

8<sup>th</sup> Edition, June 2020

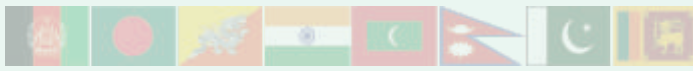


# NEWSLETTER



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**Faazaan Mirza**

ASSOCIATE EDITOR  
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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.



**Mr. Faazaan Mirza**  
**Deputy Director**

## EDITOR'S MESSAGE

**Dear 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 8<sup>th</sup> Edition of the SARCO Newsletter. This edition features news and developments from the SAARC region on arbitration and ADR. There have also been interesting and positive news about developments from our partners in the SAARC Member States. Additionally, in this Edition, there have been very comprehensive articles which have been included on pressing and relevant topics regarding Arbitration, Investment and dispute resolution from among the notable academics, professionals and officials. 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 the contributions included in this Edition of the Newsletter.

In order to protect the health of our arbitrators, partners in the region and the participants during the COVID-19 pandemic, we have deferred our Workshops and Seminars to be held in the SAARC Member States, for the time being. We are monitoring the government regulations and hope to engage with our partners in the region, as soon as the situation improves to allow organization of the events. SARCO has also engaged with our partners and helped institutions organize their activity through virtual means, during this pandemic.

To ensure that you continue to stay connected with SARCO and receive communications and updates, please keep visiting our website and our twitter page (@sarco\_sec). I look forward to the suggestion 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!





## PROFILE OF H.E. THE SECRETARY GENERAL OF SAARC



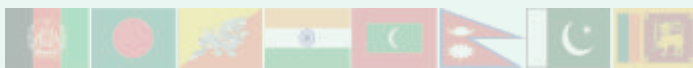
H. E. Mr. Esala Ruwan Weerakoon of Sri Lanka assumed charge of office as the Secretary General of the South Asian Association for Regional Cooperation (SAARC) with effect from 01 March 2020. He is the fourteenth Secretary General of SAARC.

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. Mr. Esala Ruwan Weerakoon, Secretary General, SAARC paid an introductory courtesy call to the Rt. Hon. Mr. K.P. Sharma Oli, Prime Minister of Nepal.



**Dr Raheem Awan**  
Ph.D in Law, LLM (UK)  
Secretary, Law and Justice  
Commission of Pakistan



## Interview of Secretary, Law and Justice Commission of Pakistan

*SARCO thanks the worthy Secretary LJCP for his time and deep insight for this interview.*

- **Please outline the role and functions of the Law and Justice Commission of Pakistan (LJCP).**

The Law and Justice Commission of Pakistan (LJCP), a Federal Government institution, is established under the Law and Justice Commission of Pakistan Ordinance, 1979 (Ordinance No. XIV of 1979). It is headed by the Chief Justice of Pakistan and comprises 13 other members including the Chief Justices of the Federal Shariat Court and High Courts. The Commission has representation from all the provinces and Islamabad Capital Territory.

The Section 6 of the Law and Justice Commission of Pakistan Ordinance 1979 elaborates mandate and functions of the Commission which mainly relates to Legal judicial research and introducing reforms in the administration of justice to ensure substantial, inexpensive and speedy justice. LJCP is also mandated to administer and manage Access to Justice Development Fund (AJDF), an endowment established by the Government of Pakistan to support under resourced judicial sector through infrastructure development, legal empowerment and professional development.

LJCP Secretariat also extends Secretarial support to the National Judicial (Policy Making) Committee (NJPMC) a statutory body of judicial leadership mandated to formulate and implement judicial policies within the court system to improve the performance of administration of justice in the country. The LJCP Secretariat also provides secretarial support to special committees constituted under the auspicious of LJCP. These committees include Police Reforms Committee under the chairmanship of Honorable Chief Justice of Pakistan, National Judicial Automation Committee (NJAC) under the chairmanship of the Hon'ble Mr. Justice Mushir Alam, Senior Puisne Judge, Supreme Court of Pakistan and five Justice Committees under the chairmanship of the Hon'ble Chief Justices of the respective High Courts whereas Secretary, LJCP acts as Secretary of all these committees.

- **What are the some of the initiatives that are currently**

### **being pursued or have been recently completed by the Law & Justice Commission of Pakistan?**

In recent past the LJCP has achieved various milestones in the field of legislative reforms as well as fair administration of justice in the country. Besides 138 Law reform reports, the Commission under the directions of the Hon'ble Supreme Court of Pakistan also held consultations on various issue of public importance like Rights & Welfare of Transgender Persons, Creating a Water-Secure Pakistan, Alarming Population Growth in Pakistan: Call for Action, launching of Police Reforms Report, holding of 8<sup>th</sup> Judicial Conference etc. and formulated recommendations for legislative, administrative and policy reforms. In addition, consultative sessions with respect to "Effective Enforcement of Transplantation of Human Organs & Tissues Act, 2010" were also conducted.

The Commission is also actively supporting the Supreme Court of Pakistan (SCP) in diverse complex and/or chronic cases which ranges from issues of Enforcement of minimum wages, Regulation of NGOs/INGOs, Effective enforcement of Probation and parole laws, Ensuring Publication of Error Free Laws in Pakistan, Improving the performance of the disciplinary committee and tribunal of Pakistan Bar Council, Transparency standards and other important legal matters. In the above-mentioned cases, the LJCP Secretariat has impartially advised and submitted reports in Court proposing comprehensive polices, suggested various laws and rules on aforesaid areas to respective governments after examining key issues, in particular, relating to legal, regulatory, policy and organizational factors hindering the effective implementation of laws.

Further, LJCP also assisted NACTA in formulation of Recommendations for Revamping the Criminal Justice System. For legal empowerment and raising public awareness of laws, LJCP has so far published 8 volumes of Qanun Fehmi and various Urdu write ups aiming to simplify laws and for public awareness and easy access have uploaded them on LJCP website and same is an ongoing process.



The NJPMC wing of LJCP is engaged in the process of administration of Justice through effective policy making. The NJPMC recently have achieved certain goals which includes the 'Expedition Justice Initiatives' in 2019, under which model criminal courts, model civil appellate courts and model trial magistrate courts have been established in the country. On the recommendations of the NJPMC, specialized and model courts including Gender-based Violence Courts, Child Rights Courts were established and trainings of Judicial Officers, Prosecutors and relevant stakeholders were conducted with collaboration of Asian Development Bank (ADB). Further, on recommendation of NJPMC, various departments in ICT were established. These includes State of Art Forensic Science Laboratory, Prosecution, Probation and Parole, Cooperative Society department aimed to improve service justice delivery and to reduce sufferings of people residing in the Capital.

National Judicial Automation Committee “(NJAC)” established for the automation of courts for efficient justice service delivery. The NJAC is working for automation and integration of courts in Pakistan on all levels including special courts and tribunals, and other stakeholders of the criminal justice sector.

The Provincial Justice Committees headed by the chief justices of the respective High Courts are also functional under the umbrella of NJPMC to establish a close linkage between justice sector institutions and for effective administration of justice. Formation of justice committees and their unique composition reflecting the blend of Judiciary and executive is an exceptional example whereby these committees are working of dispensation of inexpensive and speedy justice.

