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SAARC Arbitration Council

NEWSLETTER

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EDITOR'S MESSAGE

Mr. Faazaan Mirza
Deputy Director

Dear Readers,

I am delighted to present to you the 7th Edition of the SARCO Newsletter (2019).

This Edition recounts the various activities and initiatives of this Council in the SAARC region. The Council has been directly and vicariously involved in events, activities related to arbitration in the Member Countries including SARCO's 2nd Seminar on Arbitration in Kabul, Afghanistan and our other supportive engagements with relevant institutions. SARCO has translated its publicity document into the national language of the Member Countries, to make its role and workings more transparent and easier to comprehend for the local traders and businessmen.

Since our immediate past publication in July this year, there have been important developments related to Arbitration through legislation and judgments, observed in the Member Countries. This Edition also includes articles on different issues, from practitioners and arbitrators involved in Arbitration and Alternate methods of dispute resolution in the Member Countries. These issues are relevant for contemporary debate and encompass procedural and substantive arbitration, investment arbitration, the role of the courts and other important aspects of law. I believe these articles will prove to be intriguing and insightful for our esteemed readers.

I take this opportunity to express my sincere gratitude to authors who have contributed their scholarly work to this publication. The steady increase in the contributions to the SARCO Newsletter is reflective of its increasing readership and value as a regional publication on Arbitration, Conciliation and ADR. Further, I would like to thank the Director General of SARCO for his valued guidance and my supporting staff at the Council for the successful publication of this Edition of our Newsletter.
We look forward to comments and suggestions from our esteemed readers, which ensure the consistent improvement and success of this Newsletter and furthering the objectives of this publication.

In the end, I wish you all Happy Reading and a very Happy New Year!

Interview with Chairman of Governing Board of SARCO

Mr. A.M.J. Sadiq is the Additional Secretary, Bilateral Affairs (West) & Legal at the Ministry of Foreign Affairs of Sri Lanka and is the current Chairman of the Governing Board of SARCO

Q. Please share with our readers your views on SAARC Arbitration Council and its role for commercial dspute resolution in the region ?

A: The SAARC Arbitration Council (SARCO) was established as one of the Specialized Bodies of the South Asian Association for Regional Co-operation (SAARC) at the 13th SAARC Summit in Dhaka, Bangladesh in November 2005. However, it got off the ground and became fully operational with its Secretariat in Islamabad, Pakistan only in 2014. In keeping with its objectives and functions, SARCO is constituted as an inter-governmental body, mandated to provide a legal framework 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. Since the Mission of SARCO is to offer fair, inexpensive, expeditious and high quality arbitral and conciliatory services, I strongly believe that SARCO is pre-eminently disposed to serve as the ideal forum to resolve such commercial and investment disputes in the region. In this respect, while a few commercial disputes have indeed been referred to SARCO for conciliation, the full potential of this mechanism remains largely unutilised. Therefore, I would strongly urge SAARC Member States, through their respective Ministries of Trade and Industry and Business and Trade Chambers to encourage companies and business entities in their jurisdiction to approach SARCO for settling their business related disputes. Moreover, I would also like to exhort firms and business entities in SAARC Member States entering into commercial or investment agreements with Parties in other SAARC countries, to incorporate the SARCO's dispute settlement clause in their contracts or addendum.

Q: What is the composition of the Governing Board of the SAARC Arbitration Council and when is the Governing Board meeting convened?

A: The Governing Board of SARCO consists of a representative from each of the Governments of the eight SAARC Member States, a representative of the SAARC Secretary-General and the Director-General of SARCO, who serves as the ex-officio Secretary to the Governing Board. Additionally, a representative of the Ministry of Foreign Affairs of the Host Government may participate in the Governing Board Meeting. The Governing Board usually meets annually, the most recent, 10th Meeting being held in Lahore on 30-31 October 2019. The 10th Meeting is scheduled to be held in Dhaka next year.

Q: What role does the Governing Board of SAARC Arbitration Council play according to the mandate and core objectives of the Council?

A: The Governing Board is the supreme decision making organ of SARCO, empowered by its constituent Member States to take policy and administrative decisions that ensure the smooth functioning of the SARCO Secretariat under the guidance of the Director-General, as well as enabling it to carry out its core functions within the mandate of the Council. Some of the key areas of work undertaken by the Secretariat, include the provision of facilities for conciliation and arbitration, acting as a coordinating agency in the SAARC dispute resolution system, rendering assistance in the conduct of ad hoc arbitration proceedings and assistance in the enforcement of arbitral awards.

Q: How is the Chairman of the Governing Board appointed?

A: As per the Rules of Procedure of the Governing Board of SARCO, the Chairman is the representative of a SAARC Member State on the Governing Board,elected by fellow representatives, according to alphabetical order of the countries, for a two year tenure at the annual meeting of the Board. Accordingly, I was elected Chairman at the 9th Governing Board meeting in Lahore in October 2019, succeeding the previous Chair from Pakistan.

Q: What is the role of the Chairman of the Governing Board of SAARC Arbitration Council and the nature of his/her responsibilities?

A: The most obvious and visible function of the Chairman would be to chair the Meeting (usually annual) of the SARCO Governing Board, and steer its proceedings, hopefully to a successful conclusion. Since decisions of the Board are by consensus, the Chairman has to often play the role of a facilitator by bringing the views and observations of Member States to a common ground, so that all Members of the Board are in agreement with the particular decision or outcome reached. Additionally, the Chairman is also ex-officio Chair of the Internal Selection Committee for the selection of qualified candidates for vacant posts at the SARCO Secretariat.

Q. What, in your opinion as Chairman of the Governing Board, are the important initiatives and policy matters that the Governing Board has recommended/advised?

A: The 10th Governing Board Meeting oversaw the progress made by the Council in administrative and legal formats. The meeting commended SARCO for the steps it has taken in broadening its scope of engagement with similar institutions within the SAARC region and beyond. It was also observed that the institution has been steereed in the right direction in fulfilling its mandate. We, therfore, had a very productive and constructive meeting . a wide range of issues, including Administrative, legal and policy matters pertinent to the Council were discussed. I may not be in a position to disclose the detail, however, matters which were agreed upon and recommended for the approval of upper SAARC bodies, are crucial and fundamental for the realization of short, mid and longterm objectives of the SAARC Arbitration Council.

Q. Since asssuming Chairmanship of the Governing Board of SAARC Arbitration Council, in addition to your expreience of dealing with legal matters, how important is the role of commercial and investment dispute resolution within the SAARC region in light of the changing times?

A: The need to have a reliable, speedy and cost-effective dispute resolution mechanism outside the jurisdiction of local courts in SAARC Member States has gained much traction, not least that it is one of the fundamental requirements of modern international commerce,but also due to the rapid expansion of trade and foreign direct investment (FDI), both between Member States, as well as from outside the region. In the present day context, it would quite inconceivable and indeed most unusual, if commercial contracts and investment agreements, especially if they are inter-State or involving a foreign Party,did not include a specific clause/s providing for a dispute resolution mechanism.

In this regard, arbitration has received international acceptance as the favoured method of resolution of commercial and investment disputes. Arbitration can be particularly useful in disputes which require an in-depth understanding of technical knowledge and where privacy is crucial (eg- to avoid the disclosure of commercially sensitive information). Parties to a dispute will have to select the arbitral forum to administer their arbitration, if it has not been expressly provided for in their contract. If this is indeed the case regarding commercial or investment disputes in the SAARC region, then SARCO could provide its services to resolve such disputes in a relatively inexpensive, hassle-free and expeditious manner.

Q. In view of the intra-SAARC trade and investments, what are some of the advantages of utilizing a regional dispute resolution mechanism for commercial and investment disputes?

A: The obvious choice of an arbitral forum for resolution of intra-SAARC trade and investment disputes would be SARCO! The foremost advantage of opting for SARCO is that it is a higly professional, independent and impartial body, equipped with a well-defined and comprehensive Rules, which are periodically updated in line with latest developments in the field of international arbitration. Moreover, as pointed out earlier in this interview, in keeping with its mandate to offer inexpensive, expeditious and high quality arbitral and conciliatory services, the fees levied by SARCO are relatively modest, compared to other intertaional arbitration institutions.

It is noteworthy that the recent 9th Governing Board Meeting of SARCO had reiterated earlier recommendations that all SAARC Agreements should include SARCO's model arbitration clause. This has already been incorporated in the SAARC Energy Cooperation Agreement, SAARC Development Fund Charter and the South Asian University Act.

In the same vein, it would be most appropriate that companies and business entities entering into commercial contracts or investment agreements with counterparts in the SAARC region, include the SARCO, as the default arbitration forum for dispute resolution.

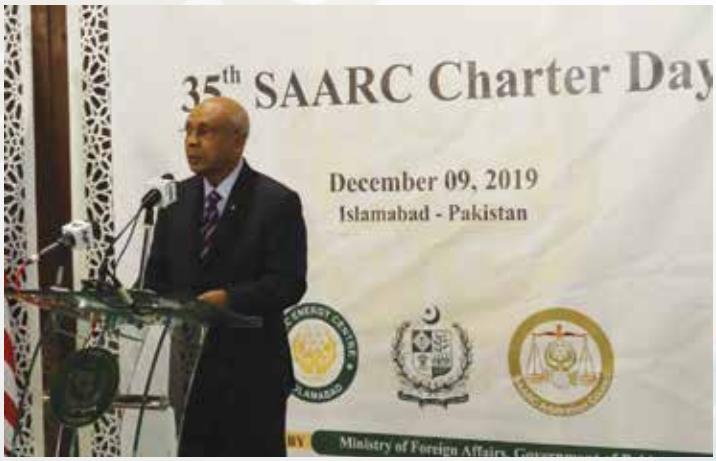
Q. What message would you like to convey to our esteemed readers in the SAARC region through this publication?

