

9th Edition, January 2021



NEWSLETTER

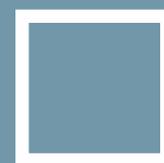


SAARC Arbitration Council
A Specialized Body of SAARC

EDITOR
Faazaan Mirza

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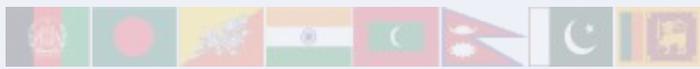
**Mr. Binod Kumar
Bhattarai**
Under Secretary,
Ministry Law, Justice &
Parliamentary Affairs,
Nepal



**Mr. Khurram Shahzad
Mughal**
Consultant,
Ministry of Law and Justice,
Pakistan



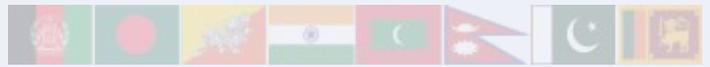
**Mr. Chanchal Chand
Sarkar**
Director (ETF),
SAARC Secretariat,
Nepal



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DISCLAIMER: Views expressed in the articles, current developments and in all other contributions to this SARCO Newsletter are those of the respective authors and do not represent the views of the SAARC Arbitration Council or the SAARC Member States.



PROFILE OF H.E. THE SECRETARY GENERAL OF SAARC



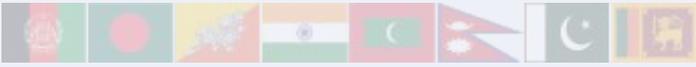
H. E. Mr. Esala Ruwan Weerakoon of Sri Lanka assumed charge of office as the Secretary General of the South Asian Association for Regional Cooperation (SAARC) with effect from 01 March 2020. He is the fourteenth Secretary General of SAARC.

H. E. Mr. Weerakoon is a career diplomat. Prior to this appointment, he was the Senior Additional Secretary to the President of Sri Lanka. He has also served as the Foreign Secretary and Secretary at the Ministry of Tourism Development and Christian Religious Affairs, Sri Lanka. In his thirty-two years of diplomatic service, he has also served as Sri Lanka's High Commissioner to India and Ambassador to Norway.

H. E. Mr. Weerakoon holds a MSc degree in Economics from the University of London.



H.E. Secretary General of SAARC at the 1st Virtual Meeting of the SAARC Planning Ministers dedicated to the theme, 'Shaping SAARC Vision 2030'.



EDITOR'S MESSAGE



Mr. Faazaan Mirza
Deputy Director

Valued readers,

Greetings from the SAARC Arbitration Council (SARCO). I hope that this Edition of the SARCO Newsletter, finds you safe and well during this COVID-19 pandemic. These are unprecedented times and we are facing a situation which has affected us all in our own ways. We, at SARCO, are thinking of our arbitrators, partners, practitioners and the SAARC region as all of us continue to deal with the effects of the pandemic.

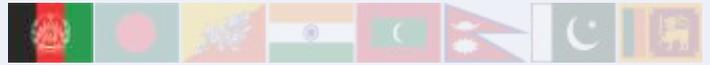
I am pleased to share with you the 9th Edition of the SARCO Newsletter. This Edition features news and developments from the SAARC region on arbitration and ADR. In this Edition, there have been comprehensive articles which have been included on interesting and relevant topics regarding Arbitration and dispute resolution from among the notable professionals. I take this opportunity to thank all of the authors of publications to this Edition. The issues discussed by our valued contributors bring

insight and an independent point of view to these very important issues which are relevant not only in the respective Member State, but have validity for others also, in the SAARC region. I hope that you enjoy reading this Edition of the SARCO Newsletter.

In order to protect the health of our arbitrators, partners in the region and the participants during the COVID-19 pandemic, SARCO is prioritizing its activities through virtual means, during this pandemic. SARCO has also continued to engage with our partners and sponsored institutions to organize activities, virtually. We are monitoring the government regulations and remain hopeful to steer through these difficult times of COVID-19, safely and successfully.

To ensure that you continue to stay connected with SARCO and receive communications and updates, please keep visiting our website (www.sarco-sec.org) and our twitter page (@sarco_sec). I look forward to the suggestions and comments from our esteemed readers, so that we continue to improve this Newsletter. I encourage you to share your thoughts with us.

Happy reading and best wishes for the New Year!



ACDR signed a joint cooperation agreement with Avicenna University to organize trainings on Alternative Dispute Resolution (ADR) particularly arbitration for university students, lawyers and commercial arbitrators to improve their capacities in ADR mechanism.

ACDR is committed to deliver prompt, professional, transparent and fair services to commercial cases through ADR mechanism.



On October 12 2020, the Afghanistan Center for Commercial Dispute Resolution launched, the first ever, three Model Contracts for private sector in three languages (Dari, Pashto and English) including:

1. Model Contract on Purchase and Sales;
2. Model Contract on Lease Agreement; and
3. Model Contract on Commercial Agency.



Barrister Mohammed Forrukh Rahman

Panel Arbitrator, SAARC Arbitration Council
Advocate, Supreme Court of Bangladesh



LEGAL ASPECTS OF SUPPLY CHAIN CONTRACTS DURING COVID-19 PANDEMIC

Our supply chain is in many cases driven by banks. Most commercial managers in business houses heavily rely on banks for supply chain solution in case of difficulties, due to the prevailing culture of over dependency and lack of education and awareness of the commercial managers and persons playing similar roles in a company. COVID-19 pandemic clearly showed various weaknesses of our exporters and importers in dealing with supply chain risks.

It is witnessed that most supply chain and commercial contract cancellations, delay notifications served from our end are very poorly negotiated. Amendment of LC has been the main objective so far.

Our importers while sourcing from local or foreign sellers are not taking the protection of the rights they already have under different commercial contracts/Proforma Invoices. This is unnecessarily putting them into more difficulties.

While our exporters are at the receiving end of such cancellations, delay notifications, they hardly rely on their power of contract, and/or question the legality and/or brought them back to the negotiation table etc. Hence without realizing the strength of contract they have simply waived their lawful rights. It is unfortunate that rights are waived accidentally and unconsciously.

Finally, a large number of contracts are settled mutually by email without putting it in writing and without inserting an appropriate dispute resolution clause etc.

The problem associated with over reliance on banking system for supply chain solution can be understood from the below hypothetical situations:

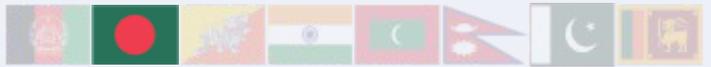
- In case of Discrepancy where buyer deny to

waive discrepancy, Bank cannot rescue the parties from the deadlock. It is only dispute resolution clause in the Proforma invoice/sales contract that plays the critical role.

- In case a party wants to exercise force majeure rights and delay in performing its contractual obligations, while LC or other parallel contract are still continuing and cannot be altered, it is the contract between the buyer and seller which provides solution to deal with such parallel contracts.

The Uniform Customs and Practice for Documentary Credits (UCP), the International Standby Practices, Uniform Rules for Demand Guarantees etc., all known as best practices, never intended to replace the main contractual terms between the buyer and seller. Hence it intentionally does not deal with many issues which should be covered in the main contracts. Obligations which are by nature applicable for buyers and sellers are not dealt in such best practices. For example, UCP does not provide any dispute resolution clause or mechanism of its own as it is by nature dependent upon the main contract and main contract supposed to have a suitable dispute resolution clause.

In such circumstances, the businesses are required to conduct due diligence and review their contracts to identify which contracts are likely to be most vulnerable due to the impact of COVID-19; and determine what rights and remedies are available. Few important terms and conditions like event of default, force majeure and frustration, change in law/illegality, material adverse change, suspension of performance/termination, notification obligations, mitigation obligation, transfer of title and risk, exclusivity, consequence of insolvency, time /shipment periods etc. play a critical role and may be



inserted in suitable cases.