Particularly in connection with the Alternate Dispute Resolution initiatives the LJCP organized the 8<sup>th</sup> Judicial Conference, 2018 on the subject “Towards Regional Economic Integration & Rule of Law”. In said conference two thematic groups were specifically designed to deliberate on the dispute resolution mechanism, one thematic group deliberated on, regional economic integration and effective dispute resolution mechanism and the other was on alternative dispute resolution methodologies and deterring factors. The participants of the Conference formulated effective recommendations in these groups.

In addition, LJCP has also arranged recently a one day training workshop in collaboration with the Oxford University, UK for capacity building of judicial officers on International Commercial and treaty Arbitration.

- **Arbitration in Pakistan is still governed by the Arbitration Act of 1940. The focus on ADR methods,**

**particularly arbitration, has increased significantly and that courts are increasingly adopting a 'pro-arbitration' approach. What are your thoughts about the need for legislative reform in this regard?**

To understand the need of legislative reforms in the context of arbitration we need to examine the applicability of the Arbitration Act 1940 (AA 1940) and other laws dealing with arbitration and enforcement of award in Pakistan. No doubt, despite elapse of decades and promulgation of Arbitration (International Investment Dispute) Act 2011 (AIIDA) and Recognition and Enforcement (Arbitral Agreement and Foreign Arbitral Awards) Act 2011 (REAFA), the AA 1940 has its own significance on domestic arbitration and enforcement of awards under New York Convention (NYC). The AIIDA provides rules on recognition and enforcement of ICSID awards, section 7 of which has made it clear that AA 1940 would not be applicable upon the ICSID arbitral proceedings. However, it does not provide replacement or alternative to the provisions of the AA1940 such as enabling the domestic courts to grant interim relief by means of interim injunction, preservation, inspection, custody etc. These lacunas and shortcomings reflect that wholly debarring the AA 1940 without offering its replacement will create a vacuum, some shortcomings and increase controversies and ambiguities.

It may be said that no law can be deemed to be a bad law completely and the same applies to the AA 1940 as besides some disadvantages it also has some advantages. Application of such advantageous provisions may well be helpful in enforcement proceedings. Therefore, without enacting the alternative debarring the AA 1940 will be problematic in enforcement proceedings and without enforcement an award is nothing more than a piece of paper.

Another important aspect which denotes the importance of Legislative reforms is that the despite barring the AA 1940 the AIIDA does not provide rules to exclude the domestic courts from exercising parallel jurisdiction on matters falling under auspices of ICSID as has been witnessed previously in **SGS v Pakistan**. It reveals that the AIIDA has not embedded rules to stay the proceedings before the municipal courts falling otherwise under the ICSID jurisdiction. Moreover, it neither provides rules on judicial assistance in aid of ICSID arbitration for the collection or preservation of evidence nor does it prescribe rules on seizing or attaching the underlying assets or subject matter of the proceedings.

Similarly, the importance of AA 1940 and need of legislative reforms can be ascertained from the scheme of REAFA which deals with the issues of international arbitral





agreement and recognition and enforcement of awards falling under NYC. It is applicable to the arbitral agreements concluded before, on and after the commencement of the Act; however, awards announced prior to 14 July 2005 are not covered by the instant Act. It has as well repealed the Arbitration (Protocol and Convention) Act 1937 ("APC"), the APC 1937 shall remain in effect to the extent of the foreign arbitral awards announced before the enforcement of REAFA. Besides, it will remain applicable on those awards which are not deemed as foreign awards pursuant to section 2 of this Act. Nevertheless, the REAFA has not expressly outlawed the AA 1940, therefore court may refuse the enforcement of such award relying on any of the grounds embedded in the AA 1940. Contrary to AIDA, application of the AA 1940 in REAFA demonstrates the immense authority of the domestic courts on such proceedings, which is further strengthened by the force of CPC 1908. It is important aspect that if arbitral proceedings falling under NYC were governed under Pakistani law, the award rendered as result of such proceedings will be deemed as a domestic award, hence the AA 1940 will be applicable on enforcement proceedings.

Significance of AA 1940 under REAFA and its inapplicability in pursuant to section 7 of AIDA without enacting its alternative has created a vacuum; therefore, it is recommended that the GOP shall incorporate new provisions to fill the gap.

- **Pakistan has recently been at the receiving end of a few BIT awards. Why do you think this has been the case and what can be done to, either avoid, or to win investment arbitrations?**

Verdicts of different arbitral tribunals against Pakistan have now affirmed my earlier apprehensions regarding investment arbitrations against Pakistan. After examining key treaty provisions and their interpretations, I was of the view that in Reko Diq and Rental Power / Karkey cases, provisions of Pak-Australia and Pak-Turkey BITs were broad enough to empower arbitral tribunals to hold Pakistan in breach of its treaty obligations. It is reiterated here that the responsible quarters completely lack the required knowledge, expertise, skills and will to understand such legal terminology, their interpretations, latest development in treaty regime and their pros and cons. Resultantly, they do not have requisite know how and expertise to negotiate and conclude such treaties and foresee consequences of BIT obligations upon Pakistan being capital importing State.

It is to keep in mind that, to negotiate BITs, many skills and proficiencies, especially, legal expertise are required. Apart from a few learned government officials, there was

no shared understanding between government officials on this point. Consequently, GOP continued negotiating BITs without considering the serious repercussions of adhering to such an approach. This reckless approach is a matter of disappointment which also reflects anxiety about the future consequences as there is nothing to suggest if there any meaningful negotiations have ever been conducted. Therefore, as consequences of these pro capital exporting States BITs it will be difficult for any government in Pakistan to follow its treaty obligations which may further raise questions upon sanctity of the contents of these BITs.

Existence of this careless approach is reaffirmed by Board of Investment ("BOI") in terms of its Investment Policy 2013 which provides that until now GOP and BOI have conducted negotiations in a whimsical manner. It has simply failed to consider the legal and economic consequences involved, the policy provides that:

"3.1..... the existing BITs have been negotiated over a period of 50 years by various ministries and there are great inconsistencies between them, which create legal uncertainty for both investors and the government. BOI will develop a model text with assistance of Law and Justice Division, which will ensure protection to investment on reciprocity basis and that model BIT will replace the existing to possible extent while all new BITs will negotiate on new templates.

- **After the Government of Pakistan settled the Karkey case with the Government of Turkey, the courts of Pakistan, including the Supreme Court, have observed that agreements containing international arbitration arrangements should be dealt with certain degree of caution. What do you understand from this observation? Please, summarize this for our readers.**

As earlier mentioned that the subsequent governments of Pakistan recklessly executed these treaties and did not bother the legal and economic consequences of executing such treaties. The GOP did not care because, in the end of the 20<sup>th</sup> century, except for **Hubco**, no significant case on violation of investment agreements or treaty obligation has been escalated to international forums against Pakistan. However, at the start of the 21<sup>st</sup> century, a series of cases on alleged violation of treaty obligations came into limelight against Pakistan, such as SGS, Bayindir Insaat and Dallah Real Estate (commercial arbitration). The awards were also pronounced against Pakistan which clearly suggest that such unbalanced development of





treaty regime that acknowledges extra ordinary rights and over protection for foreign investors is gradually weakening the real spirit/objective and purpose of modern investment instruments.

