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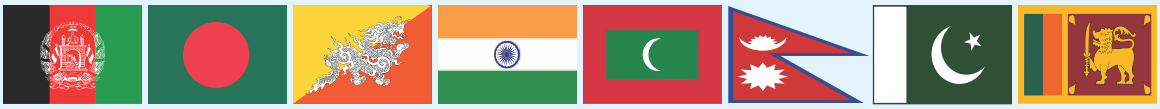

SAARC Arbitration Council

A Specialized Body of SAARC

NEWSLETTER

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EDITOR'S MESSAGE

Mr. Faazan Mirza
Deputy Director

Dear Readers,

It is indeed a pleasure to present to you the 6th Edition of the SARCO Newsletter, which we hope you will enjoy.

There have been significant developments in the legislation and case law related to Arbitration and ADR methods within the SAARC region, in the preceding year. Many developments have clarified the procedures of Arbitration and the enforcement of arbitral awards in the Member States. They have continued to take steps to further promote Arbitration and alternative methods to resolve disputes of a larger commercial and investment spectrum. SARCO has been engaged with its regional partners aiming to further the cause of ADR and enhance the harmonized utilization of this Council's services. This Council is working to expand its network of partners further in the region according to the latest developments in pursuance of our mandate to act as a coordinating agency for arbitration in the region.

This Edition includes news, articles together with events organized or to be organized in the SAARC region by this Council. This year as well we have valuable contributions from our partners in the region on important matters of interest for our readers. I take this opportunity to thank all those who have submitted their contributions for this Edition. The dedication, hard work and patience as well as the efforts put in by the team are highly appreciated.

Please feel free to provide your feedback on this Edition which allows us to remain in touch with our readers' views and their suggestions for improvement.

On this note, I wish you all 'Bonne lecture'.

Interview with CEO of SAARC Development Fund

Dr. Sunil Motiwal is the Chief Executive Officer and Board Director of the SAARC Development Fund (SDF). Dr. Motiwal has rich experience and proven track record of accomplishment in development sector in South Asia. He is a strategist and business development professional of high caliber backed with more than 30 years of experience at International Level.

(SARCO thanks Dr. Motiwal for agreeing to be interviewed.)

Q1: What are the prospects of the South Asian Association for Regional Cooperation (SAARC)?

Answer 1: The prospects are huge. South Asia is one of the world's fastest growing regions, with growth set to step up to 7.0 percent in 2019, then 7.1 percent in 2020 and 2021. However, the region needs to increase its exports to sustain its high growth and reach its full economic potential, says the World Bank in its twice-a-year regional economic update.

South Asia's exports performance has dropped in the last few years to languish at far below its potential and while growth still looks robust. To ensure growth in the long run, the region needs to integrate further into international markets to sustain its upward growth trajectory, create more jobs, and boost prosperity for its people.

Across South Asia, imports grew much stronger than exports in the last two years, reversing the region's exports dynamics of the early 2000s. Strong domestic demand, fueled by a consumption and investment boom, resulted in high import growth of 14.9 percent in 2017 and 15.6 percent in 2018, which is nearly twice as high as the region's export growth. In comparison, exports grew by only 4.6 percent in 2017 and 9.7 percent in 2018. There is so much that the region can do to accelerate progress. Efforts should include trade liberalization, spurring entrepreneurship, and equipping citizens with the skills they need to compete on the global market. It would be good to be creative and relentless in all these efforts.

Q2: In the 13th SAARC Summit the South Asian Development Fund (SADF) was reconstituted as the SAARC Development Fund (SDF). How has this reconstitution assisted SDF in functioning as an umbrella financial mechanism for SAARC projects and programmes?

Answer 2: The SAARC Development Fund (SDF) was established by the heads of the eight SAARC Member States in April 2010 during the 16th SAARC Summit held on 28-29 April at Thimphu, Bhutan, with the aim to promote the welfare of the people of SAARC region, to improve their quality of life, to accelerate economic growth, social progress and poverty alleviation in the region and to contribute to " Regional Cooperation And Integration Through Project Collaboration " .

The reconstitution positioned SAARC Development Fund as the REGIONAL FINANCIAL INSTITUTION for SAARC projects and programs which are in fulfillment of the objectives of the SAARC Charter. SDF has three funding windows viz. Social, Economic and Infrastructure through which the cross-border projects are funded under the co-financing mode.

Q3: The SDF has three functional windows viz. Social, Economic and Infrastructure. Could you please explain about them in brief for our readers?

Answer 3: Three Windows viz, Social Window, Economic Window and Infrastructure Window.
Key Requirements for Project Funding
Social Window
a) involves at least three or more than three SAARC Member States,
b) implementing and executing the projects of significant Social development focusing the thrust areas under the Social Window
c) The financing through this window is in the form of Grant with 50% Co-financing by the proponent.

Economic and Infrastructure (E&I) Windows
a) Projects in the mentioned areas of Economic and Infrastructure Windows are involving more than two SAARC Member States, or projects located in one or more SAARC Member States, of significant economic interest for two or more SAARC Member States are eligible under both these windows.
b) The loans under the two windows can be extended on 100% secured basis to private sector, public sector and autonomous bodies.
c) SDF will be co-financing with Multilateral Development Banks (MDBs)/ Financial Institutions (MFIs local financial institutions/banks/ other Regional

Financial Institutions (RFI)/ any other Funding organization.

Focus Areas:

Social Window funds the projects, inter alia, on poverty alleviation, social development focusing on education; health; human resources development; support to vulnerable/disadvantaged segments of the society; funding needs of communities, micro-enterprises, and rural infrastructure development.

Economic Window extends funding to projects in Trade and Industrial Development, Agriculture and allied sectors, Services Sector, Science and Technology, and other non-Infrastructure areas.

Infrastructure Window of SDF extends funding to projects in Energy, Power, Transportation, Telecommunication, Environment, Tourism and other Infrastructure areas

Micro Small and Medium Enterprise (MSME) program
SDF proposes to fund through its MSME program also in SAARC Member States. MSME funding scheme of SDF is within the Economic Window of SDF. The MSME Funding Scheme of SDF has recently been approved in the 30th SDF Board meeting. SDF proposes to provide line of funding to MSME Banks/ Funding institutions supported by Sovereign Guarantee of SAARC Member States.

Achievements under the Funding Windows

So far, under the Social Window of SDF, 12 projects are approved and being implemented by 67Implementing Agencies & Coordinating Agencies/LIA across the 8 SAARC Member States. Total Fund Commitment under the Social Window is USD 73.79 Million (Mn) of which the disbursed fund is USD 47.81 Mn.

Under the Economic Window, one project have been approved and the total fund commitment is USD 13 Mn. The disbursement of the loan will happen in the current year.

Under the Infrastructure Window, two projects have been approved where the total fund commitment is USD 30 Mn and two projects have been approved in-principal and the total fund commitment for these two projects is USD 30 Mn too.

SDF has already received proposals for MSME Funding from Nepal and Bhutan. The proposals are under evaluation in SDF. Total allocated fund for the funding through MSME program is USD 50 Mn.

Total Fund Commitment under the three Windows along with USD 50 Mn allocation to the MSME Program is USD 196.79 Mn.