A : As I have stated at the very outset of this interview, although SARCO became fully operational in 2014, SARCO has been organizing Workshops, Seminars, sponsorships and collaborative/assistance programmes with public and private national institutions to act as a co-ordinating agency for arbitration in the SAARC region. This has created more awareness among the business community in the SAARC countries, encouraging them to avail the services provided by SARCO, as a cost-effective and hassle-free forum for resolution of commercial and investment disputes. Therefore, I would like to urge the readers in the SAARC region of this esteemed Newsletter to spread the word among their friends and contacts in government and the business community to make full use of SARCO's untapped potential as a less expensive, convenient and effective mechanism for resolution of commercial and investment disputes.

SARCO Events

SARCO organized its 10th Governing Board Meeting in Lahore, Pakistan

SARCO celebrated the 35th SAARC Charter Day



SARCO's Outreach

Director General SARCO visited Kakar Advocates in Kabul and met with Mr. Kawun Kakar, Managing Partner.

High Commissioner of Sri Lanka to Pakistan H.E. Mr. Noordeen Mohamed Shahied and Chairman of the Governing Board of SARCO visited the SARCO Secretariat.

Deputy Director SARCO met with Secretary General of Federation of Bangladesh Chambers of Commerce and Industry and his team, in Dhaka.

Deputy Director SARCO visited South Asian Regional Standard Organization (SARSO) and paid a courtesy call on Director General of SARSO at the SARSO Secretariat, in Dhaka.

Deputy Director SARCO met with President of Sarhad Chamber of Commerce and Industry (SCCI) and his team, in Peshawar.

Deputy Director SARCO met with Vice President of Bangladesh Cotton Association (BCA) and his team, in Dhaka.

SARCO's Outreach

Deputy Director SARCO visited the Ministry of Foreign Affairs of Bangladesh and met with the Director SAARC and her team and paid a courtesy call on the Director General of SAARC & BIMSTEC at the Ministry of Foreign Affairs of Bangladesh.

Deputy Director SARCO met with the Secretary General of Dhaka Chamber of Commerce and Industry (DCCI), in Dhaka.

Deputy Director SARCO met with Mr. Forrukh Rahman, Arbitrator at SARCO, from Bangladesh.

Deputy Director SARCO visited the Bangladesh International Arbitration Centre (BIAC) and met with the CEO and his team.

SAARC Arbitration Council (SARCO) sponsored the 4th edition of the CARTAL Conference on International Arbitration organised by National Law University, Jodhpur (NLUJ) on 5th and 6th October 2019. Mr. Bharatendu Agarwal, Assistant Director (Law), SARCO an alumnus of NLUJ (Batch of 2013), attended the Conference and spoke to students about SARCO, LLM opportunities and career prospects in international arbitration.

SARCO Seminar in Kabul

Distinguished dignitaries at the Inaugural Session of the Seminar

Chief Guest H.E. Dr. Abdul Baseer Anwar, Minister of Justice of Afghanistan, addressed the participants of the Seminar.

Director General SARCO Mr. Zahidullah Jalali addressed the Seminar welcoming the Chief Guest, distinguished Speakers and participants.

Panelists at the Technical Session of the Seminar.

Panelists at the Second Technical Session of the Seminar.

Group Photo of the Speakers after the Technical Sessions.

International Investment Arbitration And The Conduct Of National Courts

Mian Sami Ud Din And Umaira Iqbal Raza[1]

1. International Investment Arbitration

1.1. A prominent feature of modern international trade is foreign investment by individuals and corporations in other countries. Foreign investment however is susceptible to innumerable risks in host states and therefore protections must be provided to foreign investors to encourage investment.

1.2. Taking over property or other investments within its territory by a sovereign state is recognised in international law as a sovereign right. This is called expropriation. However, international law imposes certain conditions on expropriation by a sovereign state. The expropriation is required to be for a public purpose; on a non-discriminatory basis; in accordance with due process of law; and accompanied by compensation. These conditions are also imposed in the domestic law of nation states. In Pakistan, Article 24 of the Constitution of Pakistan 1973 (Constitution) imposes such conditions.[2] Where these conditions are not met the expropriation is considered unlawful.

1.3. With the aim to protect foreign investments or provide an appropriate remedy against illegal expropriation, sovereign states enter into international investment agreements (IIAs). These IIAs not only impose certain investment protection obligations on host states, but also provide for an investor-state dispute settlement (ISDS) mechanism to allow foreign investors to make direct investment related claims against host states.

1.4. ISDS enables an investor to seek compensation against expropriation or other breaches of international law by host states, without the trappings of local court procedures, domestic law, and application of domestic legal standards. Rather than bringing a claim under domestic law, investors can bring claims against a host state before an international arbitral tribunal.

1.5. The settlement of investment disputes between investors and host states through arbitration has advantages similar to any other international commercial arbitration, that is: the decision-makers are neutral; the place of arbitration is a neutral jurisdiction; the parties are free to select arbitrators that have the requisite expertise and qualifications; the decision is binding and final; the proceedings are efficient and speedy, and facilitated by a credible institute; and the decision can be enforced globally.

1.6. Most ISDS mechanisms provide for investment disputes to be settled in accordance the rules of the International Centre for Settlement of Investment Disputes (ICSID) established by the Convention on the settlement of investment disputes between States and

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[1] Mian Sami ud Din is a Partner at Bhandari Naqvi Riaz. He is an Arbitrator on the SARCO Panel (nominated by Pakistan). He has been admitted as an Advocate of the High Courts in Pakistan and has been called to the Bar of England and Wales. He is also a Fellow of the Chartered Institute of Arbitrators and the Asian Institute of ADR. He specialises in international arbitration and acts as counsel in arbitration matters under the LCIA, ICC, SIAC, ICSID, and UNCITRAL arbitration rules.

Umaira Iqbal Raza is an associate at Bhandari Naqvi Riaz. She is an LLM graduate from the University of California, Berkeley (specialising in Law and Technology). She has served as a Law Clerk to three Senior Supreme Court Judges including the former Chief Justice of Pakistan at the Supreme Court of Pakistan for three years.

[2] UNCTAD, "Expropriation" UNCTAD Series on Issues in International Investment Agreements II: pg. 1, available at https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

nationals of other States, 1965 (Washington Convention),[3] or the arbitration rules of the United Nations Commission on International Trade Law (UNICTRAL).

2. International Investment Agreements

ISDS Provisions

2.1. The ISDS mechanism is found in the international investment agreements (IIAs) made between two states or multiple states. These investment agreements are usually in the form of bilateral investment treaties (BITS) and multilateral investments treaties (MITs), but are also found in investment protection clauses of Free Trade Agreements (FTAs). These treaties are meant to provide guarantees and protections to investors, and often provide for arbitration of disputes between investors and the host state.

2.2. ISDS against a host state is a mechanism available to all citizens of a state, which has entered into an IIA with that host state. However, IIAs are entered into only between state parties, and investors are not party to such treaties. However, international law recognizes ISDS provisions in a treaty between states as unilateral consents or standing offers by states to nationals of the other signatory state. The agreement to arbitrate investor claims is perfected when investors give notice to the host state to arbitrate a claim. It is at this time that the ISDS agreement is concluded between an investor and a state.

Definitions of 'Investor' and 'Investment'

2.3. In order for an investor to have a claim, and an arbitral tribunal to have jurisdiction to decide upon the claim, the investor must fall within the definition of investor in the IIA. Investors can be natural or legal entities, but some IIAs contain residency or domicile requirements. Similarly, the investment of the investor must also fall within the agreed definition of investment as provided in the relevant treaty. Therefore, definitions contained in the IIAs often determine the scope of protection guaranteed by the host state and its eventual liability in case of failure to provide that protection.

2.4. Many IIAs also contain 'in accordance with host state law' and 'anti-corruption' clauses, which impose requirements for investors to comply with the domestic law of a host state. Non-compliance gives a defence to a host state against any investor's claim.

Standards of Treatment and Protection by Host States

2.5. The major characteristic of IIAs are investment protection clauses which set out the obligations of the host state and also provide the standards which are to be met in providing such protection and treating the relevant investments of the foreign investor. Some of the popular clauses in IIAs are as follows:

2.6. National Treatment (NT): NT clauses protect foreign investments against discrimination and obligates host states to treat them equal to domestic investments by nationals of the host state.

2.7. Most-Favoured Nation (MFN): MFN clauses protect foreign investments against discrimination with regard to investments from a third country national and obligates host state to treat the subject foreign investment equal to the third-country investment by nationals of the other state.

2.8. Fair and Equitable Treatment (FET): FET clauses require hosts states to treat foreign investments or investors "fairly and equitably" as per international legal standards. This term is very wide and is often susceptible to an arbitral tribunal's subjective interpretation. It is considered to give maximum protection to foreign investors. This clause typically protects investors/investments from arbitrary and abusive treatment by the host state and can include actions which amount to denying justice in judicial or administrative proceedings and denying the legitimate expectations of foreign investors.

2.9. Expropriation: Expropriation clauses provide for payment of compensation to foreign investors in case the host state nationalises the properties of the foreign investors or takes away foreign investment in any other manner.

[3] There are 154 contracting states to the Washington Convention. Pakistan is also a signatory.

2.10. As mentioned before, additional conditions are also imposed in such clauses. The expropriation must be for a public purpose, non-discriminatory, and due process must be followed.