In my humble opinion, the capital importing states such as Pakistan do not execute such instruments merely for protection of FDI. In fact, they trade their sovereignty for the purpose of achieving a sustainable development of their economy and to develop their infrastructure. Therefore, being a capital importing State it is vital for Pakistan that, whilst negotiating and executing BITs, enacting municipal laws and promulgating investment policies it must consider the maximum protection to FDI, importance of sustainable long-lasting development and safeguard its State sovereignty simultaneously.

As long as I have examined the BITs and treaty arbitration cases against Pakistan, I am of the opinion that GOP lacks the skills and know how to negotiate BITs and evaluate their negative economic and legal effects upon the State of Pakistan.

I have already stated that GOP has executed BITs without meaningful negotiations in haphazard and whimsical manner without taking into the account their aftermaths. My study on BITs of Pakistan reveals that these BITs had never been the product of meaningful negotiations. None of the government stakeholders knew that BITs had been signed; no file, record or exchange of notes had never been maintained to show that any meaningful negotiation ever took place. The maximum level of input to the negotiation that Pakistan had proof-reading and no significant suggestions was evident.

My arguments get strength from the new version of the Pak-Turk BIT, which does not provide any term similar to Art. 6 of its previous version hence the GOP needs to be careful while negotiating such terms or at least negotiate subject to some clarificatory notes. To avoid uncertainty over the application of umbrella protection and choice of forum, GOP is required to insist on provisions similar to art. 10(5) of Pak-German BIT 2009. However, regrettably, inconsistency of such vital treaty provisions and use of open-ended provisions clearly demonstrate that the negotiators of GOP are inconsistent in their understanding and approach of BITs provisions.

Coming to second part of your question I would say that by redefining the constitutional obligations, the SCP requires the executive to; accomplish their duties with the greatest capacity, honesty and faithfully in accordance with the constitution, law and rules of assembly, to uphold the 'sovereignty, integrity, solidarity, well-being and prosperity of Pakistan' and to preserve it against any likely

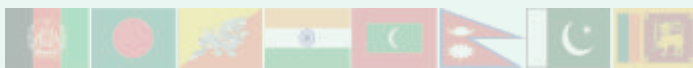
threat. In my humble opinion, the SCP requires the responsible quarters to adopt vigilant and careful approach so that in future similar situation like Karkey and Riqo Diq could be avoided.

#### • **How do you see the arbitration market in the SAARC region?**

Reciprocity of benefits for the economy of a country, traders and investors is an important characteristic of FDI. Investment is always profit-oriented, and flows towards financial markets where opportunities to maximize the profits are greater than the host market of the investor. An ideal business environment and better opportunities to maximize the return of investment in the host country attract and motivate foreign investors. Natural resources, cheap manpower and low production cost coupled with many other reasons make the SAARC countries perfect and attractive markets for foreign investors. The economies of SAARC countries have been seen as prime destinations for FDI and commercial trade. Besides, a part from maximum profit making, the protection of FDI assets is understandably a prime concern of foreign investors whilst making investment in an alien economy. A vigilant investor would always take into consideration the level of protection afforded to him and his assets/investment as well as deterring factors in the host State. I believe that the intra-SAARC trade is presently, only a fraction of its true potential and a stimulus to boost intra-SAARC trade will improve the arbitration market in this region.

SAARC region comprises of emerging and big economies such as Pakistan, India, Bangladesh and these countries offer a lot to the investors such as investment treaties in agriculture, natural resources, tourism etc. SAARC countries population is over 1.7 billion, accounting for 21% of the world's total population scattered all over the countries. SAARC's percentage share of the global trade is increasing and this has shown an increase in the number of disputes and the complexity of disputes. Parties should however realize the fact that a regionally mandated forum is available for them to resolve their disputes within their state or at the least within this region.

This could only be achieved through foreign investments and encouraging investors and traders of SAARC nations to invest in each other's country and trade with each other. However, keeping in view the geo-political situation of these countries, this could only be achieved by providing peace of mind to the investors through the strong dispute resolution forums within the SAARC countries so that they could resolve their disputes amicably within the region. In this situation, the arbitration market in SAARC region appears to be very potential and has a bright future.



- **Since its creation, SARCO has been upgraded to the status of a Specialized Body of SAARC. How do you view the role of the SARCO, in providing a regional framework for resolving disputes through arbitration and conciliation?**

It is very encouraging that the SAARC Arbitration Council provides a legal framework within the region for fair, equitable and efficient settlement through conciliation and arbitration of commercial, investment, and such other disputes as referred to the council through agreement, provides fair, inexpensive and expeditious arbitration in the region. These are the real features which an investor and a trader considers before taking decision to invest or trade with another economy.

These unique features designate significant role to the SARCO for provision of regional framework for dispute resolution. The SARCO, a Specialized SAARC body carries its own regional importance for resolution of disputes arising within the SAARC countries as cross border ground realities of SAARC nations are similar, therefore, we believe that SARCO through its regional framework can work effectively in resolution of disputes.

- **What role do you think can SARCO, the only regionally mandated arbitral institution of SAARC, can play in improving the arbitration eco-system in Pakistan?**

As we have discussed above the SARCO contains significant importance in regional dispute resolution process. Being regionally mandated arbitral institution of SAARC, it can play a significant role in regional dispute resolution of SAARC countries, especially in context of Pakistan SARCO's mandate is very important. Since Pakistan's economical relationship with its regional neighborhood are gradually improving, resultantly, the commercial trade has been increased into many folds. Besides, it is only forum which by offering a platform to the investors of member States for dispute resolution can promote bilateral trade and encourage investors of member States to invest in each other's counties with full confidence.

- **How can SARCO and LJCP work together to strengthen arbitral work domestically and regionally?**

Since, LJCP is promoting ADR techniques and intended to reduce the backlog of cases from the formal judicial system through encouraging mediation at local level as well as promoting amicable solution of international trade disputes through regional arbitration and on the other side SARCO is engaged in the arbitral process with respect to SAARC dispute, therefore, a collaboration of SARCO and LJCP can further strengthen the domestic and regional arbitral work. In this regards it has to be pointed out that

the LJCP has already proposed for developing a Regional, Economic Integration through effective dispute resolution mechanism by keeping in view the importance of regional arbitration in international trade, The LJCP is working on a proposal for establishment of "BRI Dispute Resolution Center" to devise a comprehensive Dispute Redressal Mechanism for the settlement of business, trade, investment and other related disputes arising during implementation of BRI and CPEC Development projects. The proposed mechanism is the need of the day for the successful implementation of the BRI projects to resolve the disagreement if arises in effective manners. Therefore, the LJCP and SARCO may exchange their expertise, knowledge and extend technical support to each other for promotion of regional arbitration centers.

Moreover, the LJCP is also working on the proposal to establish model post institution mediation centers wherein after institution, the matter with the consent of parties will be referred for mediation and to resolve their disputes amicably through third party i.e. mediator. The LJCP and SARCO in order to implement the proposal could work in collaboration for promotion and establishment of ADR centers and providing training opportunities to the lawyers and judicial officers. A part from ADR centers, the LJCP is planning to devise training programs for the judicial officers of the country on the same pattern as a training in collaboration with the University of Oxford was organized by LJCP on International Commercial Arbitration for capacity building of different professional, justice sector institution's representatives to enhance their practical legal approach towards international dispute resolution.