Through the three windows of SDF, the major focus area is –
1. Soliciting Cross-Border Project Co-Financing under the Social, Economic & Infrastructure Windows of SDF in SAARC Member States.
2. Build partnerships with various organizations for Fund Mobilization and Investments in SAARC Member States.

Q4: What is the importance SAARC Specialized Bodies (SDF, SAU, SARCO & SARSO) in working towards the goals of regional integration and cooperation?

Answers 4: These specialised bodies are instrumental in realising regional integration and cooperation. The SDF was established to promote the welfare of the people of SAARC region, to improve their quality of life, to accelerate economic growth, social progress and poverty alleviation in the region. The Fund serves as the umbrella financial institution for SAARC projects and programs which are in fulfillment of the objectives of the SAARC Charter. SDF's governance structure includes its Governing Council that comprises Finance Ministers of SAARC Member States, and its Board of Directors encompassing senior officials representing Finance Ministries from each Member State.

Similarly, the South Asian University (SAU) is an international university established by the eight-member nations in 2010. The South Asian University, as set out in the Agreement of the SAARC member states, envisions to:

• build a culture of understanding and regional consciousness;
• nurture a new class of liberal, bright and quality leadership and
• build the capacity of the region in science, technology and other disciplines considered vital for improving the quality of life of the people,

South Asian Regional Standards Organization (SARSO) was also set up to achieve and enhance coordination and

cooperation among SAARC Member states in the fields of standardization and conformity assessment to facilitate intra-regional trade and to have access in the global market. SARSO was established after the relevant Agreement entered into force with effect from 25 August 2011. Below are the various objectives of SARSO

- Promote and undertake harmonization of national standards of the SAARC Member States
- Removal of Technical Barriers to Trade (TBT)
- Enhance flow of goods and services
- Develop SAARC standards on the common products of regional interest
- Facilitate capacity building in the area of standardization
- Use of international standards developed by ISO, IEC & other international organizations
- Exchange of information and expertise among the NSBs.
- Establish mutually beneficial cooperation with the international and regional organization
- Promote Mutual Recognition Arrangements on Conformity Assessment Procedures

In addition, the SAARC Arbitration Council (SARCO) was set up in 2005 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.

Q 5. How do you view the role of the SAARC Arbitration Council (SARCO) in providing a legal framework within the region for fair and efficient settlement through arbitration and conciliation of commercial, investment disputes and beyond?

Answer 5: The role of the SAARC Arbitration Council (SARCO) is very important in the SAARC region. SARCO is the only regional Alternate Dispute Resolution mechanism mandated by all SAARC Member States to act as the Co-coordinating agency in the SAARC dispute resolution system. 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. SARCO provides efficient, flexible and impartial administration of arbitration and other ADR proceedings like Conciliation and Mediation in the SAARC region.

Q6: It was recently announced that SDF's Economic and Infrastructure windows stand fully activated. What does this mean and what are the its implication?

Answer 6: The approval on the project proposals by the SDF Board leads to the activation of the respective window, which represents the approved project proposal. A project under the Economic Window has been approved by the SDF Board and the total fund commitment is USD 13 Mn. The disbursement of the loan will happen in the current year. Under the Infrastructure Window, two projects were approved by the SDF Board where the total fund commitment is USD 30 Mn and two projects have been approved in-principal by the SDF Board and the total fund commitment for these two projects is USD 30 Mn as well.

Q 7. How can SARCO and SDF work together to contribute to the region's goal of attracting foreign direct investment and arbitral work to the SAARC region?

Answer 7: I am pleased to inform you that we are working closely with SAARC Arbitration Council and for that a MoU has already been signed between SDF and SARCO. We are following SAARC: Arbitration Council's Rules for SDF funded projects and dispute resolution for our collaboration with other organizations. I appreciate the efforts made by SARCO for the settlements of disputes through ADR (i.e. Arbitration and Conciliation) in the SAARC region.

Q-8: With growing investments coming in the region what overall potential do you see in the SAARC region?

Answer 8: In the SAARC region, the investments are broadly growing in the Power Sector, Renewable Energy, Tourism, Trade & Economics, ICT, Infrastructure, Climate Change, Agriculture, Technology, Rural Development, Education etc. Subsequently all of these are the focus areas under the three Windows of SDF viz Social, Economic & Infrastructure Windows and the MSME Program.

SAARC is the home of 21% (1.7 billion) world's population with 9.12 % of the global wealth. Combined SAARC is the third largest economy of the world. But a significant number of world's poor people are living in this region. With its diverse landscape and variety of natural resources, SAARC has every potential for economic development and poverty alleviation within shortest possible time.

To generate employment for such a huge amount of population, huge investment is needed. Intra SAARC investment promotion as well as attracting foreign direct investment (FDI) in the above-mentioned focus areas is one of the best options. SAARC Agreement on Promotion and Protection of Investment must be enter into force as soon as possible.

With the growing investments coming in the region overall potential is there for:
a) Boosting SAARC Economies through project financing under the Trade & Economic sector,
b) Infrastructure Development,
c) Exponential growth for Export – Import,
d) Foreign Direct Investments (FDI) can remove the trade barriers and hence, provide the strategic growth for the SAARC Region.
e) Entrepreneurship using Technology & Innovation can create gen0erate the high level of youth employment.

Q-9 What message would you like to convey to our esteemed readers in the SAARC region through this publication?

Answer 9: SAARC is the least integrated region although it is the third largest economy of the world. With the growing investments coming in the region overall potential is there for:

a) Employment Generation
b) Poverty Alleviation,
c) Enhance Literacy and imparting the Quality Education
d) GDP improvement
e) Strategic Growth of the SAARC Region.

Partnership is also key towards supporting the region to realize its full economic potential. Let us work together to ensure that people in South Asia enjoy improved quality of life through reduced poverty, accelerated economic growth and social progress.

Ibrahim Mohamed Solih, the President of Maldives recently appointed Mr. Mohamed Shahdy Anwar as the Chairman of the Maldives International Arbitration Center. Mr. Shahdy is a Fellow of the Chartered Institute of Arbitrators and of the Singapore Institute of Arbitrators and has worked on various issues related to arbitration at an international level. In addition, Mr. Hussain Siraj has been appointed as Vice Chair, while Ms. Safa Shareef has been appointed as a Member of the Board.

SARCO is a Corporate Member of The Chartered Institute of Arbitrators (CIArb)

Maldives elects first ever Bar Council. Mr. Maumoon Hamid has been elected as President, whereas, Mr. Abdulla Muizz has been elected Vice President.

Activities & Meetings of SARCO

SARCO hosted Mr. Hassan Mehmood, Chairman, SARCO Governing Board at the SARCO Secretariat on 26 June 2019.

NLSIU, Bangalore was awarded the 'Best SAARC Region Team' award at the Victors Moot organized by the Sri Lanka Law College from 22-24 March 2019 in Colombo, Sri Lanka

Mr. Bharatendu Agarwal, Assistant Director (Law) was invited by Mr. Vinayak Pradhan, Director, Asian International Arbitration Centre (AIAC) to attend the Asia ADR Week in Kuala Lumpur, Malaysia on 27-29 June 2019.