Besides, obligations under parallel contract like LC, Guarantees/indemnities/performance bonds are also required to be aligned with main contract.

In case of negotiation/variation of contract is required, it is important that things should be put in writing. Much importance is required to be given on ensuring the variation is valid and binding and appropriate dispute resolution clauses are inserted and finally rights are not waived accidentally.

Appropriate dispute resolution mechanism may vary from one contract to another depending on the location of the parties, countries involved, cost and benefits associated with it. Generally, cross-border agreements are being signed with popular arbitration clauses of ICC, SIAC, and HKIAC etc. where the sit for arbitration is commonly outside Bangladesh. None of the above institutions are created by treaties. On the other hand, the arbitral institutions like ICSID and SAARCO are the creation of treaties. While the resolution of disputes mechanism will be more or same for both types of institutions, once the award is passed, the arbitral institutions like ICSID and SAARCO will have additional enforcement mechanism which are not available to the former institutions.

For example, 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 named SAARC Arbitration Council (SARCO) to resolve disputes allowing access to both member states and individual/corporation.

Under SARCO Rules of Procedure if at least one of the parties is a national of any of the member states of SAARC and also a party to the arbitration agreement, the party can choose SARCO as a forum for dispute resolution with or without involving state. In suitable cases, parties may choose SARCO rule to incorporate in the agreement. This will not only expediate the dispute resolution process but also enable the parties to increase their chances of recovery by many folds.

The process of constituting an arbitral tribunal both ad-hoc and institutional and passing an award by the tribunal so formed can be completed in few months. On the other

hand, getting a judgement from ordinary civil court, on the same matter, which is as good as an award, in a money claim suit will take on average 5 to 7 years. By reducing the entire fact finding and trail process by couple of years, the parties actually put themselves in a much stronger position.

While execution process remains the same for both judgement or award, under arbitration mechanism, it is possible that the award-debtor's property may be attached for auction and/or the court may issue a warrant of arrest for civil imprisonment in execution proceeding within a year of commencing arbitration. Not only that, under SARCO mechanism it is possible that the government machineries may be engaged through diplomatic channel to put pressure on award-debtor to comply with the award. While the arbitral proceedings and execution process will be pretty much similar, the option of engaging diplomatic channel is not available for non-treaty-based arbitration institution like SIAC, HKIAC.

On the other land, there are local arbitration institution like BIAC in Bangladesh, Bhutan ADRC in Bhutan, CIICA in Pakistan, ICA of India, SLNAC in Sri Lanka, NEPCA in Nepal and so on. In fit cases inserting a national arbitration clause of such institutions may be more useful compared to treaty-based institutions or institutions like ICC, SIAC which are more of international nature. For example, if the parties are of the same nationality and contract value is not very high, an arbitration cause of a national institution may be more suitable.

Similarly, if one or more parties are from non-SAARC nationality, inserting the SARCO clause may not be an option. On the other hand, adding SARCO arbitration clause could be best possible alternative in case parties are from SAAARC nations.

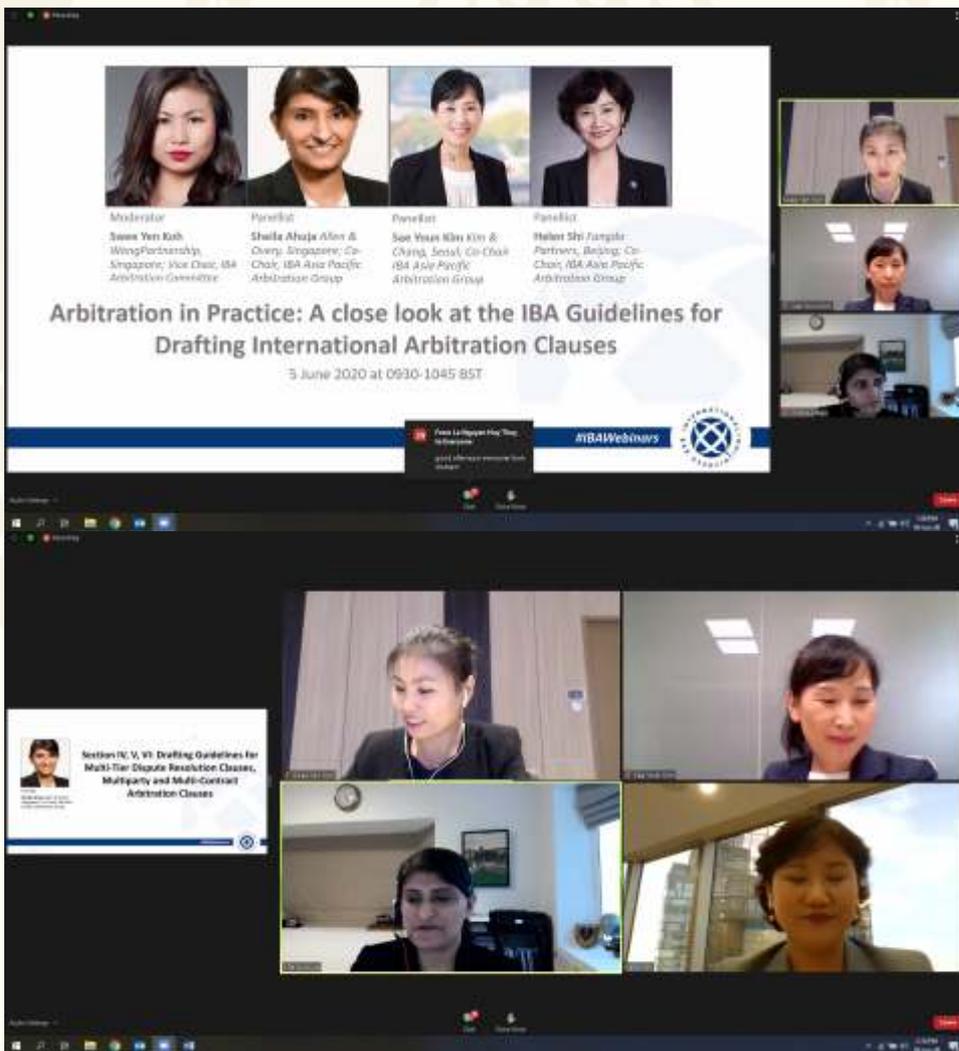
Therefore, strengthening contact by inserting suitable clause like an appropriate dispute resolution clause, avoiding exposure to unknow legal risks and remaining persuasive at the negotiation table, cannot be under estimated.



ENGAGEMENT WITH WEBINARS



Webinar on “The Future of Mediation in Pakistan” organized by the 33 Bedford Row Chambers in London and the Center for International Investment and Commercial Arbitration (CIICA) in Pakistan.



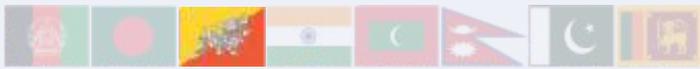
Webinar on “Arbitration in Practice: A close look at the IBA Guidelines for Drafting international arbitration clauses” organized by the International Bar Association from London, United Kingdom.



Deputy Director SARCO gave an orientation presentation through virtual participation to the cotton traders participating in the Bangladesh-India Cotton Festival 2020.

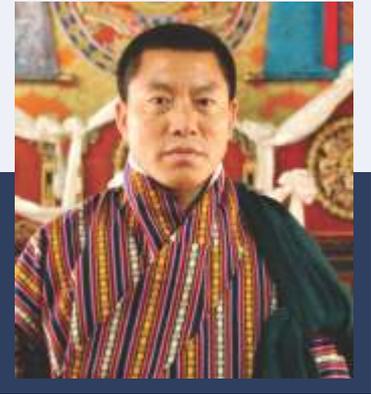


Deputy Director, Mr. Faazaan Mirza represented SARCO through virtual mode at the 9th Anniversary Online Celebration of the Bangladesh International Arbitration Centre, Dhaka.