2.11. Some expropriation clauses are worded in wide language to include indirect expropriation. That is where the host state does not purport to take over any investment but takes a certain action (legislation, regulatory measures etc.) that indirectly deprives the foreign investor from its investment.

2.12. Such clauses may also contain clarificatory language or carve out exceptions, which permit the host state to take certain measures in the interest of public health or safety, or the environment. These are then excluded from the definition or scope of indirect expropriation.[4]

3. CONDUCT OF NATIONAL COURTS

State Responsibility for National Courts

3.1. As a matter of public international law, host states are responsible for the decisions of their national courts.[5] This is now well established in international law and has been codified by the Articles on State Responsibility drafted by the International Law Commission and approved by the United Nations General Assembly in 2001.[6] Article 4 states:

"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

3.2. The Judiciary is therefore seen as one component element of the state. In the Salvador Commercial Company case (1902),[7] an international arbitral tribunal observed that "…a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government".[8] Further, it is irrelevant from an international perspective that as a matter of national law, the judiciary is "independent" of the State.[9]

Role of Courts in respect of the State's Breach of Treaty Obligations

3.3. The conduct of national courts can thus be attributable to a host state, which has made investment protection commitments pursuant to an IIA.

3.4. The manner in which national courts can cause the deprivation of a foreign investor's investment can occur mainly in two ways: (1) through a 'denial of justice', which primarily relates to issues of procedural fairness and due process failings of the courts;[10] and (2) through Judicial Expropriation i.e. a substantive decision of the court which takes away the foreign investment.[11]

3.5. Some instructive examples of international investment awards which dealt with the role played by the national courts are as follows:

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[4] For additional reading on the framework of IIAs and other clauses see: UNCTAD, "Investment Policy Framework for Sustainable Development", 2015 pg. 92, available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf#page=71

[5] Toby T. Landau, "International Arbitration and Pakistan's State Responsibility: Redefining the Role of the Court", pg. 17, available at www.supremecourt.gov.pk/ijc/Articles/8/3.pdf

[6] UNGA Resolution 56/83 on 12 December 2001

[7] This was a case brought by the Salvador Commercial Company and other citizens of the United States against the Republic of Salvador pursuant to a protocol for arbitration agreed between the United States and the Republic of Salvador.

[8] Toby T. Landau, "International Arbitration and Pakistan's State Responsibility: Redefining the Role of the Court", pg. 20

[9] Id., pg. 19.

[10] Rumeli Telekom A.S. and Telsim Mobil Telekomik A.S.Y.O.N Hizmetleri A.S. v Republic of Kazakhstan, (ICSID Case No. ARB/05/16), Award, 29 July 2008, pg. 173, paras 651-653.

[11] Id. pg. 188, para 702.

I. Yukos v. The Russian Federation ("Yukos Award");[12]

ii. Rumeli and Telsim v. Kazakhstan ("Rumeli Award");[13]

iii. Saipem v. Bangladesh ("Saipem Award");[14]

iv. Karkey Karadeniz v. Pakistan ("Karkey Award"); Yukos Award[15]

3.6. The Yukos Award was the result of a dispute involving the obligations of Russia as the host state under the Energy Charter Treaty (1994). A series of adverse actions against the UK based investor led to the bankruptcy of the Yukos Oil Company and eliminated all value of the investor's shares in Yukos. Regarding the adverse role of the Russian courts which led to the resulting expropriation, at paragraph 1583 of the Yukos Award the tribunal concluded:

"Yukos was subjected to processes of law, but the Tribunal does not accept that the effective expropriation of Yukos was "carried out under due process of law" for multiple reasons set out above … The harsh treatment accorded to Messrs. Khodorkovsky and Lebedev remotely jailed and caged in court, the mistreatment of counsel of Yukos and the difficulties counsel encountered in reading the record and conferring with Messrs. Khodorkovsky and Lebedev, the very pace of the legal proceedings, do not comport with the due process of law. Rather the Russian court proceedings, and most egregiously, the second trial and second sentencing of Messrs. Khodorkovsky and Lebedev on the creative legal theory of their theft of Yukos' oil production, indicate that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State controlled company, and incarcerate a man who gave signs of becoming a political competitor.."

3.7. In the Yukos case, the tribunal held that the primary objective of Russia was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets. It further held that its measures in respect of Yukos had an effect equivalent to expropriation.[17] Such expropriation was then held to be without due process and the Russian courts were found to have violated international standards of due process. The tribunal ultimately found Russia to be liable for breach of its obligations under the Energy Charter Treaty.

Rumeli Award

3.8. The Rumeli case involved claims by Turkish investors under the Turk-Kazakhstan BIT. The claimants, Turkish companies, established a stock company, KaR-Tel, jointly with a local company and acquired a GSM license. KaR-Tel later concluded a contract for the establishment of a GSM-standard communications network with the Investment Committee of the Kazakh government. Three years later, the Investment Committee cancelled the contract with KaR-Tel on the ground of a breach of contract. At the extraordinary general meeting of shareholders convened upon request from the claimants' local partner, the purchase of the claimants' shares in KaR-Tel was adopted in the absence of the claimants. Subsequently, the local partner filed a suit against the claimants in a domestic court to affect a purchase of the shares in question. The claimants resisted the suit but the Supreme Court eventually permitted a forced purchase of the shares. Following which the aggrieved claimants requested arbitration, alleging that these acts violated the Turkey-Kazakhstan BIT.

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[12] Yukos Universal Limited (Isle of Man) v. The Russian Federation (PCA Case No. 2005-04/AA227). The PCA acted as registry in this arbitration and in PCA Case No. AA 228 - Veteran Petroleum Limited (Cyprus) v. The Russian Federation; and PCA Case No. 2005-03/AA226 - Hulley Enterprises Limited (Cyprus) v. The Russian Federation. However, the role of the Russian courts leading to judicial expropriation has received focused attention in the Yukos Universal Limited (Isle of Man) v. The Russia.

[13] Rumeli Telekom A.S. and Telsim Mobil Telekomik A.S.Y.O.N Hizmetleri A.S. v Republic of Kazakhstan, (ICSID Case No. ARB/05/16), Award, 29 July 2008.

[14] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07

[15] Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/13/1).

[16] Yukos Award pg. 497, para 1579.

[17] Id., para 1580.

3.9. The ICSID tribunal held that the Investment Committee of the government was in violation of the FET standard, but with regard to the role that the Kazakh courts played, the ICSID tribunal held:[18]

"On the other hand, the Arbitral Tribunal considers that it does not have any clear evidence that the decisions of the various Kazakh Courts which have been reviewed above were wrong procedurally or substantially, or were so egregiously wrong as to be inexplicable other than by a denial of justice. As was evidenced by the legal experts who testified during the hearing, the issues that the Courts had to decide were sometimes highly disputed issues. The Tribunal has also noted that when the decisions were appealed, they were carefully reviewed by the appellate courts and sometimes partially reversed by them."

3.10. However, even though the courts were not in violation of the FET standard, in respect of expropriation the ICSID tribunal found:

"The final act of 'taking' as regards Claimants' investment (i.e. their shares in Kar-Tel) was the decision of the Presidium of the Supreme Court affirming the compulsory redemption of those shares.

…

Nevertheless, for reasons which the Tribunal will discuss under the heading "Calculation Of Damages And Quantum," the valuation placed on Claimants' shares was manifestly and grossly inadequate compared to the compensation which the Tribunal there holds to be necessary in order to afford adequate compensation under the BIT and the FIL. The Tribunal accordingly holds that the expropriation by the Presidium was unlawful.

…

In summary, the conclusion of the Tribunal is that this was a case of 'creeping' expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to Telcom Invest and its shareholders before Claimants were made aware of it, and which proceeded via a series of court decisions, culminating in the final decision of the Presidium of the Supreme Court. The decision of the Investment Committee was moreover unfair and inequitable in itself, as the Tribunal has found."

3.11. The Rumeli case demonstrates how even though national courts may comply with international standards of due process, if they are part of the host state's government measures or design of indirect expropriation, whether intended or not, this can result in any decision of the court amounting to a violation of the expropriation clause of the investment treaty.

Saipem Award

3.12. The Saipem Award demonstrates that a host state can be held responsible for expropriation based on the illegal interference by its judiciary in commercial arbitration proceedings.

3.13. Saipem filed ICSID proceedings against Bangladesh for breach under the Bangladesh-Italy BIT. The claims alleged undue intervention of the Bangladeshi courts in a previously filed and concluded arbitration under the rules of the International Chamber of Commerce (ICC).

3.14. Saipem, an Italian company had previously initiated ICC arbitration against Petrobangla, a Bangladeshi public company. Upon rejection of certain procedural requests of Petrobangla by the ICC tribunal, Petrobangla obtained an order revoking jurisdiction of the ICC tribunal from the First Court of the Subordinate Judge of Dhaka.

3.15. When the ICC tribunal continued proceedings, a series of injunctions in this regard were obtained by Petrobangla from the High Court Division of the Supreme Court of Bangladesh. Notwithstanding such injunctions, the ICC tribunal concluded its proceedings and eventually announced a final award. Upon Petrobangla's application to the Supreme Court to set aside the award it was held that "there is no Award in the eyes of law", rendering the award non-existent and unenforceable in Bangladesh.