SARCO sponsored the XII NLS-Trilegal International Arbitration Moot (NLSTIAM) and NLS-Trilegal International Arbitration Conference (NLSTIAC) organized by the Moot Court Society, NLSIU in Bangalore, India on 16-19 May 2019. The teams from MNLU, Mumbai emerged as the winner, whereas, the Spirit of SAARC award was won by Symbiosis Law School, Noida.

The Chickens Come Home to Roost - International Arbitration

Mr. Sajid Zahid is an Arbitrator at SARCO (Nominated by Pakistan). He is the Joint Senior Partner of Orr, Dignam and Company and has been on Pakistan Petroleum Limited's Board of Directors since March 2000. He is also a Barrister-at-Law from Lincoln's Inn, London with over 37 years of experience in corporate and commercial law. He has acted as Counsel in national and international arbitrations on behalf of leading local and foreign organizations, including oil and gas sector companies.

I have previously highlighted that the Pakistani Courts' setting aside agreements, including the underlying arbitration agreements, despite having been signed several years ago, involving foreign investors, would not necessarily meet the test set out in the international arbitration fori and will provide no joy to Pakistan in the long run. Since then, over the course of the year, it is noteworthy that the Hon'ble Supreme Court has time and again referred to its earlier decisions to highlight its current policy of 'restraint' in intervening in agreements containing foreign dispute resolution clauses. However, the Courts' cautious attitude though welcome appears to have arrived a bit late in two particular cases, given the recent developments as well as other similar high profiled international arbitration cases.

The particular two cases earlier discussed also are:
(i)the Karkey Karadeniz Elektrik Uretim AS ("Karkey") v. The Islamic Republic of Pakistan ("Karkey Case"); and
(ii)(ii) Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan ("Rekodiq Case").

In both the above cases, the foreign fori hearing the matters have either awarded or will be awarding substantial damages against Pakistan/state-owned entities. More specifically, in Karkey's case, it is reported that the International Centre for Settlement of Investment Dispute ("ICSID") on 22nd August 2017, ICSID rendered its award reported to be in excess of US$760 million plus interest in favor of Karkey.2 However, as per the recent reports, Pakistan has had a measure of unexpected success in its application seeking a revision of the Award from the ICSID Tribunal, hearing the matter, which has 'stayed' the Award. Typically, such a revision is sought, when a party makes a discovery of some fact of such a nature, so as to decisively affect the award, which fact was earlier unknown to the party and the Tribunal and the party's ignorance was not due to negligence.
Recently, it has also been reported by certain media platform that substantial damages are to be awarded in the Reko diq Case against Pakistan3 (a suggested figure of US$ 4 billion has been denied by top Pakistani officials). The consequences of all of the above has threatened Pakistan's assets abroad, including the national flag carrier, until the payment of the said damages. The 'staying' of the Karkey Award, as stated above, has temporarily reprieved Pakistan from the seizure of its assets for a set off against the Award.

Presumably taking note of the above, at a hearing held on 12th February 2018, a three-judge Supreme Court Bench, presided by the then Chief Justice of Pakistan Mr. Justice (R) Mian Saqib Nasir rejected a petition pertaining to the award of an import contract for liquefied natural gas ("LNG").4 In respect of the same, it was observed by the Court (as per the Article in the Express Tribune) that "the court does not want to repeat the embarrassment Pakistan faced in the Reko Diq and Karkey Karadeniz cases".5

In addition to the Karkey and the Reko diq cases, other instances have also come into the limelight, involving public/semi-public organizations, in terms of which foreign proceedings are taking place, which have the potential to cost the taxpayers a fortune. It was reported that arbitration proceedings have commenced against the Water and Power Development Authority ("WAPDA") and Central Power Purchasing Agency-Guarantee Limited. In connection with the same, the Claimant, Kot Adu Power Company Limited ("KAPCO") (an independent power producer) had started the arbitration to nullify substantial liquidated damages, allegedly "wrongfully imposed by Wapda/CPPA and to enforce its right to claim Rs.2.45bn, comprising the company's net losses otherwise not covered by late payment interest". In the said proceedings, the Government has been made a party to the same, as it had given a guarantee and entered into a Facilitation Agreement with KAPCO.

Moreover, KAPCO have been advised through legal advice that there are adequate grounds to defend any claim of WAPDA for such liquidated damages. In addition to the above, another 2018 noteworthy case, which should be highlighted is the case against NAB by

the Isle of Man company, Broadsheet. The background facts of the case are that following the Panamagate case, Broadsheet were retained by the government to assist the National Accountability Bureau ("NAB") detect and recover unlawful assets hidden abroad by Pakistani Nationals.

The dealings between NAB and Broadsheet commenced in 1999 on the establishment of NAB to investigate corruption allegations against public officials. Broadsheet entered into the agreement with NAB, in which it agreed to help track down assets of Mr. Nawaz Sharif and more than 200 other politicians, generals and officials at its own expense – in return for 20% of any sums recovered from the designated targets.7 NAB terminated the agreement in 2003 but Broadsheet discovered later that NAB had entered into settlements with Mr. Sharif and other targets without notifying it. Broadsheet stipulated that the agreement between themselves and NAB entitled it to a commission on any settlement with the targets, even if Broadsheet was not involved in procuring the settlement. As we understand Broadsheet has made a substantial claim, reported to be over US$ 600 million against Pakistan and both sides are being represented by top legal experts in London.

Not all Doom and Gloom

Whilst the above are matters of pessimism, it is important to highlight two particular noteworthy events, which have also taken place through the course of last year: (1) The office of the Attorney General for Pakistan has been made responsible for handling all international disputes and arbitrations and the same are being separated from the Law and Justice Division of the Federal Government; and (2) an important judgment was passed by a Pakistani Court recognizing and enforcing a foreign Arbitral Award in Pakistan under the 1958 New York Convention and the 2011 Act.

As regards (1) above, an amendment was inserted into the Rules of Business 1973 in terms of which a proviso has been added for direct consultation of the state-owned entities with the Attorney General for Pakistan, (without the intervention of the Law and Justice Division), for the purpose of settlement of its disputes through arbitration at national or international level, which will make decision making more time effective.

As regards (2) above, it will be helpful to refer to a decision of the Lahore High Court, in which my Firm acted for a foreign party seeking enforcement of the Award. Whilst the arbitration involved the Bye-Laws of the International Cotton Arbitration ("ICA"), the effect of the judgment in relation to the enforcement process of a foreign arbitration award would be equally applicable in respect of an ICC Award.

In the above cited case, the Lahore High Court disposed of the Application for enforcement of the Foreign Award by a Swiss Company under Section 6 of the 2011 Act ("Application"). The background of the Application was that the parties had agreed to resolve disputes relating to the relevant cotton contracts between them through arbitration in accordance with the Bye-Laws of ICA and the seat of arbitration was agreed to be Liverpool, UK. The arbitration took place at Liverpool and the Arbitral Tribunal passed an Award in favor of the Swiss Company on 18th March 2011.