Dasho Pema Needup

Director General, Bhutan National Legal Institute



Glimpse at Alternative Dispute Resolution Act of Bhutan 2013¹

In keeping with the constitutional mandate, the Parliament of Bhutan enacted the ADR Act of Bhutan 2013 on 25th February, 2013. It came into force on 14th March, 2013.

The Act applies to the national arbitration, international commercial arbitration and negotiated settlements with recognition and enforcement of arbitral awards, including foreign arbitral awards.

The Act provides for the establishment of a Bhutanese Alternative Dispute Resolution Centre, an independent body, having a distinct legal personality, to be administered by a Chief Administrator.

According to the Act, the parties to a domestic arbitration include citizens of the Kingdom of Bhutan; or a body corporate entity, a company, a business entity or an association which that is incorporated, or whose central management and control is exercised, in Bhutan. However, the following matters shall not be subject to domestic arbitration:

1. Disputes relating to rights and liabilities that give rise to or arise out of criminal offences;
2. Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, and child custody;
3. Guardianship;
4. Insolvency and winding up;
5. Testamentary;
6. Subject of inheritance;

7. Subject of taxation; and

8. Such other matters that are against public policy, morality or any other existing provisions of the law for the time being in force in Bhutan.

“International commercial arbitration” means arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered commercial and where at least one of the parties is:

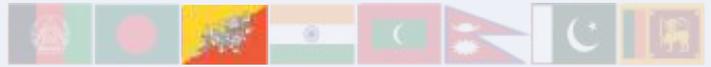
1. A citizen of the country other than Bhutan;
2. A body corporate entity, a company, a business entity or an association that is incorporated in a country other than Bhutan or whose central management and control is exercised in any country other than Bhutan; or
3. The Government of a foreign country.

For the purpose of international commercial arbitration, only those disputes arising from relationships of commercial nature, whether contractual or not, shall be arbitrated.

The parties are free to agree on the number of arbitrators provided that such number shall not be even. If the parties fail to agree on the number of arbitrators, the arbitral tribunal shall consist of three arbitrators. Unless otherwise agreed by the parties, no person shall be precluded by reason of his or her nationality from acting as arbitrator for international commercial arbitration. In the case of domestic arbitration, the arbitrator shall be a citizen of Bhutan.

Arbitral proceeding shall be normally conducted by a minimum of three arbitrators. Each party shall appoint an arbitrator each, and the two arbitrators thus appointed

¹ This article was contributed by Judge Pema Needup, (then) Presiding Judge at the District Court of Punakha in Bhutan. It was published in the Weinstein JAMS International Fellows Newsletter, Spring 2014, p.15-16. The author is also the Senior Fellow of Weinstein JAMS International Foundation.



shall appoint the third arbitrator from the list maintained by the Centre or any other person who shall act as the presiding arbitrator.

It is stipulated in the Act that the award of an arbitral tribunal shall have the nationality of the country in which the place of arbitration is situated. The national arbitral award shall have a binding force of judgment and shall be enforced by the court in accordance with the provisions of the Code of Civil and Criminal Procedure of Bhutan as if it were a decree of the Court. A foreign award shall be recognized as binding and shall be enforced in the Kingdom of Bhutan by the High Court in accordance with the Code of Civil and Criminal Procedure of Bhutan. The Act also applies to the domestic and international negotiated settlement. The mediation, conciliation and

negotiation are all classified as negotiated settlement.

For the purpose of domestic negotiated settlement, the parties may resort to negotiated settlement in accordance with the laws in force in Bhutan. For the purpose of international negotiated settlement, only those disputes arising from relationships of commercial nature, whether contractual or not, shall be negotiated. The settlement agreement shall be enforced by the court of competent jurisdiction in accordance with the laws in force in Bhutan. However, the Act does not cover negotiation and conciliation in details and it makes no mention of court-connected ADR programs. Otherwise, the Act deals with national and international arbitration and negotiated settlement in comprehensive manner.

Dasho Pema Needup took over as the new Director General of the Bhutan National Legal Institute. Bhutan National Legal Institute is the Training and Research wing of the Judiciary of Bhutan and tasked with capacity-building and enhancing the continuing legal education of the judicial personnel.

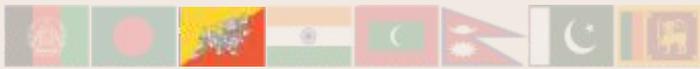
Dasho Pema Needup is a contributor to the earlier Edition of the SARCO Newsletter. SARCO wishes him the very best for his tenure.



Bhutan National Legal Institute Launched the latest Edition of the Review Journal for the year 2020. Her Royal Highness, Ashi Sonam Dechan Wangchuck established the country's first Legal Research and Training Institute in 2011 and initiated the publication of country's first law journal, the "Bhutan Law Review" in 2012.

The journal serves as the platform for the legal academics to engage in the discourses on the contemporary legal issues.





Bhutan ADR Centre



Chimi Dorje

Chief Administrator
Bhutan ADR Centre, Thimphu

First of all, the Bhutan ADR Centre, with utmost joy, shares with the SARCO Islamabad that, the new Chief Justice of Bhutan has been appointed in the month of June 2020 by His Majesty the King. The Centre, under His Lordship not only as the Chief Justice of Bhutan but also as the Chairman of the National Judicial Commission, is optimistic that, Bhutan

ADR Centre will grow from strength to strength in overall terms in rendering justice through all dispute settlement process. BADRC Centre cannot function completely out of judiciary loop as recognition and enforcement of the arbitral award lies with the Courts.

Momentum of the Arbitration culture

The BADRC is pleased to share here that, the general public gradually realizes the advantages of the arbitration system compared to the litigation processes in settling the commercial disputes thus; people chooses the BADRC as an ideal option and all arbitration cases are coming to the BADRC. One of the reasons for the people to choose arbitration as a best mechanism for settlement of disputes especially the construction related disagreement is because of the fact that, parties can choose their own judges who have relevant professional expertise and technical know-how, who, unlike in the formal Courts, can dissect the technical intricacies to conclude with factual findings. Furthermore, the arbitration proceeding is completely democratic in nature being less formal than obvious enables the parties to freely speak across the table with their judges which is not the practice in the formal Courts.

For Bhutan, as we are a developing nation, the maximum arbitration cases are coming from the construction industries between the public procuring agencies and private construction companies. We are hoping that, people may gradually choose the BADRC for other civil cases which are within the jurisdiction of the ADR Act 2013. The arbitration system can immensely benefit the

municipals as it can provide speedy and less expensive decision to the parties to the dispute and, at the same time it can also considerably reduce the workload of the Courts as all commercial disputes and other civil cases are directly taken up by the ADR. The BADRC have so far settled total 75 domestic arbitration cases largely from the construction industries and we also received few international commercial arbitration cases, but the Centre could not register the case for arbitration as the responding party did not respond and, Centre does not have the power to summon the party.

The Bhutan is also a signatory to the New York Convention since 2014 and we are optimistic that, some potential Foreign Direct Investment (FDI) companies may wish to establish their businesses franchise in our country as we always enjoy political stability, pristine environment and cheering ambiance.

Capacity Development of the BADRC

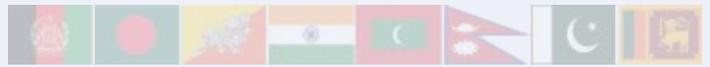
We have plans in pipeline to conduct arbitration induction course for people who aspires to become arbitrator and also refresher course for the sitting arbitrators. These activities will be implemented soon after the covid-19 pandemic situation improves. We are also to implement many new plans and activities as per our strategic plan, which we still could not still launch officially because of the covid-19 pandemic.