- **In the end, what would be your leaving remarks/message for our esteemed readers?**

We are looking forward for effective role of SARCO in regional arbitration regime and expecting to work together.

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## Activities & Participations



Mr. Zahidullah Jalali, Director General was invited to participate in the *APRAG Conference 2020: Innovations & Challenges facing the Arbitration Industry* organized in Bangkok, Thailand by the Asia Pacific Regional Arbitration Group (APRAG) in collaboration with the Thailand Arbitration Centre (THAC).



Joint Audit Team 2019 (JAT-2019) visited SARCO and completed the Audit of accounts of SARCO for the year 2019.



Mr. Faazaan Mirza, Deputy Director met with Dr. Raheem Awan, Secretary, Law & Justice Commission of Pakistan to discuss possible future collaborations.



Mr. Faazaan Mirza, Deputy Director participated in the 3rd Edition of the *International Conference on Arbitration in the Era of Globalization* organized by the Federation of Indian Chambers of Commerce and Industry (FICCI) & the Indian Council of Arbitration (ICA) in New Delhi, India.



**Judge Pema Needup**  
Presiding Judge,  
Punakha District Court, Bhutan



# Nangkha Nangdrig (Mediation): A Panacea for Dispute Resolution in Bhutan<sup>1</sup>

## Introduction

It is the noble vision of His Majesty the King to ensure that potential parties to the disputes enjoy the opportunity to resolve their conflicts on a mutually acceptable basis through mediation. This will sustainably promote peace and harmony in the society for all times to come. The Alternative Dispute Resolution (ADR) is a concept that is enshrined in Article 21(16) of the Constitution of Kingdom of Bhutan 2008 (Constitution). It is known as Dham Kha Chen gi Khoen Dhum. The ADR is now governed and regulated by the Alternative Dispute Resolution Act of Bhutan 2013 (the ADR Act). The Government has recently established an independent body – Alternative Dispute Resolution Center (ADRC) and appointed its Chief Administrator to administer the affairs and business of the center and frame related policies and rules. The Arbitration, both domestic and international, conciliation, mediation and negotiation are covered by the ADR Act although terms for arbitration, conciliation, mediation and negotiation in Dzongkha (national language) are confusing. In this paper, I elucidate the inherent benefits of mediation of disputes-especially in a collective and community-oriented society, and its unsuitability to some categories of disputes.

## Mediation in Bhutan

Bhutan has a long history of resolving disputes through ADR mechanisms, such as mediation. According to some sources, traditional mediation, commonly known as 'Nangkha Nangdrig' has been an integral part of Bhutanese culture and tradition, dating as far back as the 7<sup>th</sup> century. The formal justice system was established only in the 1960s. Prior to that, for centuries mediation was the primary dispute resolution system. It was mainly based on the principles of compassion and peaceful coexistence of the community-oriented Bhutanese society. This traditional practice has declined over the last decades. However, recent efforts have borne fruits to

revive it.<sup>2</sup>

The legal formalization of the practice of mediation in Bhutan was enshrined in sections DA 3-1 & DA 3-2 of the Thrimzhung Chenmo (Supreme Law) of 1953. The option to resolve civil disputes through mediation is now incorporated in section 150 of the Civil and Criminal Procedure Code (Amendment) Act of Bhutan 2011 (CCPC). Now, almost all the statutes contain provisions requiring the disputes to be resolved through mediation process first, before resorting to litigation. In addition, judges are mandated to inform litigants of their right to mediate their disputes out of court. While the importance of negotiated settlements is recognized by the judicial system, there is no procedural mechanism established for conducting the mediation process. Thus, mediation procedures have varied widely, depending on who conducts the mediation and local customs and practices.

The Bhutan National Legal Institute (Institute), research and training arm of the Royal Court of Justice, the Judiciary of Bhutan began training local government and community leaders, and other relevant people in the professional mediation of disputes since 2012. It has also been educating the public about the beneficial use of mediation in the community under the initiative of Her Royal Highness, Ashi Sonam Dechan Wangchuck. In conformity with modern mediation standards and trends, the Institute has been promoting interest-based and facilitative mediation in the country. The local government and community leaders are now fervently engaged in the mediation of community disputes, which erupt in their respective areas.

As per the National Mediation Report 2017, hundreds of cases are diverted from mainstream judicial system to win-win outcomes, thereby cementing the social bond and relationships between the citizens.<sup>3</sup> In addition,

<sup>1</sup> This Article by Judge Pema Needup was first published in the *Bhutan Law Review*, Volume XI Spring 2019, published by the Bhutan National Legal Institute, Thimphu, Bhutan.

<sup>2</sup> See Yargay, L.R. 'Mediation in Bhutan: Raising Hands and Saving Faces,' *Bhutan Law Review*, (2014) 8:15-18.





several private mediation services are sprouting in the country, especially in the urban areas. At the same time, the traditional mediation system has been reinvigorated with community mediation services, which are always provided free of cost.

The Judiciary is also poised to introduce and institutionalize the Court-Annexed Mediation (CAM) system in all the courts in the country, whereby the judges can refer appropriate civil cases to the Court-Annexed Mediation Units (CAMU). This creates another opportunity for the people to resolve disputes amicably with the assistance of the in-house mediation services of the courts. This will not only help courts to decrease the dockets, but enhance access to justice.<sup>4</sup> In the words of one Texas Judge, “I am interested in mediation because the cases settle earlier, and that gives me more time to be judge, to spend that time I can gain to improving the quality of justice in my court.”

### Benefits of Mediation

There is no universally accepted definition of mediation. It is a process of assisted negotiation in which a neutral third party (mediator) who has limited or no authoritative decision-making power assists the parties to voluntarily reach a mutually acceptable settlement of the issues in dispute.

Mediation and litigation are polar opposites. Parties who opt for trial have relatively little control over either the process or the outcome. The trial proceeding is a formal and public one, conducted under detailed procedural and evidentiary rules, with a judge in control. A judge decides the outcome and in doing so is bound to follow established legal principles and procedures. It pits the disputing parties against each other, causing much ill will amongst them. One of them has to win and the other has to lose. This not only harms their social relationship, but also the economic conditions of the concerned parties. Nevertheless, the process of litigation is usually expensive and cumbersome causing a lot of delay and unnecessary costs leaving a stain and stigma of enmity on both the parties.

Referring to the downside of the litigation, President Abraham Lincoln has profoundly stated:

Discourage litigation;  
Persuade your neighbours to compromise  
whenever you can;  
Point out to them how the nominal winner is often a real

loser;  
– in fees, expenses and waste of time.

Similarly, Samuel Johnson has said:

The plaintiff and defendant in an action at law are like two men ducking their heads in a bucket, and daring each other to remain longest under water.

Conversely, mediation is often voluntary, faster, cheaper, informal, confidential, and typically, the mediator has no authority to make a binding decision unless both parties agree to give the mediator that power. This means that the parties have greater flexibility and control over the outcomes that is mutually satisfactory (win-win) to both parties. Because of its collaborative, rather than adversarial process, and because mediation isn't inherently a win-lose process, important relationships can often be saved. Finally, for mediation produces better results more quickly and at a cheaper stake, compliance with mediated dispute resolutions is generally higher than with lawsuits. Therefore, Joseph Grynbaum has aptly stated, “An ounce of mediation is worth a pound of arbitration and a ton of litigation.”