The Lahore High Court in terms of its Order dated 18th April 2018, disposed of the Application. The Court, amongst other things, significantly held as under:

"…the general pro-enforcement bias which permeates the Act, 2011 is the policy of the law and must be the underlying thrust to liberalize procedures for enforcing foreign arbitral awards. The courts, on a proper objective analysis must give effect to the intention of the legislature and the purpose of the New York Convention, in the enforcement of foreign arbitral awards. The centrality of the statutory enterprise consists in shunning a tendency to view the application with skepticism and to consider the arbitral award as having a sound legal and foundational element. This presumption is for the respondent to rebut upon proof being furnished. More importantly, the policy of the Act, 2011 requires this Court to dispose of issues by the usual test for summary judgment, and not by a regular trial…

…Accordingly, I find that all requirements for the enforcement of the Appeal award have been satisfied. This application is, therefore, allowed. …"

Conclusion:

The sum total of the above appears to be a realization of our Courts that agreements with underlying international

arbitration arrangements, involving foreign investors, should be handled with a certain degree of circumspection. This would be necessary to preclude the avoidable financial exposure of the Government of Pakistan, either directly or through its state-owned or majority controlled entities, resulting from the adverse

foreign arbitral awards involving large sums of money.
It is also significant to note that in terms of the above referred Order of the Lahore High Court, it has been judicially recognized that the 2011 Act (statutorily enforcing the 1948 New York Convention), carries a "... general pro-enforcement bias...", which must be "... the underlying thrust to liberalize procedures for enforcing foreign arbitral awards..." and lastly that the 2011 Act "...requires this Court to dispose of issues by the usual test for summary judgment, and not by a regular trial..."

Whilst the final say from the Supreme Court in such matters is awaited, till then the above Lahore High Court decision can be a beacon for our Courts in deciding matters pertaining to the enforcement of the foreign arbitral awards.

Mr. Bharatendu Agarwal, Assistant Director (Law) has been invited by the South Asian University (SAU) to present a paper on the upcoming international conference on *South Asia in the Era of International Courts and Tribunals* scheduled to be held on 28th - 29th February 2020 in New Delhi, India.

SARCO is working to develop and increase the number of arbitrators and industry experts on its Panel. This will ease the process of arbitration for the parties and will help the arbitral tribunals in their proceedings.

Bhutan Arbitration Centre launches new website:

www.bhutanadrcentre.bt

Essential detail about proceedings, mandate and administration or available on the website.

Activities & Meetings of SARCO

SARCO delegation met Mr. Rifat Parvez, Additional Secretary/ Executive Director General, Board of Investment, Government of Pakistan on 02 May 2019.

SARCO hosted Mr. Abdullah Dowrani, Chief Commissioner, FDRC of Afghanistan and Governing Board Member, SARCO at the SARCO Secretariat on 18 January 2019.

Mr. Bharatendu Agarwal, AD (Law) adjudicated in the Pakistan National Rounds of the 2019 Philip C. Jessup Competition in Islamabad, Pakistan between 20-23 February 2019.

Mr. Faazaan Mirza, Deputy Director participated in a workshop organized by SAARC Chamber of Commerce and Industry in Peshawar, Pakistan on 29 April 2019.

SARCO delegation met H.E. Noordeen Mohamed Shaheid, High Commissioner of Sri Lanka at the Sri Lankan High Commission in Islamabad, Pakistan on 24 February 2019.

Mr. Faazaan Mirza, Deputy Director met Prof. Muhammad Munir, Vice President, International Islamic University, Islamabad on 23 July 2019.

Changing Trends Of International Commercial Arbitration In India*

Dr. Gogisetti Venkata Narasimha Rao is the Associate Professor of Law at the Nirma Institute of Law in Ahmedabad, India.

(SARCO thanks Dr. Rao for agreeing to publish his Article)

Arbitration today is a well-accepted mode of settling commercial disputes both national and international. It is no exaggeration to say that there exists no single sector without using arbitration. It is in this milieu that commercial arbitration assumes a great significance in the 21st century as a method of settling commercial disputes.

(A). International Arbitration in India - What it's all about?

International commercial arbitration, according to the Arbitration and Conciliation Act 1996, comes into being by virtue of a legal relationship considered commercial under the law in force in India. Such relation, however, may be contractual or otherwise wherein at least one of the parties is "(i) an individual who is national of, or habitually resident in any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country."

International commercial arbitration is the 21st-century phenomena, little known to India prior to 1990, but assumed prominence with the opening up of Indian economy in 1991. Investors from other countries with the opening of the Indian economy started investing in India and signing agreements with Indian tradesmen. These investors of other countries together with their Indian counterparts more often than not, on account of the several advantages of arbitration preferred arbitration as a choice of resolving disputes to litigation at a place outside India. What could be the reasons for the parties to prefer arbitration at a place outside India is a question the answer of which is not difficult. Inadequacy of law governing arbitration, the excess supervisory role of Indian Courts and inordinate delay in the disposal of cases by Indian Courts were some of the reasons which prompted the parties to prefer arbitration to litigation at a place outside India. Moreover, there was no comprehensive law on arbitration prior to 1996 governing both domestic and international disputes. Absence of comprehensive law created hardships to the parties in resolving disputes of the kind described above. As such the Government of India in 1995 with a view to facilitating the parties to resolve disputes through arbitration introduced a bill on arbitration in the parliament of India. The Bill so introduced came to be passed into Arbitration and Conciliation Act 1996 (hereinafter referred to as 'the 1996 Act'). The 1996 Act among several other things, sought to "(a) comprehensively cover international commercial arbitration, conciliation as also domestic arbitration (b) minimize the supervisory role of the Courts in the arbitral process (c) provide for the enforcement of every final arbitral award in the same manner as if it was a decree of a Court". This apart, the 1996 Act in consonance with the objective of UNCITRAL also intended to bring "uniformity of the law of arbitral procedures to meet the specific needs of international commercial arbitration practice and to establish a unified legal framework for the fair and efficient settlement of disputes in international commercial relations". The 1996 Act besides being comprehensive covering both the domestic and international arbitration, also has an underlying objective making India a centre of arbitration-friendly on par with other leading centres of arbitration.

The 1996 Act, though comprehensive covering domestic and international arbitration, did not operate in the way it was expected and its objective of minimizing supervisory role of the Courts, largely remained unfulfilled; the supervisory role of the Courts by no means came down; delays in no manner could be cut down; nor ever came to be enforced the final awards. On the other hand, the arbitral process throughout was interfered with. The State High Courts and Supreme Court on the application of the losing party frequently intervened in the arbitral process that took place outside India as per the choice of the parties. In several cases, the appointment of an arbitrator was stalled and the awards were set aside, nevertheless of the preferred choice of the parties to resolve disputes amicably through arbitration at a place outside India. In many Cases, the State High Courts and the Supreme Court, in spite of the

* This Article is republished with the consent of the Author and the CIArb. This Article was originally published on: https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/

above objective of the 1996 Act took conflicting positions and asserted jurisdiction to intervene and set aside the appointment of the arbitrator or as the case may be the award passed by the arbitral tribunal. Thus the conscious choice of the parties to resolve their disputes amicably through arbitration had been ignored. The foreign investors in India were drawn into unending multiple ligations. Consequently, the appointment of arbitrator turned into an illusion and enforcement of final award passed by international commercial tribunal remained a far cry.