The Centre was briefly visited by the FDI Division of the Ministry of Economic Affairs in 2019 to ascertain the capacity of the Centre in handling international commercial arbitration and, they were impressed with our basic facilities and strength of the arbitrators on externment.

Conclusion

On behalf of His Majesty and King, Royal Government of Bhutan, and the BADRC and on my own behalf, I wish the SARCO Islamabad success in shaping and leading the Arbitration Centres in the SAARC region to world class Arbitration Centre and also establish institutional linkage with other renowned International Arbitrations Centres in the world

Tashi Delek!!



Director General SARCO elected as Vice President of APRAG



Dr. Pasit Asawawattanaporn
President, APRAG and
Managing Director,
Thailand Arbitration Center

The Asia Pacific Regional Arbitration Group (APRAG) was established by representatives of 17 arbitration centers and associations during their meeting in Sydney in November 2004. The membership of APRAG has since grown to 49 members.

APRAG is a regional federation of arbitration associations which aims to improve standards and knowledge of international arbitration and will make submissions on behalf of the region to national and international organizations.

This co-operation is unique and is a reflection of the growing importance of international arbitration in Asia and Australasia, the fastest growing economic area in the world.

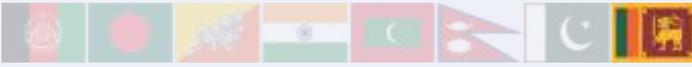
It also demonstrates the maturity and goodwill of the member organizations and their determination to further raise standards in, and improve the profile of, international arbitration in the region.



Mr. Zahidullah Jalali
Director General, SARCO and
Vice President,
APRAG

Director General, SAARC Arbitration Council (SARCO) has been elected as the Vice-President of the APRAG.

SARCO was a proposed member of the APRAG since 2018 and has been included as a full member in January 2020. At the 7th General Meeting of APRAG, Director General SARCO was elected as the Vice President of the APRAG



Dr. Dayanath Jayasuriya

President's Counsel
Panel Arbitrator, SAARC Arbitration Council
and former Chairman Securities
and Exchange Commission of Sri Lanka



One Belt One Road Initiative and Arbitration

China's One Belt One Road initiative is an important major financing event in recent decades. The Chinese initiative is a welcome development, more so now than ever before. Economies around the world have taken a severe beating with the COVID-19 outbreak. Industries have come to a grinding halt. Millions have lost jobs leaving them and their families to eke out an existence. Without a vaccine or a prophylactic in sight, many countries face a grim future. Unlike many other rich nations, China has a competitive edge when it comes to bilateral arrangements with countries along the famous Silk Route as elsewhere. The historical ties are accompanied by strong common values cherished by the Chinese. China is a strong economic power with a stable currency. Despite the setback created by the outbreak in the Province of Wuhan, the economy is showing signs of being resilient. When it comes to the construction industry, Chinese companies have a unique record for the fast completion of projects well ahead of schedule. During the last decade the Chinese economy has seen an exponential export oriented growth moving more towards mass production of quality goods. The recent USA-China trade agreement- negotiated during difficult and uncertain times- has stimulated Chinese companies to go for diversified lines of business. Chinese banks tend to lend on commercially attractive terms to countries with strong diplomatic ties.

Neutral stance within international power blocks gives China a competitive edge. Speed of negotiations and decision-making give Chinese companies an advantage over multinational financial institutions. In overseas construction industry, in particular, the Chinese have found it cheaper to use Chinese workers as against local workers. The outbreak of the virus occurred just before millions of Chinese workers were to return to countries like Cambodia and Sri Lanka.

The journey along the Silk Route has not been as smooth as expected. Political uncertainties compounded by lack of long-term national development policies have led to concerns. Bribery and corruption are rampant among Chinese companies as well as in most countries along the Silk route. Some countries are already witnessing the uprising of pockets of protestors hostile to Chinese projects and joint ventures. Weak regulatory and legal framework and the absence of an independent judiciary have meant that some Chinese companies are reluctant to make large scale investments. Differences in legal systems have posed problems and a possible way out is for the adoption of English law framework.

The outbreak of the coronavirus disease (COVID-19) has had far reaching implications than SARS or other communicable diseases vulnerable to rapid mortality. The IMF has cautioned about a significant global slowdown in growth. The failure to meet contractual obligations will mean that the affected parties would have to rely on Act of God or on a force majeure clause. Some jurisdictions will be reluctant to accept Act of God as a valid defence.

It is now open to countries and companies to have recourse to the SAARC arbitration mechanism to settle disputes. As an expeditious and inexpensive procedure with arbitrators well versed with English Law and other principal jurisdiction laws, there is a new opportunity for Chinese and other investors to settle differences of opinion and proceed smoothly.

For more information contact the SAARC Arbitration Secretariat at info@sarco-sec.org



11TH GOVERNING BOARD MEETING

SARCO organized its 11th Governing Board Meeting, this year through virtual mode, with Sri Lanka as Chairperson, on 5-6 October 2020. The Meeting concluded after fruitful discussions on necessary agendas. SARCO is possibly the first SAARC institution to conduct a virtual Governing Board Meeting, adopting the new normal!





11TH GOVERNING BOARD MEETING





India: The Unconditional Stay Ordinance

Ashima Obhan and Shivam Patanjali
Obhan & Associates



On November 04, 2020, the President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 ("**Ordinance**"). The Ordinance was promulgated to ensure that all parties get an opportunity to seek unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement or contract or making of the arbitral award are induced by fraud or corruption¹.

Prior to the Ordinance, under Section 36 (3) of the Arbitration and Conciliation Act, 1996 ("**Act**") a party could file an application seeking a stay of the arbitral award when challenging the arbitral award under Section 34 of the Act. This application could be granted by a Court subject to conditions as the Court deemed fit. The Ordinance inserted a proviso to Section 36 (3) to state that the Court can unconditionally stay an arbitral award pending the disposal of the challenge to the arbitral award provided that the Court is "*satisfied that a prima facie case is made out, (a) that the arbitration agreement or contract which is the basis of the award; or (b) the making of the award, was induced or effected by fraud or corruption.*"

The Ordinance also clarified that this amendment to Section 36 (3) would apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**").

The History of Section 36

The power of granting a stay on an arbitral award pending a challenge under Section 34 of the Act has undergone

multiple changes over the years. Until the 2015 Amendment Act, Section 36 of the Act as it stood then provided for an automatic stay of an arbitration award as soon as a petition under Section 34 of the Act was filed. The wordings of Section 36 of the Act effectively led to a scenario where an admission of a Section 34 petition would virtually paralyze the process for the winning party/award creditor. In 2009, the Supreme Court of India had observed that "*until the disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.*"²

Section 36 before the amendments read as follows:

"36. Enforcement.-Where the time for making an application to set aside the arbitration award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court."

The 2015 Amendment Act, amended Section 36 and the provision for automatic stay being granted to parties upon filing of a petition under Section 34 was removed. The 2015 Amendment Act ensured that a stay would only be granted upon a separate application being filed and deemed by the Court to merit a stay to be granted.

Revisiting the Apex Court's take on Fraud and Arbitrations The Supreme Court in *A. Ayyasamy vs. A. Paramasivam and Ors.*³ ("**Ayyasamy**") had observed that it may not be necessary to nullify the effect of the arbitration agreement between parties where there were allegations

This Article was first published by mondaq.com and can be viewed online at <https://www.mondaq.com/india/trials-appeals-compensation/1015264/the-unconditional-stay-ordinance>

¹ The Arbitration And Conciliation (Amendment) Ordinance, 2020

² 2009) 17 SCC 796 2009

³ (2016) 10 SCC 386

⁴ (2018) 15 SCC 678



of fraud simpliciter and such allegations were merely alleged, as such issues could be determined by the arbitral tribunal. While relying upon the Ayyasamy decision, it was subsequently held by the Supreme Court that only where serious questions of fraud are involved, could an arbitration be refused⁴.

