point of the dispute in investment treaty arbitration is governmental action. Yet the claimant is not itself a government or a state—it is a private party suing on the basis of an obligation in international law. However the claimant's rights are vindicated in a process all too reminiscent of the processes familiar to lawyers, familiar with the arbitration of international commercial disputes between private parties. The *sui generis* nature of the investment treaty arbitration is perhaps best exemplified by the enforceability of investment treaty arbitral awards through the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (commonly called the *New York Convention*). Although investment treaties are between nation states, the jurisprudence agrees that there can be an enforceable and binding agreement to arbitrate 'without privity' between the nation state party to the treaty, and the investor whose investments fall within the treaty provisions.

Investment treaty arbitration is concerned with rights under investment treaties. The substantive obligations which lie at the heart of Investor-State disputes and arbitration generally arise out of investment treaties between two states, known commonly as Bilateral Investment Treaties (BITs) or investment treaties to which multiple states are parties, commonly known as Multilateral Investment Treaties (MITs), Free Trade Agreements, also known as (FTAs).

An instrument which deals with the reciprocal relationship of two States regarding investment is called a BIT. According to Andrew¹, BITs are meant to encourage, promote and protect Foreign Direct Investment (FDI) in an alien economy therefore, more or less all BITs cover similar features such as describing investment, its scope and time element. BITs also contain provisions describing the level of treatment afforded to the incoming FDI, safeguard against direct or indirect expropriation and a dispute resolution mechanism. BITs are used for improving the confidence and trust level of foreign investors in the host economy by offering a pre-defined and more protectionist regime to the investors of signatory States than International Law ever has².

BITs assure special handling and added protection above the domestic laws of the host State including possibility for investors to bring arbitration proceedings directly against a Host State in the event of an alleged breach of treaty provisions.

Pakistan has been able to attract US\$23 billion in the last decade. The main foreign direct investors were the United States, China, United Kingdom and the United Arab Emirates. The received investment was in the sectors related to infrastructure and oil and gas³. Pakistan has signed 48 BITs up till 2012⁴.

In an age where legal redress is overestimated ("frivolous litigation" as described by some legal commentators⁵), arbitration is seen by many as the best alternative to judicial dispute resolution. Arbitration has been practiced in many forms since hundreds of years, but the most recent bygone decades have seen an exponential rise in the use of arbitration in international and domestic spheres⁶. This belief in arbitration is, indeed, not unfounded. Investment treaty arbitration is closely linked with the principles and rules of public international law. In the very first International Center for Settlement of Investment Disputes (ICSID) treaty arbitration, *Asian Agricultural Products v Republic of Sri Lanka*⁷, the tribunal observed that:

"...the first task of the tribunal is to rule on the controversies existing in this respect by indicating what constitutes the construction of the treaty's relevant provisions in conformity with the sound universally accepted rules of treaty interpretation..."

Article 31 of the Vienna Convention on the Law of Treaties⁸ provides inter alia that:

- 1 Andrew T Guzmán, 'Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt Them' part VI (The Jean Monnet Center for International and Regional Economic Law & Justice at NYU School of Law 26 August, 1997) <http://centers.law.nyu.edu/jeanmonnet/archive/papers/97/97-12.html>
- 2 United Nations Conference on Trade and Development XI (17 August 2004) <www.unctadxi.org/templates/Page_1006
- 3 BOI Newsletter Issue # 1 2018
- 4 BOI Website <http://boi.gov.pk/InvestmentGuide/BITs.aspx>
- 5 Mark B. Greenlee, "Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform", 26 Cap. U.L. Rev. 701 in reference to: *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994).
- 6 Christofer Coakley, 'The Growing Role of Customized Consent in International Commercial Arbitration' (2000) 29 GA J INT'L & COMP L 127, 129.
- 7 *Asian Agricultural Products v Republic of Sri Lanka* [ICSID Award Case no. Arb 87/3 at para 3]
- 8 <https://treaties.un.org/doc/publication/units/volume%201155/volume-1155-i-18232-english.pdf>

“... a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purposes”.