In the above background the article aims at analyzing how the State High Courts and Supreme Court acquitted themselves when chanced upon a matter of international nature and how they asserted jurisdiction in that matter notwithstanding one of the parties was a foreign party, the conscious decision of the parties to resolve their disputes at a place outside India, the appointment of the arbitrator, seizing of the matter by the arbitration tribunal, passing of the award by the arbitration tribunal. The article also aims at highlighting how the change in the attitude of the State High Courts and Supreme Court occurred, the measures taken by the legislature and the Government of India to make the Arbitration and Conciliation Act workable to all the parties concerned.

(II) How the state high courts and supreme court intervened and what they said up to 2011?

The State High Courts and Supreme Court except in East Coast Shipping v M J Scrap Kitechnology v Uncor GmBH Rahn Plastmaschinen and Marriot International Incorporation v M/s Ansal Hotels Ltd mentioned in the succeeding paragraphs, entertained applications under sections 1, 2, 9, 11, 34, of part I of 1996 Act even in matters where one of the parties was a foreign party and the parties chose to resolve their disputes through arbitration at a place outside India; the arbitrator was already designated; a partial or final award was passed. Yet the Indian Courts drew conclusions that "part I would apply to matters of international commercial arbitration unless the parties expressly or impliedly agreed to exclude the applicability of the provisions of part I" in spite of delimiting the applicability of section 2 (2) to matters where the place of arbitration is in India and in spite of the bar on the judicial intervention under s.5 of the 1996 Act.

(A).What the Courts Said up to 2011?

Given below are some of the leading judgments of various State High Courts and Supreme Court which mirror the issues described in the preceding paragraph and rulings thereon.

Dominant Offset v Adamovske is the lead example which shows how the Delhi High Court, in spite there being clear agreement to resolve disputes between the parties, asserted jurisdiction. The Delhi High Court entertained the petition under section 11of the Arbitration and Conciliation Act 1996 for the appointment of an arbitrator notwithstanding the existence of a clear agreement that the disputes between parties be settled through arbitration of International Chamber of Commerce (ICC) in the proceedings to be conducted in London and one of the parties was incorporated outside India. Yet the Court heard the matter in elaborate and allowed the parties to make arguments under section 11 of the Arbitration and Conciliation Act 1996 nevertheless of the fact that section 11 formed part of part I which, as per section 2 (2) would apply where the place of arbitration was in India. M/s Adamovske, the respondent took objection on the maintainability of the petition saying that it was a body corporate incorporated in a country outside India, as such it was a case of international commercial arbitration within the power of Chief Justice India (CJI) who alone was competent to entertain petition for appointment of an arbitrator but not Delhi High Court. The Delhi High Court brushed off the argument of the M/s Adamovske and asserted that it had got the power and jurisdiction to refer the parties to arbitration under section 8 when the matter was brought before the Court and accordingly referred the parties to arbitration under section 8(power to refer the parties to arbitration where there is an arbitration agreement) and dismissed the claim of Adamovske to entertain application under section 11(appointment of arbitrators) and went on observing that "section 2(2) was an inclusive definition and did not exclude the applicability of part I to arbitrations not held in India".

The Delhi High Court in Olex Focas v Skoda Export Company drew a similar conclusion as the one drawn in Dominant Offset above. Skoda Export the respondent in response to the petition for injunction under section 9 of the Arbitration and Conciliation Act inter alia opposed the Court granting interim injunction on the ground that (1) both the petitioner and the respondent were foreign companies and the applicable law was that of Swiss law, hence no jurisdiction to Indian Courts (2) no copy of the petition had been served to M/s Skoda Export (3) the dispute between the petitioner and respondent was pending adjudication before the International Chamber of Commerce(ICC) on the reference by the petitioner as

per the terms of the contract; not only the claim of the petitioner, the claim of the respondent against the petitioner was also pending (4) the award to be passed would be enforced as per the applicable laws of Switzerland against the properties of the petitioner or the respondent, hence the Courts in India had been interdicted (5) the Indian Courts had no cause for exercising jurisdiction and the jurisdiction had already been vested in the specified tribunal(6) the parties had elected to preclude the jurisdiction of all other forums (7) ICC already seized of the matter (8) ICC could not be precluded from exercising its jurisdiction. The High Court of Delhi while dismissing the petition for injunction gave a finding favouring the argument of the petitioner over the strong submission of the respondent as above stating that "sub-section (2) of section 2 was an inclusive definition and it did not exclude the applicability of part I to the arbitration on hand which did not take place in India".

The stand taken by the Delhi High Court in the above two cases found support in Bhatia International v Bulk Trading SA from the Supreme Court. The Supreme Court, having found no reason for interference confirmed the judgment of High Court of Madhya Pradesh (Indore) Bench and dismissed the appeal filed by the appellant for an injunction under section 9 of the Arbitration and Conciliation Act 1996. The Supreme Court, like the Delhi High Court in the above two cases, came to a similar conclusion asserting it had got the power to grant interim remedies in a case where the parties chose for the arbitration of International Chamber of Commerce. The Supreme Court further held that "in the absence of the expression 'only' in section 2(2) of part I of the Act would make that section apply to arbitration held outside India so long as the law of India was the governing law". The Supreme Court further observed that "arbitration not having taken place in India, all or some of the provisions of the part I might also get excluded by an express or implied agreement of parties. But if not so excluded, the provisions of part I would also apply to foreign awards".

The Supreme Court in ONGC v SAW Pipes ruled that even patent illegality could amount to a breach of public policy and held that "a foreign award which was on its face patently in violation of statutory provisions could not be said to be in public interest". Such award or judgment or decision, according to Supreme Court "was likely to adversely affect the administration of justice and as such could be set aside if it was contrary to (a) fundamental policy of Indian law (b) the interest of India or (c) justice or morality or (d) in

Venture Global Engineering v Satyam Computers Services is yet another prominent example which shows the intervention of the Supreme Court even in a case where the award was already made by a competent tribunal outside India. The Supreme Court reaffirmed the decision of 'Bhatia International' and maintained that the Court in India had jurisdiction both under section 9 and 34 of the Arbitration and Conciliation Act 1996 and as such an award passed in England through an arbitral process conducted by London Court of Arbitration could be set aside. The Supreme Court concluded that the provisions of part I would apply as the parties did not choose to exclude the provisions of part I.

SARCO delegation hosted Justice (R) Zia Pervez, Arbitrator nominated by the Government of the Islamic Republic of Pakistan.