With respect to serious allegations of fraud, two tests are required to be satisfied. The first, being whether the plea permeates the entire contract and above all, the agreement of arbitration, rendering it void. The second being, whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain⁵. *"The first test is satisfied only when it can be said that the arbitration Clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain."*⁶

The Supreme Court in *Avitel Post Studioz Limited and Ors. vs. HSBC PI Holdings (Mauritius) Limited and Ors.* also examined the meaning of fraud in Section 17 of the Indian Contract Act, 1872 ("**Contract Act**") and observed that the expression "or to induce him to enter into the contract" refers to the stage of formation of the contract. It was observed that even Section 17(5) of the Contract Act, which speaks of "any such act or omission as the law specially deals to be fraudulent" refers to an act or

omission under such law at the stage of entering into the contract.

Thus, if a party can establish, that at the very stage of entering into the arbitration agreement, that the opposite party had (i) made a suggestion as a fact, which the opposite party knew was not true; (ii) actively concealed a fact despite having knowledge or belief of the fact; (iii) a promise made without any intention of performing it; or (iv) committed any other act fitted to deceive, can a party seek unconditional stay of the arbitral award as a result of the Ordinance.

Accreditation of Arbitrators

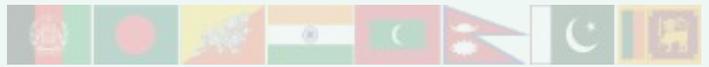
The Ordinance is also significant for future arbitrators in the country. The Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment Act**") had introduced Part 1A to the Act pertaining to the Arbitration Council of India. Section 43J under this part specified the norms for accreditation of arbitrators and accordingly inserted Schedule 8 in the Act. Under Schedule 8, an individual either had to be (i) an advocate with ten years of experience; (ii) a chartered accountant with ten years of experience; (iii) a cost accountant with ten years of experience; (iv) a company secretary with ten years of experience; or (v) an officer of the Indian Legal Service amongst others to qualify as an arbitrator.

The Ordinance has now substituted Section 43J and has omitted Schedule 8 of the Act. The substituted Section 43J now states that the qualifications, experience and norms for accreditation of arbitrators shall be specified by regulations, which could be made by the Arbitration Council of India in due course.

In November 2020, the Honorable President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020. The Ordinance has been promulgated to ensure parties get an opportunity to seek unconditional stay of enforcement of arbitral awards induced by fraud or corruption.

⁵ 2019) 8 SCC 710

⁶ MANU/SC/0601/2020



ENGAGEMENTS



Director General at the High Commission of Bangladesh in Islamabad



Director General at the Embassy of Afghanistan in Islamabad



Director General at the High Commission of Maldives in Islamabad



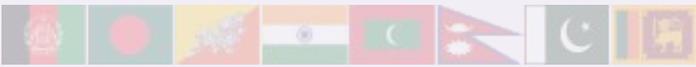
Director General at the High Commission of India in Islamabad



Director General at the High Commission of Sri Lanka in Islamabad



Director General at the Ministry of Foreign Affairs of Pakistan (Host Member State) in Islamabad



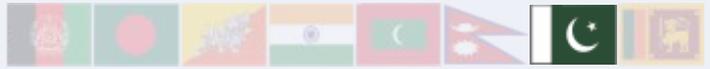
FAREWELL TO THE OUTGOING DIRECTOR GENERAL OF SARCO



SARCO bids farewell to its 3rd Director General Mr. Zahidullah Jalali (Afghanistan), upon completion of his tenure of 3 years. His distinguished leadership and effective initiatives will become a stepping stone for SARCO in the future.



SARCO observed the commemoration of the Thirty-Sixth Charter Day of SAARC, following the COVID-19 precautions as advised by the Host Country and the SAARC Secretariat. The event was organized at the SARCO Secretariat on December 8, 2020.



Syed Bilal Hussain

Advocate
High Courts of Pakistan



The Need For Updation Of Arbitration Laws In Pakistan

1. PROLOGUE

With the tremendous growth in international trade and investments, arbitration has become the most used mechanism to settle disputes. Arbitration is chosen over traditional court proceedings, given the possibility of achieving a relatively inexpensive solution by specialist arbitrators, through a quick and often less formal procedure.

In Pakistan, arbitration is an integral part of its national and religious norms¹. The Constitution of Pakistan, 1973 recognizes arbitration as a legal means of settling disputes². However, there is an inherent distrust amongst the courts of Pakistan in arbitration especially in the field of foreign investment which the courts see only as a vehicle solely for the benefit of the foreign party. Such attitude has led Pakistan to earn the reputation of an arbitration blackspot.

2. ARBITRATION AND FOREIGN INVESTMENT: BEYOND CONTRACT

Today a significant portion of the world's cross-border economic activity would simply not exist in the absence of a trusted and workable system of international alternative dispute resolution. To understand this, two aspects need consideration: (i) international commercial arbitration and (ii) treaty arbitration.

2.1 International Commercial Arbitration

Parties normally choose international arbitration for the resolution of their disputes because it provides savings in

costs and time; avoids technicalities, procedural complexities, and delays of national courts; allows for adjudication by experts; is entirely flexible in its form; and is confidential.

Two factors always motivate the choice of international arbitration. These are unchanging: neutrality and enforceability.

2.1.1 Neutrality

The resolution of any cross-border trade or investment dispute in the national courts of one party is likely to be resisted by the other party. This is more so in foreign investment contracts with a government. Foreign national courts often entail unfamiliar counsel, judges, and hostile procedures. International financing and guarantees are usually impossible to secure unless it has been insulated from the grip of local courts in the host nation. So international arbitration is, by default, the only choice that allows neutrality.

Neutrality in the context of international arbitration has two aspects³. The first is a neutral forum and the second neutral nationality of the arbitrator to avoid actual or perceived bias.

2.1.2 Enforceability

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the 'New York Convention') has become the single most successful private commercial law convention, with an unprecedented number of ratifications across the world. It allows for the enforcement

¹ Disputes in pre-Islamic society in Arabia were settled by means of arbitration. The Holy Prophet (Peace Be Upon Him) continued the tradition and acted as an arbitrator in many instances (J. Schacht, Law and Justice, in 2 Cambridge Encyclopaedia of Islam, Chapter 4).

² See Constitution of Pakistan, Articles 146(3), 152 and 159(4)

³ Susan D. Franck, The Role of International Arbitrators, 12 ILSA J. INT'L & COMP. L. 499, 501 (2006).



of arbitration agreements and arbitral awards in the courts of most trading nations, by way of a summary process. There is no single comparable arrangement for court judgments (notwithstanding sustained efforts at the Hague Conference to achieve a worldwide judgment convention). This simply means that if there is any prospect of seeking enforcement of a ruling in more than one country, or of chasing assets around the world for execution (as is the case in most modern transactions, in an ever-shrinking world), then parties must arbitrate.

2.2 Treaty Arbitration

The changes in international arbitration have not been confined to transnational contractual relationships. Over recent years, in the field of foreign investment, there has been a parallel revolution, at the level of public international law.

More than 2,000 individual interstate agreements collectively known as Bilateral Investment Treaties ('BITs') exist today. Unfortunately, these BITs tend to be the subject of scrutiny only after their conclusion, when the matter is a *fait accompli*. Upon a closer look, each BIT contains:

- (i) a range of substantive promises given by one state to the individual investors of the other state, including but not limited to undertakings with respect to fair and equitable treatment; and even the performance of contractual obligations undertaken by the state;
- (ii) a procedural mechanism for the enforcement of rights by individual investors directly against the contracting state, by way of international arbitration.