3.16. In respect of its jurisdiction the ICSID tribunal held that "the right to arbitration and the rights determined by

[18] Rumeli Award, pg. 164, para 619.

the [ICC Arbitration] Award are capable in theory of being expropriated."[19]

3.17. In respect of the decisions of the court of first instance revoking the ICC tribunal's jurisdiction and that of the Supreme Court declaring the ICC Award non-existent, the ICSID tribunal held that that these decisions amounted to illegal expropriation by Bangladesh of Saipem's right to arbitrate.[20]

3.18. The ICSID tribunal with regard to the conduct of the Bangladeshi courts held that:

"…the Tribunal considers that the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process. It is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct. It is further true that in making such order national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute. Taken together, the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right.[21]

3.19. The ICSID tribunal also held that through the revocation of the ICC tribunal and the several injunctions against the ICC arbitration, the courts frustrated the arbitration agreement which amounted to a violation of Article II of the New York Convention.[22]

Karkey Award

3.20. In the Karkey Award,[23] Pakistan, as the host state, was found in violation of its international obligations. In the ICSID proceedings, a decision of the Supreme Court of Pakistan came up for consideration in two respects: (1) Pakistan sought to rely on it with respect to challenging the ICSID tribunal's jurisdiction, contending that the Supreme Court's findings established that Karkey's investments were not in accordance with Pakistani law; (2) the ICSID tribunal considered whether the Supreme Court decision, coupled with other acts of Pakistan, amounted to expropriation.

3.21. The Supreme Court of Pakistan's decision had declared all the contracts relating to the claimant's rights (including others) to produce and sell electric power in Pakistan, null and void.[24] The Supreme Court decision was largely based on the basis that national procurement laws were not followed in the award of the subject contracts.

3.22. The ICSID tribunal affirmed certain established principles of international law with regard to decisions of national courts:

"Indeed, in order to decide whether the Tribunal may rely on the Judgment, the Tribunal must analyse whether the Judgment presents deficiencies which are unacceptable from the viewpoint of international law. However, contrary to what is alleged by Pakistan, there is no need that such deficiencies amount to a denial of justice … Deficiencies relating to the substance of the Judgment, in certain circumstances, may amount to a breach of international law. In particular, an international tribunal may decide not to defer to an arbitrary judicial decision which is, as such, incompatible with international law."[25]

3.23. Upon a review of the procedure and substance of the Supreme Court decision, the tribunal noted that the Court had treated all the rental power plants involved similarly in terms of the consequences they were liable to

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[19] Saipem Award, pg. 38, para 122.

[20] Id., para 214.

[21] Id., para 159

[22] Id., para 163-169. Article II of the NY Convention obligates all contracting states to recognize and arbitration agreement.

[23] Pursuant to ICSID proceedings arising out of the Pakistan-Turkey BIT. It has recently been reported that Karkey and Pakistan have settled the matter, see: https://www.law360.com/articles/1216990.

[24] Judgment of the Supreme Court of Pakistan in the Rental Power Case (Human Rights Case Nos. 7734-G/2009 & 1003-G/2010, as consolidated with Human Rights Case No. 56712/2010, in the Supreme Court of Pakistan), dated 30 March 2012.

[25] Karkey Award, para 550.

suffer, without setting out in its judgment "with some particularity the evidential and legal basis". The tribunal held that this made the decision "arbitrary".[26] The tribunal also noted that the Supreme Court failed to apply the Contract Act properly and the judgment was fundamentally inconsistent with regard to its findings of the rental power contracts being both "void ab initio" and "rescinded forthwith".[27]

3.24. Ultimately, with regard to the Supreme Court's judgment, the ICSID tribunal held:

"…the Supreme Court Judgment which declared the Contract to be void ab initio was arbitrary, and therefore has no effect in international law, and the Tribunal is not bound by its finding that the Contract was void. For the Tribunal, it is nothing more than a fact, attributable to Pakistan as admitted by the Respondent, which started a process leading to the deprivation of Karkey's contractual rights, the arrest of its Vessels and the seizure of its bank accounts.
…
…the Tribunal finds that Pakistan has expropriated Karkey's investment through the Judgment which declared the Contract to be void ab initio. This is because through
its Supreme Court, whose acts Pakistan accepts are attributable to it, Pakistan deprived Karkey of the use and enjoyment of its contractual rights, including Karkey's right to terminate the Contract and, as stated below, interfered with the free transfer of Karkey's investment."[28]

4. Implications for Pakistani Courts

4.1. Pakistan is currently a party to 53 BITs and 7 treaties with investment provisions.[29] The courts of Pakistan are assumed to be aware of the international obligations of Pakistan in these international treaties and are obligated as an organ of the state, to treat foreign investors in accordance with international legal standards of justice.

4.2. The China–Pakistan Economic Corridor is expected to give rise to opportunities of infrastructure projects and therefore foreign investment. The trend of judicial intervention in major commercial projects in Pakistan[30] must be re-assessed and carefully managed.

4.3. Failure by the judicial organ of a host state not only leads to an economic setback for the country in terms of financial liability but also tarnishes the image of the host state in international relations and future prospects of investment.

4.4. International cases reveal that a failure to provide due process rights and fair and equitable treatment in procedural matters, may not be the only reason national court decisions can amount to violations of international treaty obligations. As demonstrated from the Rumeli case national courts must be aware that their court process is not used to facilitate and enable government agencies or even private third parties, from causing an indirect expropriation of foreign investments.

4.5. Additionally, where the Supreme Court of Pakistan, intends to interfere in major commercial projects on grounds of violations of domestic law, it must ensure that where its decisions have the effect of expropriation, all conditions for expropriation under the relevant international treaty are complied with and the rights of foreign investors are protected.

Mr. Bharatendu Agarwal, Assistant Director (Law) of SARCO participated in the Seminar on 'Challenges & Management of Arbitration' organized by Standing Conference of Public Enterprises (SCOPE), in New Dehli.

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[26] Id. para 554.

[27] Id., para 555.

[28] Id. para 645-648.

[29] See https://investmentpolicy.unctad.org/country-navigator/163/pakistan

[30] The Pakistan Steel Mills case, the Reko Diq case, the Royal Palm case are few further examples which demonstrate this trend.

Arbitration Under International Law

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The modern history of international arbitration is generally recognized as dating from the so-called Jay Treaty of 1794 between the United States of America and Great Britain. Under the Treaty of Washington of 1871, the United States and the United Kingdom made few head of states as appointing authority of a five-member tribunal.

International law provided mechanism by which a state can bring claim before an international court or arbitral tribunal. The international legal system is traditionally constructed as sovereign state being supreme. Individuals or corporations are only considered as participants, who do not share same aim or value as state. It is only in the second half of the 20th century international law provided very limited mechanism by which an individual can bring claim before an international court/tribunal/arbitration against state. Initially the arbitration was mostly on ad-hoc basis. Later arbitral institutions like ICSID were created by multinational treaties on particular area providing access to individual/corporation along with states. This article will only cover international economic law aspects covering different sectors, where states, corporations & individuals can bring claims against states through arbitration

The Hague Peace Conference of 1899, convened on the initiative of the Russian Czar Nicholas II, marked the beginning of a third phase in the modern history of international arbitration. Accordingly, Permanent Court of Arbitration (PCA), was established by 1899 Convention for the Pacific Settlement of International Disputes. The aim of the PCA being the first global mechanism for the settlement of disputes between states, was to facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy. The Conventions says arbitration is the "most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle".

Unlike arbitral tribunals, the Permanent Court of International Justice (PCIJ) formed by Covenant of the League of Nations in 1920 later abolished and replaced by International Court of Justice (ICJ) established by the Charter of the United Nations in 1945 is a permanently constituted body governed by its own Statute and Rules of Procedure, whose judgements are binding on parties and proceedings were largely public. However, it was 19th century practice where the President of the International Court of Justice (ICJ), under many investment treaties, is made an appointing authority.

On the other hand, under many bilateral investment treaties parties including state submitted to the jurisdiction of a number of independent, mostly not-for-profit institutions like ICC the International Court of Arbitration, Singapore International Arbitration Centre, London Court of International Arbitration, Stockholm Chamber of Commerce (SCC) etc. due to their established track record for providing best in class arbitration services. On the other hand, PCA also administers arbitration and regularly acts as an appointing authority under UNCITRAL and other rules.

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very limited mechanism by which an individual can bring claim before an international court/tribunal/arbitration against state. Initially the arbitration was mostly on ad-hoc basis. Later arbitral institutions like ICSID were created by multinational treaties on particular area providing access to individual/corporation along with states.

Similarly, South Asian Association for Regional Co-operation (SAARC), comprising the Member States Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, created a separate arbitration institution by Agreement for Establishment of SAARC Arbitration Council of 2005 creating SAARC Arbitration Council (SARCO) to resolve disputes allowing access to both member states and individual/corporation. Under SARCO Rules of Procedure for Arbitration, "Arbitration" means an arbitration relating to disputes arising out of legal relationships considered to be referred to SAARC Arbitration Council for settlement and where at least one of the parties is a national of the member states of SAARC and "Party" means a party to the arbitration agreement. It shall include any individual, firm, company, Government, Government organization or Government undertaking. The parties can choose SARCO as a forum for dispute resolution with or without involving state or signing treaty.

Individual participation is largely dependent upon the state to which they belong, derived from different treaties conferring such rights and responsibilities upon individuals or corporations. It does not automatically mean that they have the ability to bring international claim to assert their rights. The position is somewhat different with human rights treaties which created different dispute resolution mechanism, international courts & tribunals.

This article will only cover international economic law aspects covering different sectors, where states, corporations & individuals can bring claims against states through arbitration.

INTERNATIONAL TRADE

Majority of state-state disputes are handled by the World Trade Organization (WTO) system, the primary body governing international trade created under the Marrakesh Agreement, signed by 123 nations on 15 April 1994. Each of its 164 members has agreed to rules about trade policy, such as limiting tariffs and restricting subsidies. A member can appeal to the WTO if it believes another member is violating those rules. The main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling. The United States, for instance, has repeatedly brought WTO cases against China over its support for various export industries, including one in early 2017 alleging that Beijing unfairly subsidizes aluminum producers. While that case has not been decided, the Trump administration retaliated by unilaterally imposing tariffs on some individual Chinese aluminum producers as well as broader tariffs on all steel and aluminum imports to the United States that are also meant to target Chinese overproduction.