### Process and Stages of Mediation

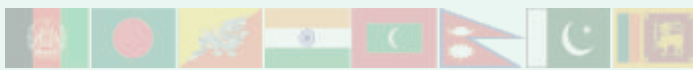
Mediation is an informal and flexible dispute resolution process. There is no best way to mediate a dispute. Mediation process varies with mediators and the parties, the conflict and mediation program. While stages of mediation are very important, none of our laws mention them. There are no guidelines on the mediation process as yet. Broadly, mediation stages can be divided into five stages:

1. Pre-mediation or Getting to the Table (Planning);
2. Opening the Mediation (Mediator's opening statement);
3. Exchanging Information (Parties' opening statements or story-telling);
4. Identifying and Negotiating Solutions (Identifying underlying needs/interests and generating options); and
5. Finalising Settlement Agreement.

### Role of a Mediator

The role of a mediator is contained in Section 172 of the ADR Act. The mediator assists and facilitates the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their disputes. The mediator does not impose his or her views or solution on the parties. Mediator only

<sup>4</sup> See Yargay, L.R. and Chedup, S. 'The Court-Annexed Mediation: Enhancing access to justice through the in-house court mediation services in Bhutan', *Bhutan Law Review* (2018)10:92-111.



facilitates the process, and solution has to come from the parties. A mediator has no right or duty to provide legal advice to the parties even if he/she happens to be a lawyer. The parties should seek legal advice solely from their legal counsel. During impasse, a mediator may evaluate the case, give the parties an idea of what the consequences might be if the case is taken to court and then give the parties a few ideas or possible solutions that could help resolve the dispute.

Even though mediation is a party-centered process, the mediator has to take charge of the process. A mediator has to maintain a high degree of confidentiality at all aspects of the mediation process. Confidentiality is an essential ingredient of effective mediation. The principal statutory authority for mediation confidentiality is contained in section 169 of the ADR Act and section 30 of the Evidence Act of Bhutan 2005 (Evidence Act). It provides that anything said or transpired in the course of negotiated settlement or during mediation shall not be admissible as evidence in a court of law. In the same vein, the parties cannot call a mediator as a witness to testify before the court of law.

#### **Cases which can be mediated**

Ideally, almost all disputes of civil nature can be mediated if the parties are willing to try although it may not be suitable for every case. There can be misapprehensions about the cases, which can or cannot be mediated. Generally, no criminal cases can be mediated. However, some non-violent crimes like those involving verbal harassment or assault may be successfully mediated. The parties may also negotiate the claims for compensatory damages if they are willing to compromise. In Bhutan, matrimonial cases without marriage certificates cannot be mediated, without the leave of the court. This is spelt under section KHA-9.3 of the Marriage Act of Bhutan 1980 (Marriage Act). Further, no parties can mediate a case, if a court of competent jurisdiction has already decided the case, or is pending or sub judice before a court.

#### **Mediation Agreement**

If the parties resolve the disputes mutually, the mediator may help the parties to draft the settlement or mediation agreements, usually on the same day.<sup>5</sup> Unless, the agreements are contrary to law, they are upheld by the courts and enforced. Unlike the general contractual agreements, mediation agreements do not require the attestation and signature of the witnesses. The agreements are signed by the mediator and the

parties; and the counsels if any.<sup>6</sup> Sections 35 and 36 of the Evidence Act have no application to the mediation agreement. Parties cannot raise objection to the validity of settlement agreement within ten days of the agreement because it is an agreement by voluntary consent.

#### **Challenges in Mediation**

Although, it is informal, cheaper and faster, mediation of disputes is more difficult than the adjudication of cases. Most people think that mediating dispute is as easy as splitting an orange into two halves, or dividing it fifty-fifty. In the court, established legal principles, procedures, legal provisions, rules and statutory Acts guide the judges. In mediation, a mediator cannot follow any of these, save his diplomatic and persuasive tactics and strategies. Section 171 of the ADR Act provides that provisions of the CCPC and the Evidence Act may not bind negotiated settlement proceedings. Without little or no coercive tools and force of the laws in their hands, the mediators must solely rely on their diligence, skills, knowledge and patience, empathy and the desire to help the parties and bring peace in the community.

Despite the obvious advantages, mediation has many flaws. It cannot solve all and every kinds of civil disputes. Certain type of categories of disputes do not lend themselves well to mediation. Mediation may not be successful if the mediators are inexperienced, untrained and unskilled for some cases as it require specific knowledge and expertise in that field. Similarly, mediation is not suited to a case where at least one of the parties has a strong aversion to the process. However, parties who are merely indifferent to or not especially keen about mediation still frequently benefit from the process and many cases settle even in these circumstances. On the other hand, where the aversion to mediation is particularly strong, then the process will likely fail. Mediation will likely fail if the parties do not participate in the negotiated settlement proceeding in good faith with the intention to settle dispute. A party, for instance may attempt mediation, not to settle the dispute, but to carry out an illicit discovery, i.e., to test the opponent's weakness; to tease out disclosure of an improvident settlement position to later advantage; to intimidate the opponent into abandoning the case; or to further some other improper purpose, such as to disclose publicly that mediation is ongoing.

Mediation also may not be effective if there is a power imbalance. The danger is that weaker parties will be unable to assert their position or needs and will accede to agreements

<sup>5</sup> Alternative Dispute Resolution Act of Bhutan, 2013 s.174 and 175.

<sup>6</sup> Section 150.3 of the *Civil and Criminal Procedure Code (Amendment) Act of Bhutan 2011*.



which are not in their best interests. Parties to a mediation may or may not be represented by a legal counsel. If a party to a dispute is self-represented, then the unrepresented party is at a disadvantage and will seek to rely on the mediator for advice either expressly or implicitly. This places the mediator in an awkward position.

Further, mediation may not be effective if the confidentiality is at stake. Confidentiality lies at the very heart of mediation. Confidentiality of mediation process should be maintained at all stages. Mediation may not be fair and just if a mediator fails to identify the underlying needs and interests of the parties. Seemingly, a dispute may be resolved but outcome may not be win-win to the parties. It may simply result in cutting an orange into two halves. Mediation may not be suitable if the cases in which one party seeks to clarify the law or requires a binding precedent or a judicial determination because mediation does not produce any rulings. If someone wants to make an impact on broader society or send a public message to a community or another party, mediation is not the right choice because it is a private and confidential process. Where injunctive relief is necessary to protect one party, a lawsuit may be a better choice.

Finally, in certain cases the parties simply want a judicial determination of their rights, win or lose; not a mediated resolution. In that event, they are entitled to a fair trial and ought not to feel pressured in accepting a compromise they are not interested in. Parties are entitled to have their rights decided in a court with appropriate procedural safeguards.

## Conclusion

Bhutan is a small country where people know each other and live together as a collective community in an interdependent and peaceful atmosphere. For all its advantages and effectiveness, adjudication of disputes in the courts result in win-lose outcomes, which affect the social harmony. Mediation was the primary dispute resolution tool used by our community

for centuries. When the modern professional courts came, the customary practice risked decline. However, it is widely used in the rural areas and resorting to the court is still the last resort. In the urban areas, the mediation is beset with the lack of trained or professional mediators both within and outside the courts.