Arbitration directly against a state under a BIT places dispute resolution at the level of public international law. If a country refuses to comply with its BIT obligations, it may lose its international credit rating, and be the subject of political and diplomatic pressure.

Hence, there has been an extraordinary explosion of activity in this field. From 1972 to 1996, there had only been 38 cases registered by the International Centre for Settlement of Investment Disputes ('ICSID') whereas in 2020 alone 58 cases were registered by ICSID.

3. ARBITRATION "BLACKSPOTS"

Certain countries around the world have earned the reputation as arbitration "blackspots", or countries where it is neither safe to locate an arbitration, nor safe to assume that a foreign arbitration will be respected and safeguarded from the interference of domestic courts. Some of these countries have failed to reform and update their arbitration laws in line with the prevailing norms. Others have made the necessary legislative reforms, and yet have failed to instil the new international approach in the hearts of their lawyers and judges.

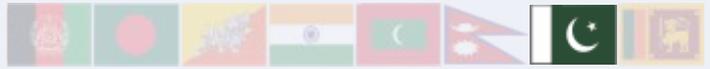
These jurisdictions are characterised by the ability to obstruct, undermine, or avoid international arbitration by recourse to a local court. The form of recourse varies, but one may list several examples:

- (i) the obtaining of an anti-arbitration injunction from a local court preventing an international arbitration from proceeding – even if the arbitration in question is located abroad;
- (ii) the commencement and maintenance of a local action on the subject matter of the dispute, in breach of an arbitration agreement, and the refusal of a local court to stay its own process;
- (iii) the launch of a public interest writ petition by a third (but often sponsored) party, in order to bring the substance of the dispute before local courts;
- (iv) the raising of broad public policy concerns (e.g. allegations of bribery and corruption) as a basis for avoiding an international arbitration on grounds of arbitrability;
- (v) the challenge of an international arbitration award before a local court, even if that award was rendered abroad, re-opening of the merits of the dispute.

4. THE CASE OF PAKISTAN – FROM HIGH TO LOW

Pakistan's record in international arbitration is marked by several firsts, and notable events.

On December 30, 1958, Pakistan signed the New York Convention, being amongst the first countries to do so. On November 25, 1956, Pakistan signed the world's first ever



BIT, with Germany⁴. At the time, it could justly be regarded as a leader in the field.

Over decades the situation has dramatically changed. Whilst the rest of the world developed and embraced the new international approach and norms, Pakistan went on to earn an international reputation as an unsafe jurisdiction for arbitration. The New York Convention had remained unratified and unimplemented for 47 years. As for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (the 'Washington Convention'), Pakistan signed, ratified, and became bound by its terms in 1965. It was only 46 years later; this Convention was incorporated into Pakistan law.

Despite sound and supportive court decisions in this field over years, there have been a few very high profile and widely criticised judgments in which the Courts of Pakistan have intervened - and in some cases undermined - international arbitration. The *Hub Power Company v WAPDA*⁵ has been the subject of adverse comment at numerous international conferences, as well as most of the major international textbooks in this field⁶. Briefly, the decision in this case is widely accepted as:

- contrary to the basic scheme of, and obligations arising under, the New York Convention;
- contrary to the basic principles embodied in the UNCITRAL Model Law;
- An unlawful interference in an arbitration that was taking place in a foreign seat – with its own supervising court (England);
- A misapplication of the doctrine of separability, and a breach of the basic principle of *kompetenz-kompetenz*;
- A wholly unprincipled extension of the doctrine of public policy⁷.

Further, Pakistan is the first country whose Supreme Court has issued an injunction against an ICSID arbitration⁸ thereby violating its international legal obligations under that Convention.

All this, as a matter of foreign perception, has made

⁴ The BIT came into force on 28 April 1962.

⁵ PLD 2000 SC 841 – reported internationally in: [2000] 16 Arbitration International 431; Mealey's International Arbitration Report, 2000 Vol 15, #7 at A.1

⁶ See e.g., the strong critique in the leading textbook Redfern & Hunter, *The Law and Practice of International Commercial Arbitration* (4th ed., Sweet & Maxwell), at 7-33 to 7-38;

⁷ See e.g. Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration", in *Pervasive Problems in International Arbitration* (J. Lew, ed., 2006).

⁸ *Société Générale de Surveillance S.A. v Pakistan* (2002 SCMR 1694) – reported internationally in: (2003) 19 Arbitration International 179 See the (adverse) commentary in Gaillard, *supra*.

international arbitration in Pakistan unsafe.

5. WHY UPDATE THE ARBITRATION LAWS AND SAFEGUARD THE ARBITRAL PROCESS?

There are several reasons why, it is suggested, Pakistan must now realign itself with the prevailing norms in international arbitration. Some of them are discussed below:

5.1 Justice

Arbitration is dependent upon an arbitration agreement that substantially excludes resolution of disputes through national courts. The enforcement of an arbitration agreement is mandated by the fundamental legal principle: *pacta sunt servanda*, (agreements must be kept). If the agreement to arbitrate reflects true consent on the part of all sides, and that consent is not vitiated by any relevant factor (all of which are catered for by contract law – such as mistake, misrepresentation, duress, undue influence, etc.), then there can be no justification to treat this form of contract as inferior to all other contracts.

The concerns as to the nature of the arbitral process are now entirely addressed by modern arbitration laws (such as the UNCITRAL Model Law), which provide for supervision by a competent court. This supervision, however, is delineated and restricted to support and not undermine, the process. There is no reason why that balance ought not to apply in Pakistan as well – at the very least to international arbitration.

5.2 Foreign Direct Investment

The attraction of foreign direct investment is the central policy of the Government of Pakistan – as with most governments. The link between an effective system of international arbitration and foreign investment is now beyond any doubt. Capital is free-flowing, and if investors lose confidence in the Pakistan legal system, and fear that their arbitration agreements will not be respected, the simple reality is that their capital will flow to safer destinations.



5.3 The Court Docket

An effective system of arbitration, which is properly insulated from undue interference by the courts, has one very important consequence: it releases significant pressure from the courts. Courts can reduce their caseload by (a) allowing matters to leave their docket and proceed in arbitration and (b) restricting the number and type of applications that can then be made by parties who are in arbitration and wish to return to the court. To this end, safeguarding and improving the arbitration system is in the wider interests of Pakistan.

5.4 The International Response

Many of the arbitration avoidance tactics deployed in *blackspot* jurisdictions (a) no longer work, or (b) even if they do work, have disastrous consequences for the country concerned.

Intervention by local courts in the international arbitration process is now frequently met with anti-suit injunctions rendered by foreign courts. These are interim measures which are designed to protect an arbitration, and which compel parties to withdraw from actions brought in local courts in breach of an arbitration agreement.

Because of the international condemnation of avoidance tactics, in an amendment to the UNCITRAL Model Law (Article 17), the power to take steps to prevent a party from resorting to local courts has now also been given to international arbitral tribunals, to protect against any harm done “to the arbitral process itself”⁹.

The anti-arbitration injunction itself (such as that granted by the Pakistan Supreme Court in *Hubco* case¹⁰) has been the subject of much scholarly analysis¹¹. The practice of enjoining international arbitration is considered violative of conventional and customary international law, international public policy, and the accepted principles of

international arbitration¹².

There has also developed a jurisprudence authorising international tribunals to continue their proceedings – notwithstanding (and often in breach of) anti-arbitration injunctions issued by local courts¹³. In so far as one member of the arbitral tribunal may be personally bound by such an order (because of nationality or some other link to the jurisdiction concerned), the tribunal may continue as a *truncated tribunal*, with one member missing¹⁴.