INTERNATIONAL INVESTMENT

Investor State Dispute Settlement (ISDS) is a mechanism contained in investment and trade agreements that allows an investor of a state party to bring a claim against another state party that is hosting the investment, if that state has allegedly breached a standard in the agreement. ISDS was originally envisaged as a way to protect investors from arbitrary state abuse. This had the ultimate goal of promoting foreign investment between state parties. Usually, the consent of the State is contained in international investment agreements between States. These agreements can be bilateral (between two countries), or multilateral (between more than two countries). There are currently more than 3,300 international agreements providing for ISDS. Consent to ISDS can also be found in the domestic investment laws of some States and in contracts between a foreign investor and a State, or a State-affiliated agency.

International Center for Settlement of Investment Disputes (ICSID) is the leading institution that provides for settlement of disputes by arbitration. ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining

a careful balance between the interests of investors and host States. The ICSID has 162 member states.

Unlike the WTO, the ICSID has no permanent tribunals and does not directly rule on cases. Rather, it administers the process by which disputants choose an independent, ad hoc panel of arbitrators to hear their case. The arbitrators are generally legal experts, including professors, practicing lawyers, and former judges. The specifics on the sorts of conflicts that can be referred to an ICSID panel are set out in individual trade or investment agreements. the ISCID has administered more than six hundred disputes in its half-century existence.

A number of institutions as provided in different treaties adjudicate investor-state disputes, such as the Permanent Court of Arbitration or the London Court of International Arbitration.

MARITIME

United Nations Convention on the Law of the Sea (UNCLOS) entered into force in 1994, is an international treaty that provides a regulatory framework for the use of the world's seas and oceans, *inter alia*, to ensure the conservation and equitable usage of resources and the marine environment and to ensure the protection and preservation of the living resources of the sea. UNCLOS also addresses such other matters as sovereignty, rights of usage in maritime zones, and navigational rights. As of 2019, 168 States are member of UNCLOS. An International Tribunal for the Law of the Sea located in Hamburg, Germany is an independent judicial body was established by UNCLOS to adjudicate disputes arising out of the interpretation and application of the Convention. It is open to state, entities other than States Parties, i.e. States or intergovernmental organisations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."

BANKING & FINANCE

Established in 1930 by Hague Agreement, the Bank for International Settlements is an international organization and the world's oldest international financial institution. The Bank at present seeks to promote the co-operation of central banks and to provide additional facilities for international financial operations. A standing Tribunal for the Bank for International Settlements was established at The Hague. The Tribunal exercises jurisdiction over disputes arising from the interpretation or application of the Hague Agreement and the Statutes of the Bank for International Settlements. Pursuant to the 1930 Hague Agreement, parties with standing to seize the Tribunal include the Contracting Parties to the Hague Agreement and the Bank for International Settlements. Article 54 of the Statutes of the Bank extends standing before the Tribunal to any central bank, financial institution, or other bank referred to in the Statutes as well as shareholders of the Bank. The International Bureau of the PCA acts as secretariat to the Tribunal.

Similarly, SAARC Development Fund agreement signed amongst SAARC member states in 2008 to promote the welfare of people of the SAARC region, to improve their quality of life and to accelerate economic growth, social progress and poverty alleviation in the region by extending finance for approved projects in SAARC Member States, leverage funding, arrange and mobilize financing and/or co-financing projects and provide grants for projects of strategic importance to SAARC. SAARC Development Fund agreement referred to SAARC Arbitration Council for settlement of disputes.

ENERGY

The Energy Charter Treaty (ECT) 1994 created a legal framework for energy trade, transit and investment among member states. The ECT, a multilateral investment treaty, aims to unite its signatories behind the common goals of setting up open energy markets, securing and diversifying energy supply and stimulating cross-border investment and trade in the energy sector. The Energy Charter Treaty provides a comprehensive and tailor-made system for settling disputes on matters covered by the Treaty.

The two basic forms of binding dispute settlement are ad hoc arbitration for disputes between Contracting Parties on the interpretation or application of almost all aspects of the Treaty (except for competition and environmental issues), and investment arbitration for disputes between an investor and a Contracting Party. The most commonly chosen forum for investor-state disputes arising under the ECT is international arbitration. ICSID, Arbitration Institution of Stockholm Chamber of Commerce (SCC),

PCA under UNCITRAL rules mostly administer such arbitrations under respective rules. Energy Charter Secretariat located in Brussels, Belgium can facilitate parties in a conflict to establish contact and to begin to explore ways to reach an amicable settlement.

SAARC Framework Agreement for Energy Cooperation (Electricity) 2014 were signed with a view to facilitate cross border electricity exchanges and trade among the SAARC Member States leading to optimal utilization of regional electricity generating resources, enhanced grid security, and electricity trade arising from diversity in peak demand and seasonal variations. Article 16 of the Agreement provides "Any dispute arising out of interpretation and/or implementation of this Agreement shall be resolved amicably among the Member States. If unresolved, the Member States may choose to refer the dispute to SAARC Arbitration Council." SAARC Energy Centre has been created as the Special Purpose Vehicle to realize the vision of SAARC leaders to establish an Energy Ring in South Asia.

ENVIRONMENT

The International Court of Justice (ICJ) was initially the only permanent international tribunal dealing with environmental disputes. Later, in the second half of the 20th century ITLOS, WTO directly or indirectly played role in settling disputes relating to environment. Environmental concerns also arise in investor-State disputes, for example, under the North American Free Trade Agreement (NAFTA). Under Article 1120 provides alternatively for arbitration under the ICSID. NAFTA investor-State arbitrations often address environmental concerns. Environmental issues also arise under bilateral free trade agreements. ICC, The American Arbitration Association (AAA), SCC and LCIA also administer commercial arbitrations involving environment related issues.

The PCA has been regularly included as the forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments concerning natural resources and the environment, and offers specialized rules for arbitration and conciliation of these disputes. Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (PCA Optional Rules), is a important resource to handle international environmental disputes.

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- International Arbitration and The Protection of The Environment: Should the Existing Legal Instruments Evolve? By Benoit Le Bars

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The Maldives has acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)

Maldives has become the 161st 'State Party' to the New York Convention

A Snapshot of the Future of Commercial Arbitration: Lessons for SAARC Members with an emphasis on Sri Lanka

By Dr. Harsha Cabral, President's Counsel, Sri Lanka[1] Panel Arbitrator at SARCO

It is an admitted fact that in developed jurisdictions, commercial arbitration has superseded litigation to resolve commercial disputes, both domestic and international. However, statistics[2] do not reveal much growth in commercial arbitration in Sri Lanka. With the expansion of activity in trade and commerce, Sri Lanka too would see a growth, if the systemic deficiencies in the commercial arbitration culture in Sri Lanka are addressed.[3]

It is important to note that a majority of international commercial disputes are resolved by commercial arbitration in an extremely methodical and expeditious manner in many countries. Neighbouring the South Asian Association for Regional Cooperation (SAARC), Singapore is considered one of the best venues for international commercial arbitration due to the efficiency of the arbitration system in Singapore. A majority of the arbitrations in Singapore, whether it is domestic or international, are held at the Maxwell Chambers in Singapore which houses the Singapore International Arbitration Centre (SIAC) headquarters and provides state-of-the-art facilities for commercial arbitration.

Precision at all stages of arbitration is a hallmark of International Chamber of Court (ICC) arbitrations. As a sitting member of the ICC International Court of Arbitration in Paris, the writer has been privileged to witness and experience same. The final award of an ICC Arbitration is meticulously scrutinized by the ICC prior to the delivery of the award. A tribunal which delayed the award by 6 months last year was penalized by deducting half of the arbitrator's fees. Such discipline at all stages of arbitration proceedings is paramount, if arbitration is to succeed in any jurisdiction.

Time is of the essence for transactions in the business community. Since the benefits of arbitration are many[4], it is the most suitable route for the 'man in business' to resolve disputes. If timely case management is not put in place, the business community will opt for other dispute resolution mechanisms or litigation. Since an adjudicator's award and/or Dispute Adjudication Board (DAB) award cannot be enforced in a court of law that process has become ineffective in Sri Lanka. In developed jurisdictions and under reputed international arbitration institutes it is now common to see expedited rules of arbitration invoked by parties. That is a clear indication that the corporate world requires quick results.

With the advancement in technology and the growth of activity in the commercial world with e-commerce, the entire landscape of commercial arbitration has changed internationally where most of the documentation, correspondences and even oral testimony is carried out electronically. Gone are the days where parties relied on physical documentation in their transactions, commercial

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[2] For statistics of commercial arbitration in Sri Lanka compared with reputed international institutes see, Cabral H, Law and Practice of Commercial Arbitration in Sri Lanka (Dr Harsha Cabral PC 2018) 109112.

[3] For Deficiencies in Commercial Arbitration in Sri Lanka see, Cabral H, Law and Practice of Commercial Arbitration in Sri Lanka (Dr Harsha Cabral PC 2018) 118-122.