The question of what constitutes as an investment is one of the major issues in investment arbitration proceedings. The definition of investment is central in determining whether and to what extent, a treaty confers rights on a particular entity. Article 1, for example of Pak-China Bilateral Investment Treaty (BIT) 1989 provides that ‘... investment’ means *movable and immovable properties and right in rem, share and interests of the companies, money claim or performance having economic value, copy rights including know-how and technical process and concessions including concessions to search and exploit natural resources*. Apparently ‘investment’ is appeared to be simply drafted however its significance is that, it includes copy rights, claims having economic value and the concessions for search and extract or natural resources within the ambit of ‘investment’. The definition enshrined in the instant BIT provides one prerequisite stipulating ‘in accordance with law and regulations of contracting party accepting investment’. However, the treaty is silent about addressing the problem if the Host State’s law does not provide definition of investment.

With regard to Pakistan the term ‘investment’ came under discussion before the SCP in **Société Générale de Surveillance**⁹ case whereby the SCP dismissed SGS’s appeal to grant injunction against domestic arbitration proceedings. The SCP dismissed the said appeal on grounds that; Pakistani law does not recognize ICSID Convention and pre shipment services did not comprise investment under the Bilateral Investment Treaty between Pakistan and Switzerland (Pak-Swiss BIT). However, the arbitral tribunal did not concur with SCP’s interpretation, while widely interpreting the term ‘investment’ it held that; it has jurisdiction to hear the matter as it is a legal dispute arising out of investment under ICSID Convention¹⁰. Though verdict of the tribunal was a relief for foreign investors but it was worrying for the Government of Pakistan (GOP) seeing that the tribunal stretched the definition of ‘investment’ beyond intention of the signatory parties and had overridden SCP’s decision despite the following facts; the investment was not made within Pakistani territory in pursuance to the Pak-Swiss BIT, the commercial contract with SGS obligated signatory parties to submit their dispute to domestic arbitration in Pakistan under its domestic laws and the ICSID Convention was not ratified by the Pakistani Parliament. The tribunal, while doing so broadly interpreted the term ‘concessional agreement’ and held that, *“Pre-Shipment Inspection Agreement (“PSI”) is equivalent to concessional agreement and satisfies the requirements of investment within the meaning of BIT.”*

Similarly, in **Bayindir v Pakistan**¹¹, the tribunal held that, Bayindir successfully met the definition of investment and its essential features. Pakistan vehemently contested the scope of investment in terms of the claimant’s contribution in *know how* and equipment, and asserted that these objects have no economic value, and therefore do not

fall within the definition of ‘every kind of assets’. The tribunal rejected all the arguments of National Highway Authority (NHA) by acknowledging the **Salini**’s test¹² and held that¹³, ‘... Bayindir did contribute “assets” within the meaning of the general definition of investment set forth in Article I(2) of the Bilateral Investment Treaty¹⁴. In **Fedax v Venezuela**¹⁵ and **CSOB v Slovak Republic**¹⁶, the tribunal held that financial instruments, e.g. loans and promissory notes qualify as investment under a BIT and ICSID conventions equally. Likewise, in **Kaiser v Jamaica**¹⁷ and in **Alcoa v Jamaica**,¹⁸ the tribunal held that where a foreign national investor invested by trusting in the agreement of the Host State, such investment is within the meaning of the ICSID Convention. Moreover, the amount spent on development of the concession and other undertakings based on the concession agreement also qualifies as investment under the meaning of the Convention.

The aforementioned discussions reveal that arbitral tribunals gave broad meanings to ‘Investment by stretching open-ended phrases used in Investment Clauses such as *concessions, know how, loan, promissory notes, assets, expenditures of development of concessions etc.* The Bilateral Investment Treaty between Pakistan and China (Pak-China BIT) reveals that it had embedded identical phrases in its Investment Clause capable of covering and protecting variety of assets and unproductive investments which Pakistan had never meant to include whilst executing this BIT. Therefore, this paper foresees a problematic and uncomfortable situation for Pakistan in the event of any dispute arising between the Government of Pakistan (GOP) and investors of CPEC projects in the international arbitral tribunals on definition of investment.

Desiring to reciprocally encourage, protect and create favourable conditions for investors of signatory States Pakistan and China had executed a Bilateral Investment Treaty (BIT) in 1989 (Pak-China BIT)¹⁹. Understandably, China Pakistan Economic Corridor (CPEC) was not in the mind of executors of both the countries while signing the said BIT three decades ago. Given that CPEC is nothing other than inward flow of foreign investment to Pakistan hence Pak-China BIT will be a driving instrument for CPEC in all aspects as BITs are the globally recognized instruments which exclusively deal with foreign investment and connected issues. Since in the CPEC scenario, Pakistan is at the receiving end of the Foreign Direct Investment (FDI) spectrum thus contrary to the BIT provisions the obligations contained in this treaty will have unilateral effects on Pakistan rather than bilateral.