It is at this time that the Bhutan National Legal Institute stepped in with the revival plans and strategies. The mediation system has once again become very vibrant in the community with the nation-wide training of the local government and community leaders. With the plan to introduce Court-Annexed Mediation services in the country, the future of mediation is very bright. Though, it is not a panacea for all categories of disputes, if conducted effectively, mediation affords parties opportunities to access the soft justice quickly and at relatively low cost compared to the complex and expensive court processes. Therefore, it is still “better to lose in the village than to win in the court of law”, as it has been for centuries.

**Note:** This article was contributed by Mr. Pema Needup, Presiding Judge at the District Court of Punakha in Bhutan. It was published in “Bhutan Law Review” Volume XI Spring 2019 at page 57-63 by the Bhutan National Legal Institute, Thimphu.

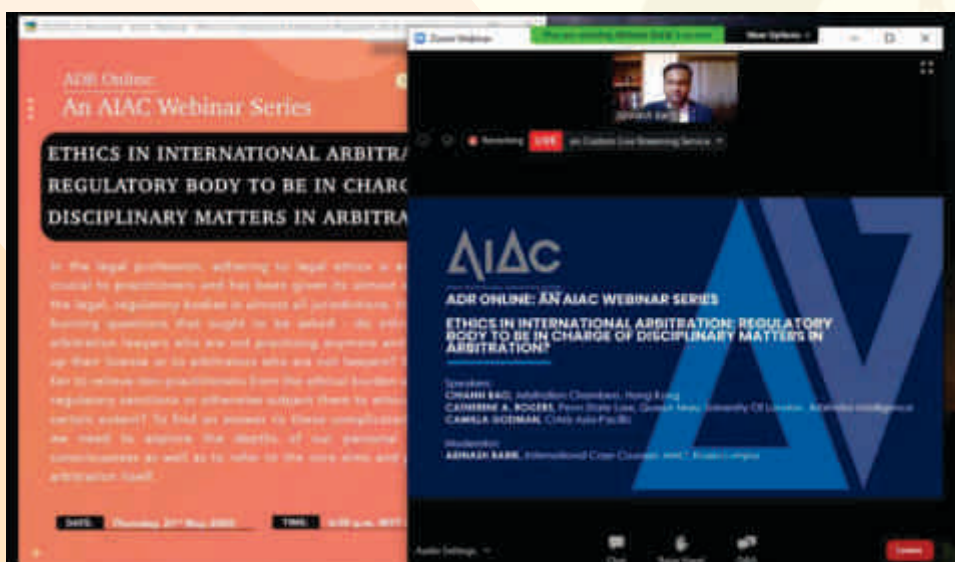


Bhutan National Legal Institute launched the National Mediation Report 2019 on 04 March 2020. The period covered in the Report is from January till December 2019. It sheds light, also on the Court Annexed Mediation started last year.





Mr. Bharatendu Agarwal, Assistant Director (Law) participated in the Webinar on *Arbitration Tales: Predicting the Future through the Looking-Glass of Past Recessions* organized by the Asia International Arbitration Centre (AIAC)



Mr. Bharatendu Agarwal, Assistant Director (Law) participated in the Webinar on *Ethics in International Arbitration: Regulatory Body to be in charge of Disciplinary Matters in Arbitration* organized by the Asia International Arbitration Centre (AIAC)

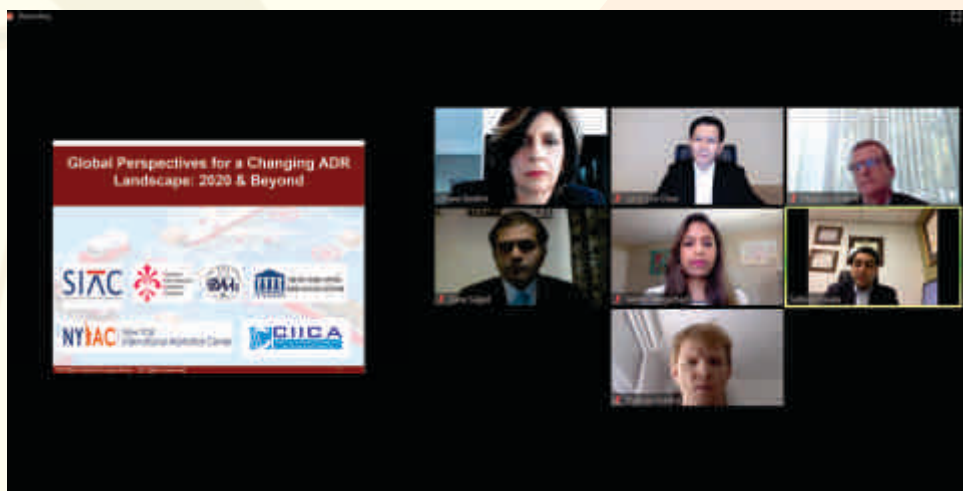


Mr. Faazaan Mirza, Deputy Director participated in the ZOOM Meeting on *How to Write an International Arbitration Award* organized by the Council for National and International Commercial Arbitration (CNICA)

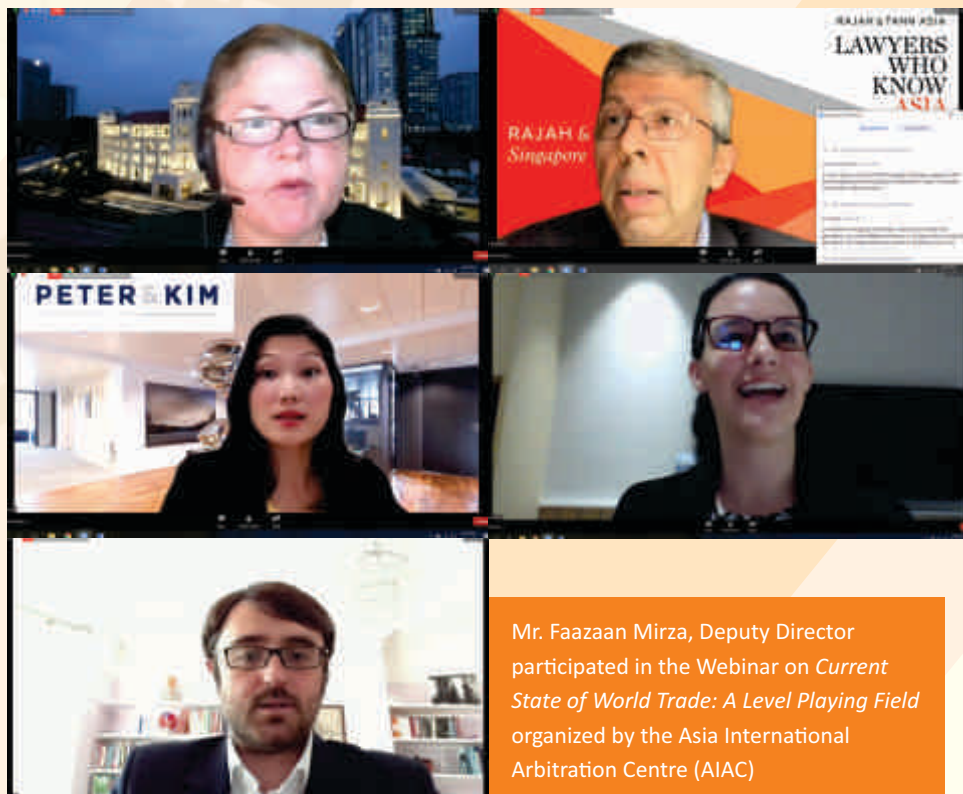




Mr. Faazaan Mirza, Deputy Director participated in the Webinar on *Economic Prospects in a Post-COVID World* organized by the Palkhivala Foundation.