[4] For advantages and disadvantages of commercial arbitration see, Cabral H, Law and Practice of Commercial Arbitration in Sri Lanka (Dr Harsha Cabral PC 2018) 113-117.

and otherwise. In several developed jurisdictions, even litigation is moving away from traditional methods of physical documentation to a paperless era. On a visit to Seoul, South Korea to attend a seminar/workshop on 'Ease of Doing Business' a few years ago as part of an official delegation from Sri Lanka, the writer was shown a completely paperless court house by the South Korean judiciary. All pleadings, evidence and written submissions were filed online and the judgment was delivered online within an exceptionally short period of time. Since a majority of the commercial transactions are on documents alone, this is possible in most commercial cases. If such innovation is possible in litigation, it is certainly possible in arbitration. Some World Intellectual Property Organization (WIPO) arbitrations and domain name arbitrations follow paperless mechanisms to resolve such disputes. In the aforesaid background, it is crystal clear that the future of commercial arbitration lies in moving forward with advanced technology.

Commercial arbitrations in Sri Lanka too should take cognizance of these changes and move to the digital era enabling the filing of pleadings, evidence (affidavits and counter affidavits), written submissions, providing evidence on skype or similar service and posting the award online. The physical sittings, if any, ought to be minimal to ensure that proceedings are run smoothly, and efficiently and expeditiously. It is also important that the tribunal, at the outset and where needed, to make procedural orders with the agreement of parties to manage proceedings of the tribunal, which is something we are yet to see in Sri Lanka. It is also vital to ensure the supportive role of the relevant courts improved (the High Court and the Supreme Court in Sri Lanka) if the objectives of arbitration are to be realized. The Sri Lankan legal system burdened with severe delays, has to improve their standards with regard to efficiency, quality and speed. Thus, it is apparent that without proper case

management in arbitration and in courts, none of these could be achieved. It is the writer's belief that with the foresight of the next generation of young lawyers and others involved in arbitrations, these expectations can be achieved in Sri Lanka.

As a concluding remark, the writer observes that, for a better culture of arbitration in Sri Lanka the following are essential.

- Better case management in arbitrations.
- Greater discipline in arbitrations both by counsel and tribunal.
  Day to day hearings on arbitrations as against the present system where the tribunal may have two sittings in three months.
- Tribunals to be manned by competent arbitrators.
- Counsel to be competent and disciplined.
- Efficient support staff for tribunals.
- Improved secretarial and administrative support for tribunals.
- Tribunals to be equipped with state-of-the-art facilities.
- Avoid unnecessary applications to the courts.
- The judges appointed to the High Court hearing arbitration matters to be trained in the principles and practices of commercial arbitration prior to appointment.
- Systemic delays in High Court to be addressed to expedite the process.
- The High Court to make better use of provisions contained in the Arbitration Act, No. 11 of 1995 (Arbitration Act) which requires a loosing party, making an application to set-aside an arbitral award, to bring monies awarded to be paid therein to Court or to secure thereof otherwise until the pending the determination of the said application. This would discourage such applications being made without merit.
- Supreme Court to be strict in granting leave in arbitration cases.
- Time management introduced to High Courts especially with regard to arbitration cases as a first step.
- Arbitration Rules to be formulated through the Supreme Court.
- Landmark Judgments on commercial arbitration for the development of jurisprudence of arbitration.
- Amendments to improve the current Arbitration Act.
- Introduce a healthy culture of commercial arbitration taking a leaf off the better managed international arbitration institutes.

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SAARC AGREEMENT ON PROMOTION AND PROTECTION OF INVESTMENT (SAPPI): IS THERE STILL HOPE?

A recent World Bank study on the prevailing trade environment in South Asia reveals that *'[i]n South Asia, on average, overall FDI is well below potential, and intraregional FDI is even more so. Intraregional FDI stocks account for only 1.1 percent of total outward FDI in South Asia.*[1] The study presents detailed, data based, statistical analysis to show that South Asian countries trade more with distant countries rather than with their own neighbors.

This unpleasant reality has never been a secret. For this precise reason, and with the intention of gradually resolving several other similar issues, the South Asian Association of Regional Cooperation (SAARC)[2] was established in 1985. Despite the manifestation of SAARC, the South Asian region, due to several complexities, has failed to integrate its efforts in a comprehensive manner. Undoubtedly there have been efforts, however, efforts have often fallen short either due to lack of consensus, limited political will or other extenuating circumstances. A prime example of efforts falling short in critical areas, particularly in the present global economy, is the non-finalization of SAARC Agreement on Promotion and Protection of Investment (SAPPI).

SAPPI's journey dates back to 1997. It was in the 9th SAARC Summit *(12-14 May, 1997-Male, Maldives)* that the discussion on promotion and protection of investment was first proposed. The Heads of States[3] agreed that regional trade and economic cooperation would be strengthened by initiating specific steps to promote and protect investment. India offered to host the inaugural meeting[4] which happened on 29-30 September, 1997 in New Delhi[5]. However, between 1997 and 2002, SAPPI took a backfoot as the discussion on investment promotion and protection did not feature in SAARC documents (i.e. those available in the public domain).

Then, in the 11th SAARC Summit *(04-06 January, 2002-Kathmandu, Nepal)*, the Heads of States decided to instruct the Secretary General of SAARC to facilitate the early finalization of a regionally agreed investment framework to meet investment needs of the SAARC Member States[6]. Subsequently, in the 12th SAARC Summit *(04-06 January, 2004-Islamabad, Pakistan)* an Inter-Governmental Expert Group (IGEG) was constituted to primarily consider three agreements *viz.* Agreement on Promotion and Protection of Investment, Agreement for Establishment of a SAARC Arbitration Council and Multilateral Tax Treaty for Avoidance of Double Taxation[7]. The IGEG had its first meeting in New Delhi *(22-23 March, 2004)*, where the IGEG formed two sub-groups, one to deal with investment and arbitration and the other to deal with avoidance of double taxation[8]. The IGEG meeting was presided by the Foreign Secretary, Ministry of External Affairs, Government of India and the Executive Director of

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[1] Kathuria, Sanjay, Editor 2018, *A Glass Half Full: The Promise of Regional Trade in South Asia*, South Asia Development Forum, Washington, DC: World Bank, Page 52

[2] The South Asian Association for Regional Cooperation (SAARC) was established with the signing of the SAARC Charter in Dhaka on 8 December, 1985. SAARC comprises of eight Member States - Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

[3] Under the SAARC mechanism, the term 'Heads of States' collectively refers to the respective Presidents of Afghanistan, Maldives & Sri Lanka, along with, the respective Prime Ministers of Bangladesh, Bhutan, India, Nepal and Pakistan.

[4] Declaration of the 9th SAARC Summit, Paragraph 17

[5] Aggarwal, Aradhna, 2008, *Regional Economic Integration and FDI in South Asia-Prospects and Problems*, Working Paper, No. 218, Indian Council for Research on International Economic Relations (ICRIER), New Delhi, Page 8

[6] Declaration of the 11th SAARC Summit, Paragraph 9

[7] Chander, Rajiv K., 2005, *Regional Economic Cooperation in SAARC* in *Economic Integration in South Asia*, Nepal Rastra Bank, Research Department, International Finance Division, Page 11

[8] https://www.saarcchamber.org/index.php?option=com_content&view=article&id=370&Itemid=480 ; Also see https://mea.gov.in/press-releases.htm?dtl/7688/On+First+Meeting+of+the+SAARC+InterGovernmental+Expert+Group+IGEG

the Indian Council of Arbitration had, at the request of the Ministry of Commerce, Government of India, presented a concept paper on the need and importance of constituting the SAARC Arbitration Council[9].

After the first IGEG meeting and creation of the subgroups, the Sub-group on Investment and Arbitration met at regular intervals. Reasonable progress was made and it led to the King of Nepal stating at the 13th SAARC Summit *(12-13 November, 2005-Dhaka, Bangladesh)* that *"[w]e believe that the signing of the four agreements on Promotion and Protection of Investments, Mutual Administrative Assistance in Customs Matters, SAARC International Commercial Arbitration Centre and Avoidance of Double Taxation will further strengthen the SAFTA regime with a positive bearing on the growth of intra-regional trade and investment."*[10] By its 6th meeting *(19-20 September, 2006-Kathmandu)*, the Sub-group on Investment and Arbitration had already finalized the text for the Agreement for Establishment of a SAARC Arbitration Council[11] and was working on SAPPI vigorously.[12] In the 14th SAARC Summit *(03-04 April, 2007-New Delhi, India)* the initiative got a push when the Heads of States *'directed that the Agreement on Investment Promotion and Protection be finalized.'*[13] All these events cumulatively led to the Sub-group on Investment and Arbitration's 7th meeting *(29 November, 2007-Kathmandu)* where the draft text of SAPPI was finalized except for one particular clause.[14] This clause would turn out to be SAAPI's Achilles' heel and has been obstructing SAPPI's finalization since then, i.e. approximately for more than 11 years.

A Note prepared by the SAARC Secretariat in 2014[15] reveals the problematic clause as Sub-Article 4 (3) (c) which reads *'any other bilateral or multilateral agreement relating to investment signed prior to this Agreement'*. As the draft text of SAPPI is not available in the public domain it is difficult to assess the implications of this clause in the overall context. There is, however, a possibility that this clause implies that upon signing SAPPI all other investment related agreements signed between SAARC nations prior to SAPPI would become ineffective. If this is indeed the case, the apprehensions would be justified as it would create complexities for the agreements which are already in force among the SAARC nations. The clause, on the other hand, could be making reference to something completely different. Unfortunately, there is no way to be certain in the absence of the complete draft text.