⁹ Société Générale de Surveillance S.A. v Pakistan [2002] SCMR 1694.

¹⁰ Société Générale de Surveillance S.A. v Pakistan, Decision on Jurisdiction, ICSID Case No. ARB/01/13 [2003] <www.worldbank.org/icsid/cases/SGS-decision.pdf

¹¹ Bayindir v Pakistan ICSID Case No. ARB/03/29 Decision on Jurisdiction, Dated: 14 November 2005 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC523_En&caseId=C27

¹² Salini/Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco (Decision on Jurisdiction): International Centre for Settlement of Investment Disputes (ICSID): [July 23, 2001] <www.italaw.com/sites/default/files/case-documents/ita0738.pdf

¹³ Bayindir v Pakistan ICSID, 14/11/05. para 116 ICSID Case No. ARB/03/29 Decision on Jurisdiction, Dated: 14 November 2005

¹⁴ *ibid* para 121.

¹⁵ Fedax N.V. v the Republic of Venezuela Case No. ARB/96/3 para 43, Decision of the Tribunal on Objections to Jurisdiction July 11, 1997 <www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf

¹⁶ Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic, paras 90 & 91 Case No. ARB/97/4 Decision of the Tribunal on Objections to Jurisdiction <www.italaw.com/sites/default/files/case-documents/ita0144.pdf

¹⁷ Kaiser Bauxite Company v Jamaica (ICSID Case No. ARB/74/3), 6 July 1975: Decision on Jurisdiction and Competence of July 6, 1975, 1 ICSID Rep. 296 (1993); 114 I.L.R. 144 (1999) <http://internationalinvestmentlawmaterials.blogspot.co.uk/2011/09/kaiser-bauxite-company-v-jamaica-icsid.html>

¹⁸ Alcoa Minerals of Jamaica, Inc. v Jamaica (ICSID Case No. ARB/74/2), 1975 Decision on Jurisdiction and Competence of July 6, 1975, 4 Yearbook Commercial Arbitration (Y.B. Com. Arb.) 206 (1979) (excerpts) <<http://internationalinvestmentlawmaterials.blogspot.co.uk/2011/09/alcoa-minerals-of-jamaica-inc-v-jamaica.html>

¹⁹ Preamble of Pakistan-China BIT

While it varies by treaty, investors can generally elect to arbitrate before one or more of the following:

- (i) an *ad hoc* tribunal organized under the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules.

Investment treaty dispute settlement provisions often provide for an ad-hoc arbitration. The arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), remains a frequent choice of rules for such ad-hoc arbitrations. With the adoption of the UNCITRAL Rules on Transparency in treaty based Investor-State arbitrations in 2013, the new Paragraph 4 was added to the UNCITRAL Arbitration Rules to incorporate the Rules of Transparency.

- (ii) an *institutional* arbitration by an institution e.g. through the World Bank’s International Center for Settlement of Investment Disputes (ICSID), or the SAARC Arbitration Council (SARCO).

As provided in the World Bank Executive Director’s Report “...adherence to the convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention”. The ICSID has a set of Rules for Arbitration proceedings initiated pursuant to the ICSID Convention, namely “Rules of Procedure for the Institution of Conciliation and Arbitration proceedings (Institution Rules) and the Rules of Procedure for Arbitration Proceedings (Arbitration Rules). In addition to this, ICSID has its own administrative and financial regulations as well. These contain provisions with respect to the costs of the arbitration, the relationship between ICSID and the parties with respect to the arbitration, which contain provisions related to costs, establishment and maintenance of a Panel of Arbitrators.