Mr. Faazaan Mirza, Deputy Director participated in the Webinar on *Global Perspectives for a Changing ADR Landscape: 2020 and Beyond* organized by the New York State Bar Association (NYSBA)



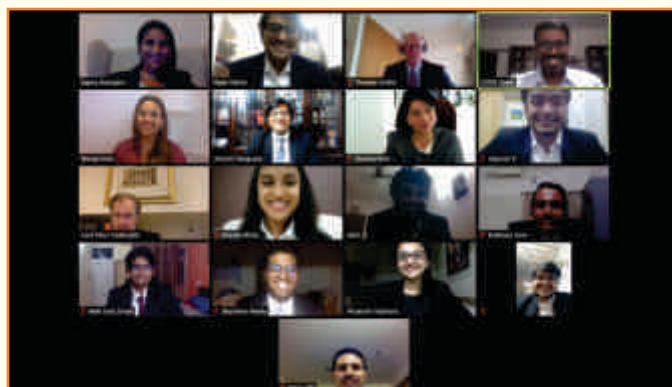
Mr. Faazaan Mirza, Deputy Director participated in the Webinar on *Current State of World Trade: A Level Playing Field* organized by the Asia International Arbitration Centre (AIAC)



## SARCO co-sponsored the 13<sup>th</sup> National Law School-Trilegal International Arbitration Moot 2020



Online Virtual Hearing Room



Closing Ceremony



Quarter Final Rounds

SARCO continued its sponsorship to the NLSIU Trilegal International Arbitration Moot this year for its 13<sup>th</sup> Edition. The Moot Competition was organized by the National Law School University of India. The moot competition was held online due to the COVID-19 pandemic.

The NALSAR University of Law, Hyderabad, India won this year's competition. SARCO continued its sponsorship of the Spirit of SAARC Award this year too. The spirit of SAARC Award was co-awarded this year to the University of Dhaka, Bangladesh Team and the Prithvi NarayanCampus team from Nepal.

Justice Sharad Arvind Bobde, Honorable Chief Justice of India said the traditional methods of arbitration in India could be augmented by the use of Artificial Intelligence to achieve international standards. He was speaking at the International Conference on 'Arbitration in the Era of Globalization' on 8<sup>th</sup> February 2020 in New Delhi.





Prabhash Ranjan<sup>1</sup>



## The Present and the Future of the Indian BIT Programme: Throw the bathwater, but keep the Baby!

The Indian bilateral investment treaties (BIT) programme is at cross roads. India started signing BITs since early 1990s as part of India's economic liberalization programme. From 2005 onwards India started entering into free trade agreements (FTAs) containing investment chapters. India has signed more than 80 BITs and FTAs with investment chapters. However, BITs did not get much traction in India till the end of 2010. However, things started to change from 2011 onwards when India lost the first BIT case to an Australian company called White Industries. In *White Industries v India*,<sup>2</sup> a BIT tribunal held that India violated her obligations under the India-Australia BIT.<sup>3</sup> The decision in the *White Industries* case opened the floodgates for more BIT claims against India. Starting from the year 2012, a large number of foreign corporations such as Vodafone, Cairn Energy, Nokia, Telenor etc sued India under different BITs challenging a wide array of actions such as rulings of the Indian judiciary, amendments in tax laws by the Indian parliament, cancellation of telecom and spectrum licenses by the executive etc.<sup>4</sup> Some of these cases have been decided with India losing another two disputes<sup>5</sup> and managing to

win one.<sup>6</sup> Many cases are on-going.<sup>7</sup>

### Effect of these cases on the Indian BIT programme

A cumulative effect of these cases on the Indian BIT programme was that India decided to review its BITs with the objective of identifying legal and policy challenges arising from these treaties. The review of BITs by the Indian government led to two important admissions. First, the government conceded that Indian BITs were not well-drafted as they contained broad and vague provisions open to wide interpretation by investor-State dispute settlement (ISDS) tribunals.<sup>8</sup> The specific admission was made by the government in the Parliament where it is said that India's earlier BITs '*contained many provisions which can be subjected to broad and ambiguous interpretations*'.<sup>9</sup> India's 2014 statement during UNCTAD'S World Investment Forum, specifically mentioned that the fair and equitable treatment (FET) and most favoured nation (MFN) provisions in Indian BITs are vague.<sup>10</sup> Specifically, India said that MFN '*has been expanded to include rights beyond what is granted by a treaty*'. Second,<sup>11</sup> India admitted that its BITs containing broad and

<sup>1</sup> Senior Assistant Professor, Faculty of Legal Studies, South Asian University, New Delhi. This paper was first published in Volume 14, Issue 7/8 of the Global Trade and Customs Journal published by Kluwer Law International.

<sup>2</sup> *White Industries Case [White Industries Australia Limited v. Republic of India]*, UNCITRAL, Final Award, 30 November 2011.

<sup>3</sup> For detailed commentary on this case see Manu Sanan 2012. 'The White Industries Award—Shades of Grey', *Journal of World Investment and Trade*, 13:661.

<sup>4</sup> For a list of cases brought against India see UNCTAD, 'India – as Respondent State, Investment Policy Hub', <<http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2>> accessed 12 March 2019.

<sup>5</sup> *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, 25 July 2016; (hereinafter *Devas v India*); *Deutsche Telekom AG v Republic of India*, PCA Case No 2014-10, 13 December 2017 (hereinafter *Deutsche Telekom v India*).

<sup>6</sup> *Louis Dreyfus Armateurs SAS (France) v. The Republic of India*, PCA Case No 2014-26, 11 September 2018.

<sup>7</sup> Some of these cases are *Vodafone International Holdings BV v. Government of India [I]*, PCA Case No. 2016-35; *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7.

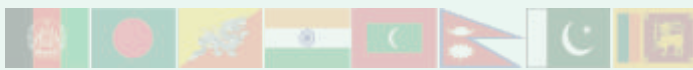
<sup>8</sup> Government of India, Ministry of Finance, Lok Sabha, Unstarred Question No. 1754 (10 March 2017) (<http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=47888&lsno=16>) accessed 14 February 2019.

<sup>9</sup> Id.

<sup>10</sup> Statement by India at the World Investment Forum 2014, UNCTAD, <http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Mayaram.pdf> accessed on 15 March 2019 (hereinafter *India 2014 Statement*).