Speculations apart, efforts were made to break the deadlock. In its 39th Session *(07-08 November, 2011-Addu)* the SAARC Standing Committee expressed hope that consensus on SAPPI would be arrived at expeditiously and the overall text would be finalized by the 8th meeting of the Sub-group on Investment and Arbitration. The 2014 SAARC Secretariat Note states that efforts to organize the meeting were met with challenges as *"there [was] a difference of opinion among Member States as to whether a Meeting [was] necessary, if the question of position of a Member State with regard to deletion of a minor article [was] only required."* In subsequent gatherings the Finance Ministers and Finance Secretaries underlined the importance of early finalization of SAPPI's draft text which lead to Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal and Sri Lanka recommending deletion of Sub-Article 4 (3) (c) with a view to finalizing the draft text. The Note further states that at the 40th Standing Committee Session *(19 February, 2014-Male)*, the delegation of Pakistan informed that the SAPPI text was under

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[9] Indian Council of Arbitration, 39th Annual Report 2003-2004, Page 9

[10] Statement by His Majesty Gyanendra Bir Bikram Shah Dev, King of Nepal, Thirteenth Summit, *Statements and Declarations of SAARC Summits of the Heads of State or Government 1985-2010*, Institute of Foreign Affairs, Tripureshwor, Kathmandu, Page 54

[11] The Agreement for Establishment of SAARC Arbitration Council (SARCO) was signed during the 13th SAARC Summit. After ratification by all SAARC Member States the Agreement entered into force on 2 July 2007.

[12] Annual Report 2006-2007, Policy Planning and Research Division, Ministry of External Affairs, Government of India, Page 119 & 121

[13] Declaration of the 14th SAARC Summit, Paragraph 15

[14] Ekanayake, Raveen and Perera, Nipuni, 2015, *Stimulating Intra-Regional Investment in SAARC - Is a Regional Investment Agreement the Way Forward?* in *Towards South Asia Economic Union - Proceedings of the 7th South Asia Economic Summit (SAES), 5-7 November 2014, New Delhi*, Research and Information System for Developing Countries, Page 167

[15] Note by the SAARC Secretariat on Current Status of Economic and Financial Cooperation under the Framework of SAARC, 3rd Annual Regional

consideration and views would be shared shortly. This prompted the Standing Committee to recommended that a meeting of the Sub-group be convened to re-negotiate the existing draft text. Subsequently, the Sub-group on Investment and Arbitration held its 8th meeting *(07-08 August, 2014)* at the SAARC Secretariat. In the meeting it was agreed that the draft should be reworked taking into account national interests of each SAARC country.

Subsequently, in the 8th meeting of the IGEP on Financial Issues *(20-21 July, 2016-Islamabad)* India shared a model text on which it was observed that if the text was reformulated and made multilateral instead of bilateral, it could serve as a broad template text for SAPPI's negotiation.[16] The meeting also urged the SAARC Member States to host the 9th meeting of the Sub-group on Investment and Arbitration and finalize SAPPI's draft text. Accordingly, India conveyed the revised draft text on multilateral basis for the SAARC Regional Investment Treaty which was circulated to all SAARC Member States for views/comments by the SAARC Secretariat on 04 April, 2017, along with the request to host the 9th Sub-group meeting.[17] Thereafter, there has been no news indicating SAPPI's status or the stage at which negotiations stand.

A closer observation of SAPPI's timelines indicates that negotiations have been irregular, rife with phases of swift progress followed by phases of impasse. While SAPPI was first conceptualized in 1997, it was only in 2004, i.e. around 7 years later, that a dedicated group of experts began working on its text. Then between 2004 and 2007, the expert group held as many as 7 meetings and were able to reach consensus on the entire draft text barring only a single clause. However, after that discussions went downhill, the next meeting of the Sub-group *(the 8th meeting)* happened only in 2014, around 7 years later.[18] In the meeting, unfortunately, previous discussions could not be furthered, instead the scale was reset and it was decided the draft be reworked in light of recent developments. Since then almost 5 years have passed but the 9th meeting of the Sub-group on Investment and Arbitration has yet not been convened.[19] Effectively, the only development that has happened since 2007 is India's sharing of a draft multilateral text which has since been circulated to SAARC Member States for comments. It is unknown what stand, if any, has been taken by respective countries.

Study of the SAAPI's lifecycle makes one wonder when, or even whether, SAAPI will see the light of day. In multilateral treaty negotiations, finalization of the draft text, in other words reaching consensus on the clauses and sub-clauses of the treaty, is only half the process. Once the text is finalized and signed, States have to ratify the treaty individually, which often turns out to be a lengthy process. The treaty comes into force only after ratifications have been received by each negotiating State. There is also the probability of a State wanting to opt for reservations and avoiding the applicability of certain provisions. In this entire process, SAPPI, it appears, has not even reached the halfway mark.

There is unanimous consensus across all cross-sections that an investment arrangement among the SAARC Nations would greatly benefit the economies. Several studies have been conducted and all indicate that increased investment fosters trade, creates a ripple effect and eventually uplifts the overall eco-system. A recent study prepared to assess the next steps for the South Asian Economic Union (SAEU) reiterates the same.[20] This

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[16] Sainju, Rabi Shankar, 2017, *Unleashing The Potential Of Intraregional Investment*, Tenth South Asian Economic Summit (SAES X), Page 24 - Available at http://sawtee.org/saes/wp-content/uploads/2017/12/Presentation_SAES_RSSAINJU.pdf

[17] *Supra* note16, Page 25

[18] Between 2008 and 2014 only 4 SAARC Summits could be conducted (2008, 2010, 2011, 2014) due to issues such as political instability, economic crises and tensions in bilateral relations between SAARC Member States. Hence, during this phase all SAARC initiatives were affected.

[19] As of May, 2019

[20] Next Steps to South Asian Economic Union - A Study on Regional Economic Integration (Phase II) - 2018 - Available at http://saarc-sec.org/download/downloads/Study_-_SAARC_Next_Steps_to_SAEU.pdf

has been understood by other regional inter-governmental organizations, such as the Arab League, Organization of Islamic Cooperation (OIC), South African Development Community (SADC) and Association of Southeast Asian Nations (ASEAN), and they are reaping the benefits of similar investment arrangements.[21]

The impending necessity marred by the long and fruitless journey, begs the question whether any hope is left for SAPPI. SAPPI's history coupled with the current deadlock in SAARC presents an unpromising picture. However, all hope is not lost. Despite all its limitations the internal mechanism of SAARC keeps functioning. The pace at which initiates move is reduced, nonetheless the wheels go on rotating. SAAPI is certainly on SAARC's agenda list. A study of statements made by the SAARC Secretary General in recent events across the globe indicate that finalization of SAPPI is high on the priority list. In 2018 and 2019,[22] the point of finalization of the Agreement on Promotion and Protection of Investment is mentioned in as many as 6 public statements *viz.* 6th SAARC Business Leader's Conclave *(16-18 March, 2018-Kathmandu)*,[23] 12th SAARC Finance Ministers Informal Meeting *(04 May, 2018-Manila)*,[24] SAARCFINANCE Governor's Symposium *(27 June, 2018-Kathmandu)*,[25] Round Table on Asian Regional Cooperation Organizations *(28 March, 2019-Hainan)*,[26] 6th South Asian Region Public Procurement Conference *(22-24 April, 2019-Thimphu)*[27] and 13th SAARC Finance Ministers Informal Meeting *(02 May, 2019-Nani)*.[28]

The repeated reference by the Secretary General indicates that there is indeed a silver lining and efforts are being made at the highest level to push SAPPI negotiations to its logical conclusion. While the process may still take a while, the resumption of regular discussions on the subject would be a minor success and a step in the right direction. Accordingly, it seems that all hope is not lost and SAPPI may indeed become a reality in the future, on the lines of the popular expression - better late than never!

The Supreme Court of India struck down the s.87 of the Arbitration and Conciliation Act 1996, which was inserted though the 2019 amendment Act passed by the Indian Parliament.

This judgement was delivered in the case of **Hindustan Construction Company Ltd v Union of India,** which was heard by a bench comprising Justices R F Nariman, Surya Kant and V Ramasubramanian.

The Court held this provision to being manifestly arbitrary and violative of Article 14 of the Constitution of India.

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[21] The ASEAN Comprehensive Investment Agreement came into force in 2012; the SADC Protocol on Finance and Investment came into force in 2010; the OIC Agreement on Promotion, Protection and Guarantee of Investments came into force in 1988; the Unified Agreement for the Investment of Arab Capital in the Arab States came into force in 1981

[22] As of May, 2019

[23] Statement available at http://saarc-sec.org/uploads/digital_library_document/SixthSAARCBusinessLeaders-Conclave_2018-Kathmandu-16-18March2018.pdf

[24] Statement available at http://saarc-sec.org/uploads/digital_library_document/Twelfth_Informal_Meeting_of_SAARC_Finance_Ministers-Manila-4_May_2018.pdf

[25] Statement available at http://saarc-sec.org/uploads/digital_library_document/SAARCFINANCE_Governors_Symposium-Kathmandu-27_June_2018.pdf

[26] Statement available at http://saarc-sec.org/uploads/digital_library_document/29-03-2019.pdf

[27] Statement available at http://saarc-sec.org/uploads/digital_library_document/Sixth_South_Asia_Region_Public_Procurement_Conference-

Recognition & Enforcement of Foreign Arbitral Awards: Challenges from a Maldivian Perspective

Maldives International Arbitration Centre

This Article is co-authored by Raya Ali & Mansha Abdullah Salih, Legal Counsels at the Maldives International Arbitration Centre (MIAC)

Introduction

An arbitral award is final and binding upon the parties to a dispute. The finality, along with the private and consensual nature of the arbitral process are key features which make international arbitration a more favourable method of dispute resolution in cross border transactions. Whilst most parties comply with arbitral awards voluntarily, a possible hurdle arises if the losing party refuses to perform. This is where the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention) steps in to ensure an award rendered by an arbitral tribunal can be recognized and enforced outside of the jurisdiction in which the award is made. The Republic of Maldives acceded to the New York Convention in September 2019. Prior to this a party would have to rely solely on the domestic laws for enforcing foreign arbitral awards.