In such situations where a contractual arbitration is the subject of local court interference, resort is now routinely made to treaty arbitration under a BIT, as a second and more powerful tier of dispute resolution.

5.5 Public International Law and State Responsibility

The international response has recently taken a very important turn. It is now established that decisions of national courts which impinge upon or in any way undermine arbitration agreements may give rise to an action by an individual for breach of international law against the State whose courts are concerned. In short, as a matter of public international law, the State of Pakistan is responsible for the judgments of its Courts. In this regard, three different propositions are:

- (i) The international law *doctrine of State Responsibility*, and the associated *rules of attribution*, whereby a State may be held liable for the decisions of its national courts;
- (ii) The substantive international law obligations owed by the State of Pakistan and its national courts;
- (iii) The procedural mechanism whereby an individual (or foreign State) might bring an action for breach of

⁹ An example of such an order issued by an international tribunal, see *E-Systems v Iran* (Iran-US Claims Tribunal): Award No. ITM 13-388-FT, 2 Iran-US C.T.R. at 51-57 (issued under Art 26 of UNCITRAL Arbitration Rules).

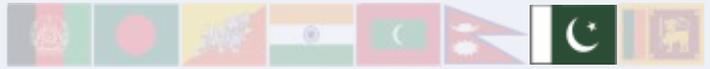
¹⁰ *Supra* note 5

¹¹ See e.g.: *Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration No. 2 (E. Gaillard ed., 2005), a collection of essays on this topic by a wide range of leading international academics and practitioners - with frequent (adverse) citation of decisions of the Courts of Pakistan.

¹² Stephen M. Schwebel, *Anti-Suit Injunctions in International Arbitration – An Overview*, in *Anti-Suit Injunctions in International Arbitration*, IAI Series on International Arbitration No. 2 (E. Gaillard ed., 2005)

¹³ See e.g. the detailed analysis in *Salini v Ethiopia* (7 December 2001), where an anti-arbitration injunction from the courts of the seat of arbitration was disregarded by the arbitral tribunal (excerpts in 21 ASA Bulletin 59 (2003)).

¹⁴ See Schwebel, *Three Salient Problems*, for an exhaustive analysis of the legal justification for this procedure. For an example, see *Himpurna California Energy Ltd v Indonesia*, interim award, 26 September 1999; final award, 16 October 1999, extracts in (2000) XXV Yearbook Commercial Arbitration 109.



international law against the State of Pakistan.

5.5.1 State Responsibility

Primary rules of international law define the content of the substantive rights and obligations of States. In contrast, secondary rules, of which the doctrine of State Responsibility forms part, address (a) the general conditions under international law whereby a State will be deemed liable for wrongful acts and omissions, and (b) rules as to the legal consequences which flow therefrom.

These secondary rules are codified by the International Law Commission ('ILC') in its "Articles on State Responsibility"¹⁵. In this regard, Article 2 states that two elements are required for a State to be held liable for breach of international law: (a) "attribution" of the conduct in question to the State and (b) the breach of a substantive international law obligation.

5.5.1.1 Attribution

The *doctrine of attribution* is the international law mechanism that identifies the type of entity for whose conduct a State may be responsible. There are, of course, many different types of entities whose conduct might be attributed to the State, but the simplest and most obvious is a State organ. In 1871, Umpire Lieber stated in the *Moses* case that "an officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority."¹⁶

This rule was confirmed by the International Court of Justice in the *Cumaraswamy* case as a rule of customary international law¹⁷.

5.5.1.2 National Courts as State Organs

National courts are as much organs of a State as its

¹⁵ Adopted by the International Law Commission on 9 August 2001, A/56/10, p 43 et seq and noted and commended to Governments by the United Nations General Assembly in Resolution 56/83 on 12 December 2001. For the text of the articles and a commentary, see J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, 2002), and the earlier work of S Rosenne, *The International Law Commission's Draft Articles on State Responsibility* (Dordrecht, 1991).

¹⁶ Moore, *International Arbitrations*, vol III, p.3127 (1871), at p.3129.

¹⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports, 1999, p.62 & p.87 (para 62).

¹⁸ For commentary see *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two.

¹⁹ 1926, P.C.I.J. Collection of Judgments, Series A, No 7, at p.19.

²⁰ See: Professor Christopher Greenwood CMG, QC, *State Responsibility for the Decisions of National Courts in Issues of State Responsibility Before International Judicial Institutions*, *The Clifford Chance Lectures*, Vol VII (ed. Fitzmaurice & Sarooshi, Hart, 2004), at 55-74.

²¹ C. Dupuis, *Liberté des voies de communication et les Relations internationales* (1924) *Recueil des Cours*, vol I, 129, at 354, as translated and cited by Jan Paulsson in *Denial of Justice in International Law* (Cambridge, 2005), at p.38.

parliament, executive government and armed forces. As such, their actions are imputable to the State. The ILC Articles on State Responsibility codifies this rule in Article 4¹⁸.

In this regard, the Permanent Court of International Justice stated as follows in *Certain German Interests in Polish Upper Silesia (Merits)*:

*"From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."*¹⁹

A State, therefore, may be held responsible for a violation of international law incurred because of a decision of one of its national courts – whether the lower or the highest court²⁰. A State can also not disavow the law of nations by using judicial authority than by a fancy of Parliament or by outrageous conduct of the government.²¹

5.5.2 Relevant Substantive International Law Obligations

Two elements require consideration here: (a) the public international law delict of "Denial of Justice" and (b) the specific substantive obligations that may be offered by a State by treaty.

5.5.2.1 Denial of Justice

It is a substantive rule of customary international law, which provides that no State may deny justice to aliens. Such a denial has been held to exist when the judicial system of a State has fallen short of international standards, whether by virtue of (a) discrimination against a foreign litigant or (b) some failure in the judicial system itself. The failure to administer justice is itself an international legal wrong.



There are many different articulations of the standard to be applied, such as a requirement of *manifest injustice* or *gross unfairness*²² or *flagrant and inexcusable violations* of international norms.²³

In Pakistan, two aspects need consideration; (i) negation of arbitration agreement between individuals; and (ii) negation of arbitration agreement to which State is a party.

5.5.2.1.1 Negation of Arbitration Agreement Between Individuals

Whatever the precise standard, there remains the possibility that a foreign party whose arbitration clause has been annulled, impeded or undermined by a decision of a Pakistani Court may assert a breach of international law and thus a denial of justice. It has been suggested by some that the law of Pakistan has permitted the Pakistani courts to intervene in foreign arbitrations, to negate arbitration agreements, and to accede to the requests of Pakistani parties who wished to be relieved from their obligations to arbitrate.

Since the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 has repealed the offending parts of the the Arbitration (Protocol and Convention) Act, 1937, and the common law that had developed in this area therefore, this argument is no more sustainable. The position now is simple: a substantial deviation from international law, a denial of an alien's procedural rights or a manifestation of discrimination, will amount to a breach of international law.

5.5.2.1.2 Negation of Arbitration Agreement to which the State is a Party

Where the Government itself is a party to, or bound by, an arbitration agreement then Governmental negation of such an agreement – even if by the order of a national court – itself constitutes a denial of justice, and so a breach of international law. There are, sadly, many examples²⁵ in

²² per J Garner, International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice, 10 British Yearbook of International Law (1929), p.181, at p.183.

²³ per J de Arechaga, International Law in the Past Third of a Century, 159 Recueil des Cours (1978), p.282

²⁴ See generally: Stephen Schwebel, Denial of Justice by Governmental Negation of Arbitration, in International Arbitration: Three Salient Problems.

²⁵ See the Hubco case Supra note 5. Himpurna v. Indonesia (Himpurna California Energy Ltd v Indonesia, interim award, 26 September 1999; final award, 16 October 1999, extracts in (2000) XXV Yearbook Commercial Arbitration 109.