In contrast Calcutta High Court in East Coast Shipping v M/s M J Scrap and Delhi High Court in Kitechnology v Uncor GmBH Rahn Plastmaschinen and Marriot International Incorporation v M/s Ansal Hotels Ltd during the same period as mentioned above drew conclusions different from the one drawn by the High Court of Delhi and Supreme Court referred above and came to the conclusion that part I would apply only to arbitration where the place of arbitration was in India.
The stand taken by the Delhi High Court and the Supreme Court ignoring the clarification referred under s.2 (2) above and provisions of Protocol on Arbitration Clauses in the above cases seems inappropriate. In Dominant Offset the assertion of the Court that it had got the power and jurisdiction to refer the parties to arbitration under section 8 when the matter was brought before the Court appears fallacious for the reason neither section 8 nor section 11 permitted the Court to entertain an application in matters of international commercial arbitration. Section 8 dealt with the power of the Court to refer parties to arbitration where there is an arbitration agreement; whereas section 11 dealt with modalities such as eligibility for the appointment of arbitrator, freedom of the parties to appoint an arbitrator and procedure to be followed for such appointment and the formalities to be completed in case of a failure of an agreement on the procedure for appointment of arbitrators and the criteria the Chief Justice has to take into consideration while appointing an arbitrator. Sections 8 and 11 nowhere indicated that they would apply the international commercial arbitration, foreign award and enforceability of foreign award etc. Section 8 and 11 obviously had no relevance to the issues raised in this case. The Delhi High Court still gave the above finding.

The stand was taken by the Delhi High Court in Olex Focus that sub-section (2) of section 2 is an "inclusive definition and did not exclude the applicability of part I to arbitrations not held in India" is bereft of reason and there is no indication whatever in the 1996 Act clarifying that part I would apply to international arbitration unless the parties exclude it. Further, the Court's assertion that "the powers of the Court are essential in order to strengthen and establish the efficacy and effectiveness of the arbitration proceedings" is similarly devoid of the reason for the Court was not supposed to exercise a jurisdiction which it was not lawfully endowed with.

In ONGC case the Supreme Court set aside the award passed by the Arbitration Tribunal citing vague reason 'patent illegality'.

In 'Bhatia International' the Supreme Court ought to have dismissed the application under section 9 saying that part I had no application in matters of international commercial arbitration but rather chose to interpret the law that "(1) in the absence of expression 'only' in section 2(2) of part I of the Act would make that section to apply to arbitration held outside India so long as the law of India was the governing law (2) in cases of international commercial arbitration held outside India, provisions of part I would apply unless parties by agreement express or implied excluded of all or any of its provisions (3) the definition of 'Court' did not make any distinction between international commercial arbitration held in India or outside India, commercial arbitration held in signatory or non-signatory country to New York Convention or Geneva Convention". Supreme Court observed that the definition of 'Court' did not provide that the Courts in India had no jurisdiction in matters of international commercial arbitration. The Supreme Court, as it may be observed, even if the application was filed under section 11, gave finding that the case would fall under section 8(power to refer the parties to arbitration where there is an arbitration agreement) of the Act but never attempted to bring it under part II even if the elements of international commercial arbitration described in the first page were present; Court seized the matter under section 8 for reference to arbitration in spite of its knowledge that arbitrator had already been designated and assumed jurisdiction which it did not have. Supreme Court ought to have dismissed the application originally filed under section 11stating that the ICC arbitrator was already named and should have directed the parties to approach ICC for arbitration which it did not do rather heard the matter in elaborate and gave the findings mentioned in the preceding paragraphs.

III. Is there any change since 2011 in the attitude of the courts? If so, is it a right change?

The Indian Courts, as is evident from the above, took nearly a decade and a half to understand the intricate values of international commercial arbitration. The Courts seemed to have changed their attitude and stopped entertaining applications under part I of the 1996 Act in matters of international commercial arbitration. A brief survey of the recent judgments of the State High Courts and Supreme Court post 2011 shows a perceptible change in their attitude. The judgments delivered by the State High Courts and Supreme Court were in tandem with the legislative and executive intent. The Courts seemed to have refrained themselves from

intervening with appointment, passing and enforcement of the award. Further, the Courts seemed to have refrained themselves from intervening with the choice of the parties to resolve disputes amicably through arbitration. Not only did the Courts refrain themselves but even went to the extent of holding that the matters involving fraud could also be referred to and determined by the arbitral tribunal.

The following are some of the judgments which outline the change in the attitude of the Courts.

(A). What did the Courts say since Phulchand Exports in 2011?

Phulchand Exports v Ooo Patriot marks the beginning of a new era in the history of commercial arbitration of India. The central issue that came up for consideration before the Supreme Court was that whether the enforcement of the award of International Court of Arbitration (ICA) at the Chamber and Industry of Russian Federation, Moscow in favour of Ooo Patriot, the respondent would be considered as contrary to the public policy of India under sub-section (2) (b) of section 48 of the Arbitration and Conciliation Act 1996. The validity of the above award was directly in issue before the Supreme Court claiming that the said award was contrary to public policy. The Supreme Court declined to interfere with the award of the International Court of Arbitration and held that "the agreed terms must ordinarily be respected as the parties may be taken to have had regard to the matters known to them".

Bharat Aluminum v Kaiser Aluminum Tech Services is another notable case which reflects the change in the attitude of the Supreme Court in matters of international arbitration. The Supreme Court declined to intervene in the enforcement of the award passed by the Arbitral Tribunal and was very categorical in holding that "the application under section 9 seeking injunction for stalling the enforcement of the award was not maintainable for the reason that the principle of the territoriality as adopted in the UNCITRAL Model Law was very much adopted even in the Arbitration and Conciliation Act 1996 and as such section 2(2) of part I should apply to arbitrations which took place within India". And part I of the Arbitration and Conciliation Act, according to the Supreme Court, "had no application to matters of international commercial arbitration held outside India", accordingly concluded that "in a foreign seated international commercial arbitration, there was little scope for maintainability of an application for interim relief either under section 9 or any other provisions as the application of part I was limited to arbitrations which took place in India" and accordingly "disagreed with the conclusions drawn in Bhatia International and Venture Global Engineering".

In Antrix corp v Devas Multimedia the Supreme Court while, concurring with the findings of the Punjab &Haryana High Court, dismissed the arbitration petition stating that "in a case where the arbitrator had already been appointed and such appointment was already communicated to the other party, no application for appointment of an arbitrator was further maintainable". The Supreme Court, while agreeing with the High Court of Punjab & Haryana observed that "the language of article 20 of the arbitration agreement provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL. As such Devas was entitled to invoke the rules of the arbitration of the ICC for the conduct of arbitration proceedings". The Supreme Court further said that "where the parties had agreed that the procedure for the arbitration would be governed by the ICC rules, the same would necessarily include the appointment of an arbitral tribunal in terms of the arbitration agreement and the said rules". The Court was of the opinion that "once the provisions of the ICC rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in proceedings under section 11 of the 1996 Act".

Shri Lal Mahal v Progetto Gramo Spa is one more instance which testifies Supreme Court's averse to intervene in the enforceability of the foreign award saying that "while considering the enforceability of foreign award, the Court was not inclined to exercise appellate jurisdiction over the foreign award nor was it inclined to inquire as to whether, while rendering foreign award, some error had occurred". In World Sport Group (Mauritius) v Msm Satellite (Singapore) Pte the Supreme Court refrained itself from intervening and went a step beyond in holding that "allegations of fraud could also be decided by the International Arbitral Tribunal as there was no bar against referring such matters involving fraud to international arbitral tribunals". In Pricol v Johnson Controls Enterprise the Supreme Court turned down the request to set aside the partial award passed by the arbitrator. Enercon v Enercon GMBH and Union of India v Reliance Industries are other leading examples which testify that Supreme Court was not inclined to intervene either in the appointment of an arbitrator or as the case

may be enforcement of foreign awards. It is not the Supreme Court alone which embraced change, even the State High Courts seemed to have embraced it. In Cruz City 1 Mauritius v Unitech , Daiichi Sankyo v Malvinder Mohan, Convention Hotels India v Ager Hotels the Delhi High Court declined to intervene in the process of enforcement of a foreign award. These cases outline except Oil & Natural Gas Commission v Western GECO International the changing environment in India in matters of international commercial arbitration. The State High Courts and Supreme Court in all these cases abstained themselves from intervening with the arbitral process already commenced or enforcement of a foreign award.