The mechanics of arbitration, are relatively straightforward. Investors initiate arbitration by submitting a Request for Arbitration to their selected forum, when they feel that their right(s) have been infringed as guaranteed under the Bilateral or Multilateral Investment Treaty. Then, the process of selecting a tribunal, which shall have the jurisdiction to arbitrate on the matter, begins. Typically panels of three arbitrators resolve investment disputes. The investor selects one arbitrator and the respondent State picks a second arbitrator. The default rules for selecting the final arbitrator, the *Presiding Arbitrator* or *Chair*, vary according to the institution chosen. At ICSID, parties can agree on the appointment of the *Presiding Arbitrator*, and where the parties cannot agree, ICSID makes the final appointment. In contrast, in ad hoc UNCITRAL arbitrations, party-appointed arbitrators agree on the presiding arbitrator. As per the SAARC Arbitration Council Rules of Procedure for Arbitration e.g. it is highly recommended that the parties (i.e. the Investor and the Host State, if possible agree on the Appointing Authority. The Appointing Authority as per SARCO Rules of Procedure acts as the *safety valve* of the arbitral process and especially during the appointment of arbitrators and the constitution of the arbitral tribunal. Often it is observed that the parties nominate their respective single arbitrators, but are unable to agree on

the *Presiding Arbitrator* or the *Chair*. In such a scenario, the Appointing Authority already designated by both the parties, steps in and nominates the *Presiding Arbitrator*. The agreeing upon on the name of the Appointing Authority by the parties at the signing of the Investment Treaty or even any commercial contract, is more advisable, as at the time of the signing of the contract or the Treaty, the parties are in a cordial mindset to agree on things and when a dispute arises, the will to agree subsides considerably.

All arbitrators are generally required to be impartial and to contribute to the arbitral outcome. Nevertheless, the *Presiding Arbitrator* “performs a different role than the party-appointed arbitrator,” and his or her appointment is a matter of vital importance. The Presiding Arbitrator can influence the style of an international arbitration and make critical procedural decisions. Some suggest that *Presiding Arbitrators* resolve disputes between party-appointed arbitrators and, in some cases, become the ultimate decision makers. For these reasons, the role of the *Presiding Arbitrator* is of particular interest. Once the tribunal is constituted fully, the parties gather evidence and present arguments. The tribunal then renders an award on the merits of the dispute that is considered enforceable worldwide.

The arbitral process is only completed upon the successful enforcement of the Award by the winning party. The enforcement of the Award can become complicated but at the same time, the enforcement of awards is one of the main advantages of international arbitration over international litigation. There would be little point in arbitration if the final award could not be enforced against the losing party.

The right to enforce derives from a contractual undertaking to honour the award and therefore the non-performance of the award is a breach of the agreement or Treaty under which the arbitration took place.

An arbitral award is final and binding on the parties subject to either party’s right to challenge the award. An arbitral award unlike an order or judgment of a court does not immediately entitle the successful party to begin execution against the assets of the unsuccessful party. It is first necessary to convert the award into a judgment or an order of the court, only then can the successful party can begin executing the award. A challenge of the Award can only be made on the grounds given in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, commonly known as the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

An example of challenging enforcement of award on grounds of public policy was recently seen in the case of **NNPC**²⁰. NNPC had engaged IPCO to design and construct a petroleum export terminal. Pursuant to disputes between the parties under their business contract, arbitration proceedings were commenced and an arbitral award was passed in favour of IPCO. The Award directed NNPC to pay USD 152 million and an additional 5 million Naira plus interest at 14% per annum to IPCO. IPCO whereas, filed an application for enforcement of Award. In response to this, NNPC filed an application for setting aside the enforcement order on non-fraud challenges. The matter was appealed up to the United Kingdom Supreme Court (UKSC) on ground of payment of security and cost on

²⁰ IPCO (Nigeria) Limited (‘IPCO’) v Nigerian National Petroleum Corporation

the issue of seeking adjournment of the enforcement. The UKSC held that there was an error in the Court of Appeal's order as nothing in the Public Policy Challenge provision (or in the underlying provisions of Article V of the *New York Convention*) provides that an Enforcing Court can decide an issue pending before it under section 103(2)f of the English Arbitration Act, conditional upon payment of security. It further held that the delays in hearing issues under enforcement before courts are part of decision making process and cannot be interpreted to mean 'adjournment' as envisaged under section 103(5) of the Act. In international disputes, it is crucial that the rights of the creditor be protected but the zeal to protect these rights cannot be at the detriment of the other party. IPCO's own submissions tantamount to imposing 'substantially more onerous conditions' as not only NNPC had deposited a reasonable amount of security in the past but also had a *prime facie* claim of fraud.