²⁶ (2000) XXV Yearbook Commercial Arbitration 109, at pp.182-3.

²⁷ 12 Iran-US CTR, p.308, 318-9.

²⁸ ICSID Case No. ARB/03/3

which States have sought to avoid their commitments to arbitrate, most often by recourse to their own courts.

This is widely considered a denial of justice as such recourse prevents a foreign party from pursuing its remedies before a forum to the authority of which the State consented, and on the availability of which the foreigner relied in making investments explicitly envisaged by that State.²⁶

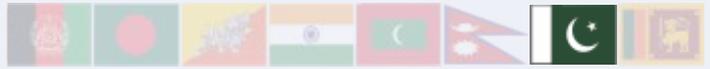
5.5.2.2 Breach of Substantive Treaty Obligations

Aside from the doctrine of denial of justice, which focuses upon the rights of aliens to standards of justice, it is now settled that the decision of a national court might itself breach a State's substantive international law obligations. For example, as a matter of customary international law, no State is entitled to expropriate the rights of an alien, without appropriate compensation. This obligation may well be breached by the decision of a national Court. Hence in the *Oil Field of Texas* case²⁷, the Iran-US Claims Tribunal held that a judicial decision (of the Islamic Court of Ahwaz – a lower court) amounted to a measure of expropriation.

This aspect has now become of critical importance because of the substantive obligations, including the provision of *fair and equitable treatment* to foreign investors that the Pakistan State (as with most other States) has undertaken in its numerous BITs.

Bringing all these strands together, a decision by any Court in Pakistan – including the Supreme Court – that undermines an arbitration agreement or an ongoing arbitral process, may be a breach of the State of Pakistan's affirmative obligations under a BIT, and give rise to a cause of action by an investor directly against the State.

This is not simply academic. Pakistan has already faced such an allegation (in the BIT arbitration in *Impregilo v Pakistan*²⁸) – a US\$ 850 million claim by foreign investors against the State of Pakistan which was settled in 2005. Part of the claim focused on the denial of a contractual



right to arbitrate, by reason of allegedly adverse interference by the Courts of Pakistan.

5.5.3 Procedural Analysis: Recourse by Foreign States and Individuals Against the State

Finally, there is the question how, as a matter of procedure, an individual (or a foreign State) might bring such a cause of action against the State of Pakistan.

The advent of BITs, as described above, is the short answer. Most BITs contain a standing consent to international arbitration on the part of each State, which may be accepted by individuals. Hence, the substantive rights afforded by BITs are given procedural teeth. This direct access to the remedies of international law is a dramatic development, yet many have still to appreciate the breadth of its consequences.

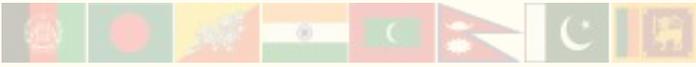
6. EPILOGUE

Indeed, today arbitration is predominantly driven by trade and investment, be it State-State arbitration or investor-state arbitration. Investors demand less intervention by the courts and host states demand wider 'public policy' considerations. Countries such as China and India have attracted billions of dollars' worth of Foreign Direct Investment by inter alia making their arbitral awards in line with the international laws.

If Pakistan intends to attract similar investment from around the world it will have to regain the initiative, it had in the 1950s and redefine the approach of its Courts to international arbitration. This will require several different concrete steps, including but not limited to:

- (a) Arbitration should be followed in its true essence which means that arbitrators should decide the dispute without the need for the matter to be taken to the court. Similarly, the Pakistan courts should strictly limit the scope of challenge to arbitration proceedings especially on frivolous grounds to avoid the range of tactics employed by the parties to arbitration proceedings to get a 'second bite at the apple'.
- (b) The wholesale reform of the Arbitration laws which in turn will require much more than simply enacting the UNCITRAL Model Law, since a host of local juridical issues will need to be addressed.
- © Establishment of Council of Arbitration to provide facilities for arbitration of both domestic and international commercial disputes;

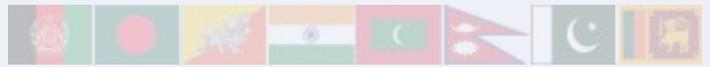
- (d) Pakistan should, as a matter of policy, promote the SAARC Arbitration Council and subscribe to the UNCITRAL Arbitration Rules;
- (e) The government should undertake a comparative analysis of UNCITRAL, ICSID, ICC and other arbitration procedures with a view to promoting healthy competition between these mechanisms to ensure proper and reasonable costs, neutrality and speed;
- (f) Most importantly, and perhaps of most difficulty, the reform of legal and judicial attitudes towards arbitration. Such reforms can only be achieved once Pakistan's defensive posture in this field is overcome. The more lawyers, academics and judges in Pakistan that become involved in the field of international arbitration, the sooner local distrust of the process may diminish.



Mr. Faazaan Mirza, Deputy Director SARCO represented this Council at the 58th Session of the Programming Committee Meeting of SAARC, alongside other heads of Specialized Bodies and Regional Centres. The Meeting was organized through virtual mode from the SAARC Secretariat in Kathmandu, on the 15th December 2020.

PROGRAMMING COMMITTEE MEETING OF SAARC





Important updates from the SAARC Region

Afghanistan

1. An online training on alternative dispute resolution program was held by the Asian International Arbitration Center (AIAC) based in Kuala Lumpur, Malaysia in partnership with Commercial Law Development Program (CLDP) for the staff of Afghanistan Center for Commercial Dispute Resolution (ACDR).

The purpose of the abovementioned training was to provide information on the operation and structure of the AIAC and detailed information on resolving disputes through arbitration, mediation, adjudication, and domain name dispute resolution.

Bangladesh

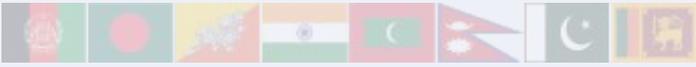
Minister for Law, Justice and Parliamentary Affairs Mr. Anisul Huq, MP has said that the present Government is relentlessly working on incorporating Alternative Dispute Resolution (ADR) provisions in different existing laws of the country in order to make commercial dispute resolution process easier and less time consuming. Our judiciary has already started conducting court proceedings via video conferencing. However, we are yet to go a long way regarding the virtual form of ADR. Suggested virtual ADR practices can either be based on phone conferences or internet supported video conferences

India

1. In *Vidya Drolia and Others vs Durga Trading Corporation* (dated 14 December 2020), the Supreme Court of India pronounced its landmark precedent as to the arbitrability of landlord-tenant disputes in the Indian context. The apex court considered two distinct yet interconnect aspects of the Arbitration and Conciliation Act, 1996 viz. (i) the meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and (ii) the conundrum of who decides the question of non-arbitrability. The view taken by the apex court in this case has affirmed the arbitrability of landlord-tenant disputes and has also set the record straight as to all the factors that need to be assessed by stakeholders at the time of submitting disputes to arbitration.

2. In *Government of India v Vedanta Limited & others* (dated 16 September 2020, in Civil Appeal No. 3185 of 2020), the Supreme Court of India rejected the Government of India's challenge to the enforcement of a foreign arbitral award rendered in favour of Vedanta Limited, Ravva Oil (Singapore) Ltd and Videocon Industries Limited.

This is a welcome decision affirming a pro-enforcement approach to international arbitration and providing clarity on the applicable limitation period.



DISPUTE RESOLUTION CLAUSES OF SARCO

The SAARC Arbitration Council recommends the inclusion of the following clause:

MODEL ARBITRATION CLAUSE

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

Consider adding to model clause:

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

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

The SAARC Conciliation Rules provide a standard clause for inclusion by the parties in their contract/agreement for trade or services. The Clause states:

MODEL CONCILIATION CLAUSE

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

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



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