(B). What did the Legislature do in 2015?

Even if the change as explained above in the attitude of the State High Courts and Supreme Court is perceivable, the Government of India could visualize the ill-effects brought forth by the judgements up to 2010. Government of India, with a view to offset the ill-effects, introduced a bill to make the Arbitration and Conciliation Act workable by effecting appropriate amendments to the existing provisions and by introducing certain new provisions into the Act. The bill came to be passed as the Arbitration and Conciliation (Amendment) Act 2015 (hereinafter referred to as the 2015 Act).

2015 Act in many ways is intended to reduce the supervisory role of the Courts. Given below are some of the amended provisions intended to reduce the supervisory role of the Indian Courts. The definition of 'Court' has been 'elaborated to include Principal Civil Court of original jurisdiction and State High Court of original civil jurisdiction and appellate jurisdiction. The amended definition leaves no room for the inferior Courts to intervene in matters of arbitration much less in matters of international commercial arbitration. A Civil Court which is of a grade inferior to Principal Civil Court cannot intervene in matters of arbitration. In matters of international commercial arbitration, even the power of the Principal Civil Court functioning at the district level has been nullified. 2015 Act, however, empowers only State High Court to intervene in matters of international commercial arbitration under its ordinary original civil jurisdiction and appellate jurisdiction if the same has been the subject matter of a suit. This apart, a newly added proviso to section 2(2) states that the provisions of sections 9, 27 and 37(1) (a) and (3), subject to an agreement to the contrary, "shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of part II of the 1996 Act". But the operation of the proviso is made contingent upon the existence of an agreement to the contrary.

The amended section 8 empowers the Court to refer parties to arbitration subject to one or more specific grounds described therein, but the operation of section 8, similar to the operation of the provision mentioned in the preceding paragraph, has been made contingent upon the absence of the existence of a valid agreement.
The amended section 9 empowers the Court to pass interim measures on the application of a party. This application, however, has to be filed before or during arbitral proceedings or at any time after the making of the arbitral award but before enforcement in accordance with section 36. The Court, for any reason whatever, before the commencement of the arbitral proceedings, passes an order granting an interim relief under subsection (1), the arbitral proceedings have to be commenced within a period of ninety days from the date of such order or within such further time as the Court may extend. However, on the constitution of the arbitral tribunal, the Court cannot entertain an application under subsection (1), unless the Court finds "the circumstances exist which may not render the remedy provided under section 17 efficacious". This amendment is significant for the reason that passing of interim measure by the Court does not render the arbitral proceedings wholly inoperative which hitherto was the case. Arbitration proceedings as a matter of obligation shall commence within a period of ninety days from the date of such order or such extended period as the Court may determine. Furthermore, the Court is debarred from entertaining applications under subsection (1), once the arbitration tribunal is constituted. It is also significant for the reason that the power of the Court to entertain application is further narrowed to the existence of the circumstances which, in the opinion of the Court, may not render the remedy provided under section 17efficacious.

Amended section 11 assures the autonomy of the parties by according freedom to the parties to appoint arbitrators of their choice of any nationality. Parties are further given freedom to decide on the procedure for appointing the arbitrators. The power appointing arbitrators vested in State High Courts and Supreme Court, like the power under section 8 and 9 in the preceding paragraphs, is made contingent upon the failure of an agreement on the procedure for appointing the arbitrator and that too on the request of a party. The

role of the State High Courts and Supreme Court till then remains dormant. The power of the State High Courts and Supreme Court in appointing arbitrators, even after assuming power on the failure of the agreement, is limited to the provisions of the agreement arrived at by the parties. When so assuming power, the State High Court and Supreme Court are to dispose of the application for appointment of the arbitrator as expeditiously as possible. The power of the State High Courts and Supreme Court is thus conditioned by the absence of an agreement, necessity of specific request by a party and specific provisions of the agreement.

The amended section 17 slashes the power of the Court to entertain applications during the arbitral proceedings or at any time after making of the arbitral award but before its enforcement in accordance with section 36, for the specific cases mentioned therein.

Section 34 which deals with the 'application for setting aside arbitral award' is one provision which the parties to an international arbitration often resorted to for setting aside the arbitral award. The State High Courts and Supreme Court used to entertain such applications under section 34 at the instance of the losing party. The 2015 Act did not affect any change in the grounds enumerated in sub-sections 1 and 2 of section 34. The text of section 34 of 1996 has been retained as it was. Section 34 of 1996 Act empowered the Court to set aside an award if it was 'opposed to the public policy of India', but what exactly does 'opposed to public policy' mean had nowhere been defined. In the absence of a precise definition, the expression 'opposed to the public policy of India' became a constant source of abuse and led to conflicting judicial decisions. With a view to set at rest the conflicting situation, explanations (1) and (2) were added to section 34 which are more in the nature of clarifications. An award, according to explanation 1, may be treated in conflict with the 'public policy of India' only if "(i) the making of the award is induced or affected by fraud or corruption or is in violation of section 75 or section 81 or (ii) it is in contravention of the fundamental policy of Indian Law; or (iii) it is in conflict with the most basic notions of morality or justice". Similarly, explanation 2 clarifies that "the test as to whether there occurs contravention of the 'fundamental policy of Indian law' shall not entail a review on the merits of the dispute". It is how the newly added explanations which are in the nature of clarifications, will help slim down the role of the Courts in matters of arbitration especially in matters of international commercial arbitration. What exactly 'the fundamental policy of India', 'basic notions of morality and justice' is nowhere explained and as such a matter of interpretation by the Courts.

(C). What did the Executive do in 2015 and 2018?

Besides the legislative changes above, the Government of India also made certain positive moves in this direction indicating its keen interest to make India one of the leading hubs of arbitration. Government of India with a view "to speed up the resolution of the commercial disputes and to facilitate effective conduct of international and domestic arbitrations" has set up a High Level Committee (HLC) with Justice B N Srikrishna former Judge of Supreme Court as its chairman and judges of the State High Courts and Supreme Court, representatives of Industry and senior advocates as the members. On submission of the report by the High Level Committee, the Union Cabinet has approved the recommendations of the High Level Committee. The Union Cabinet, having approved the recommendations of the High Level Committee, has affected the Arbitration and Conciliation (Amendment) Bill 2018(hereinafter Amendment Bill 2018) introduced in Lok Sabha which Lok Sabha passed. One of the objectives of the Amendment Bill 2018 is to encourage institutional arbitration for settlement of disputes and make India a robust centre of Alternative Disputes Resolution (ADR) mechanism.

(IV). CONCLUSION

(A).What The Future Holds for International Arbitration in India?