An Enforcement mechanism is often compared to enforcement of domestic court judgments. The Queen Mary University Survey²¹, reported that: "Enforceability of Investment awards is seen as arbitration's most valuable characteristic (65 %), followed by avoiding specific legal systems (64%), flexibility (34%) and selection of arbitrators (38%). Enforcement of Arbitral Awards are seen as time consuming and un-predictable in particular jurisdictions e.g. the use of emergency arbitrators was seen as an unnecessary extra in some jurisdictions because of the perceived effectiveness of the national courts compared to the uncertainty of enforcing an emergency arbitrator's decision. However, the norm of progressive arbitral jurisdictions is to provide for emergency arbitrator provisions.

In similar vein, the Supreme Court of India clarified the scope of the seat's exclusive jurisdiction in India seated domestic arbitrations, in the case of Indus Mobile Distribution Pvt Ltd v Datawind Innovations Private and Ors. Brief facts of the case are that, an agreement was entered into between the Appellant and the 1st respondent. The appellant's registered office was in Chennai and as per the commercial arrangement between the parties, goods were to be shipped from Amritsar to Delhi. Subsequently, disputes arose between the parties and the dispute resolution clause vested exclusive jurisdiction on the courts of Mumbai. The 1st respondent, *inter alia* filed an application before the Delhi High Court for interim relief. The High Court (HC) assumed jurisdiction, and allowed the interim relief sought. On Special Leave Petition to the Supreme Court of India, the Supreme Court (SC) set aside the decision of the HC. The *ratio decidendi* of the Special Leave Petition was that once the seat of arbitration has been fixed, courts of such seat will exercise exclusive jurisdiction on the proceedings arising out of or in connection with the arbitration. The Supreme Court relied *inter alia* on BALCO²², where the Supreme Court of India has maintained its consistent finding that when a seat of arbitration is chosen, by necessary implication, courts of that country will have supervisory jurisdiction over that arbitration.

Arbitration and specially the Enforcement of an Award has been encouraged domestically by the SAARC member

states and this has been the trend internationally as well, even by less opted countries for arbitration e.g. Qatar, a signatory to the New York Convention. Enforcement of Foreign Arbitral awards in Qatar has been inconsistent and awards have been annulled for reasons which seemingly contradict the provisions of the New York Convention, including, that the arbitration agreement did not explicitly state that any awards would be final and binding and thus the award was open to an appeal on the merits. However, recently²³ the Qatari Court of Cassation overturned the rulings of the lower courts to find that there was no basis for not enforcing an ICC Paris-seated award in Qatar, which had met the requirements under Article IV of the New York Convention.

It has unfortunately been revealed and observed that the Government of Pakistan used to sign BITs in a haphazard manner and without taking into account the likely consequences, resultantly, Pakistan had to face and is still facing number of costly treaty arbitration before ICSID tribunals. The same fact may well be observed from the Board of Investment (BOI) Pakistan²⁴ which acknowledges the "...inconsistencies in the text of BITs signed over the last fifty years and the legal uncertainty created by such texts for investors and States equally." The policy has exposed the drawback in the negotiation of BITs in the last five decades affirming that during different periods different ministries negotiated these BITs, meaning that there was never a uniform text for Pakistan's BIT negotiations, nor was there a single department or ministry responsible for negotiating the BITs.

In context of the SAARC region, there remains a need for the development of a Common Mechanism for the Enforcement of Arbitral Awards (be it investor state or commercial arbitration) given within the SAARC member states. This step will be the beginning of the realization of the dream of better SAARC intra-regional trade and attraction of more Foreign Direct Investment to the region.

SARCO's upcoming Workshop titled "Importance of SARCO as Regional Arbitration Centre for Development of Trade and Investment & The Context of Arbitration in Sri Lanka" scheduled to be held on 3rd August 2018 in Colombo, Sri Lanka.

9th Governing Board meeting of SAARC Arbitration Council (SARCO) is scheduled to be held in October 2018. Matters of policy, finance and program of activities for the year 2019 shall be presented to the Governing Board

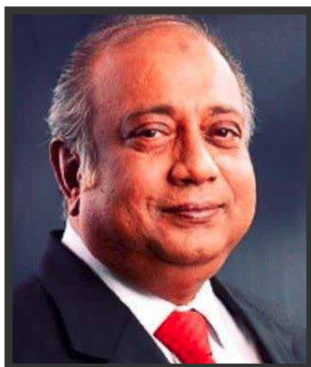
21 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration

22 Bharat Aluminum Co v Kaiser Aluminum Technical Services Inc.

23 Case No. 173 of 2016

24 Board of Investment Pakistan (BOI), Investment Policy 2013

Doing Business Index: Improving Bangladesh's Ranking.