Recognition and Enforcement under the Arbitration Act of Maldives

The Arbitration Act of Maldives (the 'Act') came into force in 2013 and set out the framework for arbitration in the Maldives in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. It further provided a domestic regime for recognition and enforcement of foreign arbitral awards. Section 72 of the Act requires mandatory compliance with a foreign arbitral award and Section 73 sets out the process by which a party may apply to seek enforcement through the competent court. Under the power conferred to the High Court of Maldives (the 'High Court') by the Act, the High Court issued a Regulation pursuant to the Act which stipulates that recognition and enforcement of an arbitral award shall be in the same manner as that of a court judgment. Furthermore, the grounds for refusing recognition and enforcement under the Act mirrors the limited grounds set out in Article V of the New YorkConvention. As such, the Act envisages recognition and enforcement of awards made outside the territory of Maldives in a similar manner as that of a domestic award despite not being a contracting state to the New York Convention at the time the Act came into force. The only effect of Maldives not being a member state would be that an award rendered in the Maldives may not have the similar effect outside of the Maldives.

Nevertheless, as with any Act of Parliament, it is the application of the provisions of the Act by the national courts and its interpretation that would determine how it would work in practice. Since the enactment of the Act, the issue of recognition and enforcement has only been tested once in the national courts.

Enforcement in practice

The case before the Maldivian courts related to a contractual dispute between Hilton International Manage (Maldives) Pvt Ltd ('Hilton') and Sun Travels Pvt Ltd ('Sun') with respect to a Hotel Management Agreement entered into by the parties. An arbitral award was issued in favour of Hilton in the matter by the International Chamber of Commerce (ICC) in May 2015.

The arbitral award was submitted by Hilton to the Civil Court of Maldives (the 'Civil Court') for enforcement in December 2015. Upon registration, the case was forwarded to the Property and Monetary Large Claims Division of the Civil Court. After multiple hearings took place, where Sun noted that the award cannot be

enforced in the Maldives on the grounds that the agreement was invalid, a verdict was issued in September 2016 which stated that the case was beyond the jurisdiction of the Property and Monetary Large Claims Division and that it should be submitted to the Enforcement Division of the Civil Court.

Hilton made an application again to the Civil Court for enforcement in November 2016, this time to the Enforcement Division. However, the Civil Court concluded that it did not have jurisdiction. In declining jurisdiction, it stated that recognition and enforcement of a foreign arbitral award would fall within the scope of Section 73 (a) of the Act which requires a party to seek enforcement of an award issued by an arbitral tribunal outside of Maldives by submitting an application to the 'relevant Court of Maldives'. It was construed that the relevant court was the High Court as Section 89 (b) of the Act defined "Court" to be the High Court having the jurisdiction to decide on matters set out in the Act. As such, it was decided that the Civil Court did not have the jurisdiction to enforce the award until the High Court made a determination on it. Hilton appealed this decision to the High Court and following submissions made by both parties, in April 2017, the High Court held that the decision by the CivilCourt was contrary to the legal rules and principles and as such, the Civil Court verdict was overruled and the High Court held that the Civil Court has jurisdiction to enforce arbitral awards issued in a foreign territory.

Amid the confusion as to which court had jurisdiction to enforce the arbitral award, in October 2017, Sun commenced a court case, re-litigating the same issues which had already been decided by the arbitration. Hilton challenged Sun on jurisdictional grounds and failed. In contrast to the arbitral award, the Civil Court issued a verdict awarding substantial damages to Sun. This decision was appealed by Hilton in the High Court and is still pending a decision to date.
In parallel, after the decision of the High Court in April 2017, the arbitral award was re-submitted for enforcement in the Civil Court. This application to enforce the arbitral award was denied by the Civil Court on account of the appeal pending at the High Court of Maldives with respect to the Civil Court's judgment in favour of Sun on its claim on the merits of the dispute.

Following the decision of the Civil Court, in July 2017, Hilton submitted an application to the High Court of Singapore to prevent Sun from taking any action based on the Civil Court decision in favour of Sun and to make a determination that the proceedings at the Civil Court were contrary to the arbitration agreement and that the arbitral award was valid, final and binding on the parties. The Singapore High Court decided in favour of Hilton and upon appeal, Hilton was denied a permanent anti-enforcement injunction by the Court of Appeal of Singapore but the Court of Appeal upheld the declaration that the arbitral award is valid, final and binding on the parties and that the claim submitted by Sun was against the arbitration agreement between the parties.

The High Court has not made a determination in the case and it still remains undecided as to whether the Singapore Courts' declaration on the finality of the arbitral award would be persuasive to the pending proceedings. In any event it has left the matter unresolved and the parties left without a remedy since 2015.

Challenges and implications

Even though most arbitral awards are voluntarily performed, even in the Maldives, the case between Hilton and Sun sheds light on some of the challenges prevalent in international arbitration. An arbitration agreement confers the power on the arbitral tribunal to resolve a dispute and issue a final and binding on the parties. Once an award is made the tribunal's function is terminated and if the losing party refuses to comply, the arbitral tribunal does not possess the power to compel performance. Thiscoercive power is vested in the state courts and interpretation and practice vary vastly from state to state which can become problematic as demonstrated by this case.

One of the issues in the context of Maldives is the lack of understanding of the unique nature of international commercial arbitration by the national courts. Unless the judiciary is well versed on the implications of an agreement to arbitrate and the distinctive features of arbitral proceedings and the resulting arbitral award, courts would be reluctant to accept that a court's jurisdiction can be excluded by the agreement of the parties and that a decision by the tribunal cannot be challenged on its merits other than the limited grounds under which an award may be set aside. This could be the reason for the Civil Court's decision to entertain a claim to re-litigate the subject matter of the dispute previously decided by arbitration despite the fact that it directly contravenes the spirit of the agreement to arbitrate.

The second issue relates to the disparity in interpretation of the court having the competent jurisdiction to decide

on matters of enforcement under the Act. Under arbitration laws in many jurisdictions including Singapore and Hong Kong, applications for setting aside arbitral awards and applications to seek recognition and enforcement of foreign arbitral awards have to be submitted to the High Courts of the respective jurisdictions. In these jurisdictions, the High Court often has the function of being a court of first instance as well as that of an appellate court. In contrast, the High Court of Maldives is a court of appeal that reviews decisions of the lower courts directly under the Supreme Court. High Court cases are heard by a bench instead of one judge as would be the case in the courts of first instance. This leaves room to debate whether the scope of powers vested in the High Court to determine certain matters in the Arbitration Act of Maldives excludes that of enforcement of awards. Section 73 (a) of the Act states that an application to seek enforcement should be submitted to the relevant court and the Regulation issued under the Act further clarifies that enforcement should be sought in a similar manner to court judgments. Judgments of the court are enforced through the Enforcement Division of the Civil Court and by applying this to the context of Section 73 (a) it would be reasonable to interpret that enforcement of foreign arbitral awards would fall within the jurisdiction of the Civil Court. By application of this reasoning to the dispute between Hilton and Sun, the decision of the Enforcement Division of the Civil Court to decline jurisdiction would appear to be erroneous.

An alternative view could be that the Act envisages a dual system for recognition and enforcement of arbitral awards. Since recognition and enforcement are distinct from each other, even if used in conjunction frequently, it may be argued that the Act had intended for the High Court to be thecompetent authority to give recognition to an award and a party would then have to seek enforcement through the Civil Court in accordance with the normal mechanisms for enforcing court judgments.

Whether one interpretation is correct or not or whether there is an underlying ambiguity in the law is still not settled. Nevertheless, the decisions by the Maldivian Courts, reinforce the need for international conventions in international arbitration and the possible impediments to international arbitration being an effective method of dispute resolution where the domestic system is not adequate or uncertain.

The road ahead

Despite the inconsistency in the courts' application of the law and subsequent challenges in enforcing arbitral awards, the Maldives has made efforts to promote arbitration and strengthen its overall Alternative Dispute Resolution (ADR) mechanism.

In particular, 2019 has been a milestone year for ADR in the Maldives. With the reconstitution of the Board of the Maldives International Arbitration Centre, the Centre's operations have commenced for the first time and it is in the process of developing a comprehensive set of Arbitration Rules and promoting awareness among all stakeholders involved in the process.

The Maldives also signed the Singapore Convention on Mediation in August and the Government has announced its intention to develop the necessary national legal and regulatory framework for mediation in the Maldives.

Most significantly, in 2019 Maldives became the 161st signatory to the New York Convention and reaffirmed its progressive outlook on arbitration. There is still a need to review and clarify the legislation and since its ratification enforcement under the New York Convention is yet to be tested in the courts. Whilst there will always be a certain degree of dependence on national courts, accession to the New York Convention recognizes the finality of arbitral awards and gives assurance to parties on the likelihood of enforceability of awards in the Maldives.

These developments and further policies of the Government such as including specific plans in the National Strategic Action Plan to strengthen ADR show a shift towards being an arbitration friendly jurisdiction. A unified system will ensure certainty of the process as arbitral tribunals would know that their awards will be enforceable and parties will not undermine the effectiveness of the system. Efficient and effective provision of remedies will boost investor confidence and promote foreign investment and economic growth in the long run.

Mr. Zahidullah Jalali, Director General SARCO represented the Council at the **57th Session of the Programming Committee** of SAARC.

DISPUTE RESOLUTION CLAUSES OF SARCO

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.

Parties are encouraged to 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, 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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