It is obvious from the foregoing that a change is taking place gradually on all fronts. Indian Courts have refrained themselves from interfering with the arbitral process in the cases where the parties chose to settle their disputes amicably through arbitration to give effect to the preferred choice of the parties; besides the Arbitration and Conciliation (Amendment) Act 2015 and the Arbitration and Conciliation (Amendment) Act 2018 respectively brought about changes like reducing to a considerable extent as explained above the supervisory role of the Courts and establishment of Arbitration Council of India for the purposes mentioned below to give fillip to the institutional arbitration. These efforts of all the three wings of the Government testify that India is taking all possible measures to make India investor friendly which may lead India one of the prominent hubs of arbitration on par with other leading centres.

News from SAARC Development Fund, Bhutan

ECONOMIC AND INFRASTRUCTURE WINDOWS OF SAARC DEVELOPMENT FUND (SDF) FULLY ACTIVATED AFTER THE APPROVAL OF THE FIVE PROJECTS

With the approval of five projects Economic and Infrastructure windows stand fully activated. Approved project details are as under:

Economic Window:
I. Purchase of new ATR aircraft for Drukair Corporation under sovereign guarantee extended by the Royal Government of Bhutan.

Infrastructure Window:
ii. Expansion of Koshi Corridor 220 kV Transmission Line Project in Nepal
iii. 37 MW Upper Trishuli 3B Hydroelectric Project in Nepal
iv. 13.2 MW Fairway Waste to Energy Project in Sri Lanka (in principally approved).
v. GMR 900 MW Upper Karnali Hydroelectric project in Nepal (in principally approved).

Total amount USD 73 Million is allocated for these projects and it is expected that loan disbursement will take place in second quarter of year 2019.

UPCOMING SARCO ACTIVITIES

- **SARCO plans to organize a WORKSHOP in Dhaka, Bangladesh during the year 2019.**
- **SARCO plans to organize a SEMINAR in Kabul, Afghanistan during the year 2019.**
- **SARCO's 10th Governing Board Meeting is scheduled to be held during October 2019.**
- **SARCO is translating its publicity material into the official language(s) of the SAARC Member States**

9th Meeting of the Governing Board of SARCO has approved updated Guidelines for arbitrators and other procedural documents for Arbitration and Conciliation.

Notable Developments In The SAARC Region

AFGHANISTAN

04 May 2019 – Kabul – ICC Afghanistan and ICC YAF organized the 3rd ICC YAF Conference on Arbitration with the institutional support of American University of Afghanistan (AUA).

BANGLADESH

29 January 2019 – Dhaka – The Bangladesh International Arbitration Centre (BIAC) conducted a day long training on ADR for students at the BIAC Secretariat. Participants included representatives from the newly established Bhutan Alternative Dispute Resolution Centre (BADRC) in Thimpu, Bhutan.

27 February 2019 – Dhaka – The Bangladesh International Arbitration Centre (BIAC) conducted a session on 'ADR in Money Loan Court Act, ADR in Procurement Disputes, ADR in Human Resource Management' for Assistant Judges of the 38th Foundation Training Course at the Judicial Administration Training Institute (JATI).

17 June 2019 – Dhaka – The Bangladesh International Arbitration Centre (BIAC), IFC/ World Bank Group and Association of Bankers Bangladesh (ABB) jointly organized an international workshop on Resolving Financial Disputes through ADR.

BHUTAN

11 June 2019 – Thimphu – Bhutan Alternative Dispute Resolution Centre (BADRC) organized a week long training course for their new batch of Arbitrators.

INDIA

16 February 2019 – New Delhi – Nani Palkhivala Arbitration Centre (NPAC) conducted its 11th Annual International Conference. The theme of the conference was 'Arbitration Regime in India - Evolving Opportunities and Daunting Challenges'.

22-24 February 2019 – Sonipat – Jindal Global Law School (JGLS) organized the 9th Indian Vis Pre-Moot. The competition witnessed participation of 26 teams from 17 law schools across India.

8-10 March 2019 – Tiruchirappalli – The Tamil Nadu National Law University (TNNLU) conducted its 1st National Med-Arb Competition in collaboration with Nani Palkhivala Arbitration Centre (NPAC).

16 March 2019 – Bengaluru – ICC India conducted a half day arbitration conference. Themes included 'Transparency in International Arbitration' and 'Key Developments in Indian Arbitration Scenario'.

26 March 2019 – Dehradun – Law College Dehradun organized a National Seminar on International Commercial Arbitration on 26th March, 2019. The keynote speaker of the event was Ms. Neeti Sachdeva, Secretary General and Registrar, Mumbai Centre for International Arbitration.

29-31 March 2019 – Cuttack – National Law University Odisha (NLUO) conducted its 6th Bose & Mitra & Co. International Maritime Arbitration Moot 2019.

16-19 May 2019 – Bengaluru – National Law School Indian University (NLSIU) conducted the XII NLS-Trilegal International Arbitration Moot (NLSTIAM) and the II NLS-Trilegal International Arbitration Conference (NLSTIAC). Symbiosis Law School, Noida was the recipient of the Spirit of SAARC Award, an award sponsored by SARCO.

01 June 2019 – Pune – ICC India conducted a half day arbitration conference in association with the Mahratta Chamber of Commerce, Industries and Agriculture (MCCIA). Themes included 'Changes in the Arbitration Act and ICC Institutional Arbitration'.

14-15 June 2019 – New Delhi – Indian Law Institute (ILI), in collaboration with Law Mantra, Rajiv Gandhi National University of Law (RGNUL), Maharashtra National Law University Nagpur (MNLU Nagpur) and Himachal Pradesh National Law University (HPNLU, Shimla), organized a two days International Seminar on Challenges and Prospects of ADR.

SRI LANKA

22-24 March 2019 – Colombo – Sri Lanka Law College organized the 2nd H V Perera QC Memorial Moot Court Competition (Victors Moot). The competition participation from 16 law schools from Sri Lanka, Pakistan, India, Thailand, Nepal and Hong-Kong. NLSIU, Bangalore was adjudged as the Best SAARC Region Team, an award sponsored by SARCO.

DISPUTE RESOLUTION CLAUSES OF SARCO

As you are aware, the Rules of procedure for Arbitration at SARCO have been updated in 2016. These rules recommend the inclusion of the following clause:

MODEL ARBITRATION CLAUSE

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, between the parties shall be settled by arbitration in accordance with the SAARC Arbitration Rules as at present in force, and the award made in pursuance thereof shall be binding on the parties.

Consider adding to model clause:

a) The appointing authority shall be _____ [institution/person]
b) The number of arbitrators shall be _____ [one/three]
c) The place of arbitration shall be _____ [city/country]
d) The language to be used in arbitral proceeding shall be _____ [language]

This clause may be included in any business and services contract for SARCO to have jurisdiction to resolve any commercial dispute referred to it.

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The Rules of procedure for Conciliation at SARCO, have been updated in 2017. These rules provide a standard clause for inclusion by the parties in their contract/agreement for trade or services. The Clause states:

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the SAARC Conciliation Rules as at present in force.

This clause may be added with the consent of the parties to any business contract or any addendum to a contract.

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