Muhammad A. (Rume) Ali
CEO, BIAC & Former Deputy Governor
Bangladesh Bank

If you have a commercial dispute in which your claim is Tk.1 crore and you decided to go for legal action, if successful, you can hope to recover around Tk 33.2 lacs and in other words the cost of recovery is estimated at 66.8% of the claim. This is what The World Bank's Doing Business Index 2017 says. Indeed it is numbers like this one that reinforces negative perceptions about Bangladesh. Before I go on to explaining what factors affect our ranking, it would be useful to introduce BIAC. At BIAC we have been making an effort to bring about a major change in the way we settle commercial disputes in this country. BIAC's objective is to embed settlement of commercial disputes through Alternative Dispute Resolution (ADR) as the default process, instead of taking it to the court. This may sound very simple and logical, but the reality, for a variety of complex reasons is quite different. I know, the first thing that crops up in our minds is that we are as a people, fond of taking our disputes to the court, but the truth is our history and culture says otherwise. Traditionally, our villages and towns had a heritage of 'shalishi' - an alternative dispute resolution process which had elements of both mediation and arbitration. It is known the 'mohalla sardars' would conduct similar process of dispute resolution in old Dhaka. Although elements of it still exist in different forms in our rural and urban areas, the rise of new socio-cultural ethos and stronger and a more structured legal eco system that was established during the British colonial period of our history has eroded and disempowered the social authority of this quasi legal process. The quantum increase of contractual relationships and transactions and the consequent impact of increasing number of disputes has put enormous strain on our commercial legal system. The legacy of a public sector dominated economy till the mid to late eighties, limited the body commercial legal precedence and practice of commercial jurisprudence in Bangladesh.

In such a situation, the conventional response of increasing capacity of the legal resources of the state to meet the need does not make economic sense and would be an unsustainable financial burden on the state. Economists consider this as increasing the economic transaction cost and therefore lowering the efficiency of

the economy. To clarify the meaning further I will quote from Wikipedia "In 'Transaction Costs, Institutions and Economic Performance' (1992), Douglass C. North argues that institutions, understood as the set of rules in a society, are key in the determination of transaction costs. In this sense, institutions that facilitate low transaction costs boost economic growth. Douglass North states that there are four factors that comprise transaction costs - "measurement," "enforcement," "ideological attitudes and perceptions," and "the size of the market." Measurement refers to the calculation of the value of all aspects of the good or service involved in the transaction. Enforcement can be defined as the need for an unbiased third party to ensure that neither party involved in the transaction reneges on their part of the deal. It is the legal system that ensures 'enforcement'. However if enforcement takes longer than what is than an acceptable period, on time value of money calculation, the end result is that the discounted value of the 'enforcement' is unviable, nil or negative. To make this point, let me cite some available statistics.

A study conducted by International Finance Corporation (IFC), Bangladesh Investment Climate Fund (BICF) and Centre for Effective Dispute Resolution (CEDR) (UK) (2009) came up with the following findings, which I believe are still relevant:

CIVIL (APPEAL & REVISION) CASES : 15.3 YEARS

WRIT CASES : 3.68 YEARS

CIVIL CASES (Original Jurisdiction) : 5.78 YEARS

The situation in case of outstanding litigation under the Money Loans Court Act (2003) is not encouraging either:

BANGLADESH BANK: Number of Cases Pending with Artha Rin Adalat was 49,656 until 2016 (amount Tk 60,142 crore).

Clearly, the above numbers do reinforce the view that "enforcement" is at best weak and at worst barely existent. This also feeds into "ideological attitudes and perceptions" part of the 'transaction cost' equation. Issues like these have much larger knock-on effect than one perceives. Take the case of a global ranking published every year by different agencies on aspects of economies of different countries, the 'Doing Business Index' of the World Bank ranks Bangladesh at 176th among 190 countries trailing Sri Lanka (110), India (130) and Pakistan (144). It may surprise many to find that war torn economies like Iraq (165) and Syria (173) fared better than us. This is the point I was trying to make in the opening few lines on how qualitative rankings can exacerbate negative perceptions about the country. We certainly need to address this to help create a positive image of Bangladesh as a country which welcomes FDI.

This composite index has ten underlying factors e.g. Starting Business, Dealing with Construction Permits, Getting Electricity, Registering Property, Getting Credit,

Protecting Minority Investors, Paying Taxes, Trading Across Borders, Enforcing Contracts and Resolving Insolvency. We are in last 10 of the 190 countries in three factors, in the last 50 in seven (including the three) and we are in the first 100 in only one. To improve this ranking we need to look at the ones that are pulling us down the most. The three that stand out are Getting Electricity ranking 187, Registering Property ranking 185 and Enforcing Contracts 189 all out of 190 countries. We are among last five countries in these three. While the first two of these three appear to be 'work-in-progress' for the government, the last one is the most challenging one and one that perhaps requires a quantum change in attitude towards Alternative Dispute Resolution process. We cannot resolve the huge backlog of cases by simply increasing the number of courts or judges. The cost could be astronomical. Most economies have faced this issue of backlog of cases and most have resolved it by making the legal infrastructure ADR friendly and more importantly, forcing litigants into the ADR track. The latest example is Malaysia who brought down the index ranking by lowering the average number of days it takes to enforce a contract to 425 in 2012 from 585 in 2011 by forcing litigants to use ADR rather than trying to resolve all outstanding cases through the judicial process. Malaysia moved from 102 out of 183 economies to 23 out of 190 economies in 2011 and 2017, respectively. This upward ranking was to a great extent assisted by their improvement in 'Enforcement of Contract' ranking through adoption of ADR friendly regime. Forcing cases on the ADR track

freed the courts to concentrate on the more important and impactful litigation, lowered transaction cost and created a more efficient economy. The present thinking on the role of ADR is succinctly summed up in the following quote from Justice Sandra Day O'Connor of the US Supreme Court; "The courts ... should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried".

Bangladesh International Arbitration Centre was set up by the three leading trade bodies, International Chamber of Commerce Bangladesh, Dhaka Chamber of Commerce & Industry and the Metropolitan Chamber of Commerce & Industry Dhaka. This not-for-profit institution, like similar ones in Singapore, Hong Kong, Thailand and Malaysia has been for the last five years working in the ADR space in Bangladesh. It is the only ADR institution in country and can play a more effective role if utilized to assist in the process of making enforcement of contract. Effective ADR in the commercial legal infrastructure is now not a 'good to have' it is increasingly becoming a 'must have' for Bangladesh. The positive 'spin-off' from this will be a much desired improvement in our 'Doing Business' ranking with consequent impact on FDI. There have been reports in newspapers that Bangladesh Investment Development Authority (BIDA) has recently undertaken a project to improve this global ranking of Bangladesh. It is indeed one of the most important initiatives this institution has taken which the precursor institution, BOI should have done much earlier.



SARCO delegation led by the Director General, Mr. Zahidullah Jalali met H.E. Mr. Amjad Hussain B.Sial, Secretary General of SAARC in Kathmandu on 25th June 2018.



A meeting of SARCO's delegation led by Mr. Zahidullah Jalali, Director General, was held with Mr. Krishna Prasad Dhakal, Joint Secretary (Division Chief), SAARC Section, MOFA at Khatmandu, on 25th June 2018.

A Workshop on “Challenges and Opportunities of Arbitration in the SAARC region with a focus on India”

SARCO in collaboration with the Indian Council of Arbitration (ICA) and the Federation of Indian Chambers of Commerce & Industry (FICCI) organized a Workshop on “Challenges and Opportunities of Arbitration in the SAARC region with a focus on India” which was held on 19th May 2018 in New Delhi. Union Law Secretary Mr. Suresh Chandra was the Chief Guest for the Workshop. Prominent Arbitrators and ADR professionals spoke at the Technical Session and the Workshop was lauded by the ICA as the need of the hour and as the most crowded event held on arbitration in ICA. Mrs. Uma Shekhar, Joint Secretary, Legal & Treaties (L&T) Division, Ministry of External Affairs, New Delhi & Member Governing Board of SARCO also spoke at the event as special guest.



Esteemed Dignitaries at the end of the Inaugural Session



Interactive Q&A Session in the Workshop



Speakers of Technical Session pose for a group photo



Discussions of the future co-operation strategy between FICCI, ICA and SARCO



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