<sup>11</sup> Id.





vague provisions could encroach upon the host State's regulatory power.<sup>12</sup> Specifically, on the basis of *White Industries* award and other ISDS notices served on India, India said that the 'current investment treaty regime' 'can be viewed as unfair for State's in the exercise of their regulatory power'.<sup>13</sup>

The review process led to three outcomes. First, India adopted a new Model BIT, replacing the 2003 Model BIT,<sup>14</sup> on 14 January 2016.<sup>15</sup> The claimed objective of the 2016 Model BIT is to provide appropriate protection to foreign investors in India and simultaneously maintaining a balance between investor's rights and the government's obligations.<sup>16</sup> The Indian 2016 Model BIT has substantially scaled down the substantive protections offered to foreign investors.<sup>17</sup> For instance, the Model BIT does not contain a MFN provision. Likewise, the Model BIT significantly dilutes the procedural protection for foreign investment by making it mandatory for foreign investors to exhaust local remedies at least for five years and satisfy numerous other conditions before bringing a claim in front of an international tribunal.<sup>18</sup>

India wishes to conduct all new BIT negotiations on the basis of the 2016 Model BIT. So far, India has been successful in negotiating new BITs based on 2016 Model BIT with Belarus<sup>19</sup> and Taiwan.<sup>20</sup> Most capital exporting countries to India such as the United States and Canada

have not shown much interest in the new 2016 Model BIT. Second, in 2016, India issued notices of unilateral treaty termination to more than 50 of its BIT partner countries.<sup>21</sup> Many of these treaties now stand terminated.<sup>22</sup> However, all the Indian BITs provide for survival clauses, ranging from 10 to 15 to 20 years, in case of unilateral termination. Therefore, all these BITs shall remain in force for the said period and continue to provide protection for investment made before the treaty was unilaterally terminated. Investment made to India from any of these countries, after the termination of the treaty, shall not enjoy treaty protection.

India unilaterally terminated these BITs so as to enter into new BITs with these countries based on the 2016 Model BIT. However, this objective could have been achieved without unilaterally terminating BITs. India should have requested its BIT partner countries to negotiate a new text. Once such text would have been ready, it could have replaced the existing treaty text or the existing treaty could have been mutually terminated and the new treaty could have been signed. This would have achieved the same purpose without creating a vacuum for protection of foreign investment in the intervening period i.e. from the date when the BIT is terminated till the time a new BIT comes into force. Given the fact that international treaty negotiations take time, it is quite possible that foreign investment in India from these countries and *vice versa*

<sup>12</sup> Government of India, Ministry of Commerce and Industry, Rajya Sabha, Question No. 1122 (26 July 2017) ([http://dipp.nic.in/sites/default/files/ru1122\\_0.pdf](http://dipp.nic.in/sites/default/files/ru1122_0.pdf)) accessed 14 February 2019.

<sup>13</sup> India 2014 Statement.

<sup>14</sup> Indian Model Text of BIPA Agreement Between the Government of the Republic of India and the Government of the Republic of....for the Promotion and Protection of Investments <https://www.italaw.com/sites/default/files/archive/ita1026.pdf> accessed on 10 March 2019

<sup>15</sup> Model Text for the Indian Bilateral Investment Treaty 2016, < [https://dea.gov.in/sites/default/files/ModelBIT\\_Annex\\_0.pdf](https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf) > accessed 12 March 2019.[hereinafter 2016 Indian Model BIT] Important to keep in mind that the Indian Model BIT contains two dates – 28 December 2015 given in the letter accompanying the text; and 14 January 2016 on the website of the Ministry of Finance, Government of India as the date of publication of the BIT - < <https://www.finmin.nic.in/office-memorandum> > accessed 12 March 2019. In this paper, we use the 14 January 2016 date, and thus call the Model BIT as 2016 Indian Model BIT and *not* 2015 Indian Model BIT.

<sup>16</sup> See Saurabh Garg et al. 2016. 'The Indian Model Bilateral Investment Treaty: Continuity and Change' in Kavaljit Singh and Burghard Igle (eds.), *Rethinking Bilateral Investment Treaties – Critical Issues and Policy Choices* (Both Ends, Madhyam and Somo) 69-80.

<sup>17</sup> For a detailed commentary on the Indian 2016 Model BIT see Prabhaskar Ranjan and Pushkar Anand. 2017. 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' *Northwestern Journal of International Law and Business* 38:1 (hereinafter Ranjan and Anand 2017).

<sup>18</sup> See Articles 15 and 16 of the Indian 2016 Model BIT.

<sup>19</sup> Treaty Between the Republic of Belarus and Republic of India on Investments <https://dea.gov.in/sites/default/files/BIT%20with%20Belarus.pdf> accessed on 10 March 2019

<sup>20</sup> Bilateral Investment Agreement between the Indian Taipei Association in Taipei and the Taipei Economic and Cultural Centre in India <https://dea.gov.in/sites/default/files/BIA%20between%20ITA%20and%20TECC.pdf> accessed on 10 March 2019

<sup>21</sup> Government of India, Ministry of Finance, Lok Sabha, Unstarred Question No. 4834 (31 March 2017) (<http://164.100.47.194/Loksabha/Questions/QResult15.aspx?gref=51410&lsno=16>) accessed 14 February 2019.

<sup>22</sup> For a list of BITs that India has unilaterally terminated see Ministry of Finance, Government of India <https://dea.gov.in/bipa> accessed 20 March 2019.





made after the termination of the treaty shall not enjoy treaty protection for a considerable amount of time.

Moreover, terminating BITs unilaterally does not behove of world's biggest democracy that has always championed the creation of a rule-based global order and spoken against unilateralism. Unilateral termination of BITs is a clear attempt by India to escape responsibility under international law. The argument that since few other countries such as Latin American countries and South Africa have done the same is not a strong argument to justify unilateral termination.

Third, India requested 25 of its BIT partner countries to issue joint interpretative statements in order to resolve, what India describes as 'uncertainties and ambiguities that may arise regarding interpretation and application of the standards contained' in India's BITs.<sup>23</sup> If these joint interpretative statements are finalised, India expects that they would become an important element in the process of treaty interpretation. So far, India has been able to sign these joint interpretative statements with two countries – Bangladesh<sup>24</sup> and Colombia.<sup>25</sup>

### **Right questions, wrong answers and incomplete diagnosis**

India took the right decision to review its BITs with the objective to balance investment protection with State's right to regulate and also to bring in greater clarity in the language of the treaties and thus reduce arbitral discretion. Both these are laudable objectives because fundamental critiques of BITs, especially the first generation BITs signed in 1980 and 1990s, is that they follow a *laissez faire* liberalism model. Thus, these treaties they fail to balance investor rights with host State's right to act in public interest. Furthermore, these treaties contain

vague, broad and indeterminate language, which, in turn, gives ISDS arbitrators enjoy much arbitral discretion to interpret the treaty.

However, the 2016 Model BIT has not been able to achieve these objectives. As pointed out earlier, by substantially scaling down substantive and procedural protection to foreign investment, the scale tilts in favour of the host State and reduces protection for foreign investment. There are several provisions in the 2016 Indian Model BIT that are not precisely defined and thus continue to remain subject to significant arbitral discretion.<sup>26</sup> For instance, Article 1.4 of the 2016 Indian Model BIT states that for an enterprise to satisfy the definition of investment it must possess certain economic characteristics such as the investment has "significance for the development" of the country. However, there is no guidance available in the text as to how to determine that an investment has 'significance for the development' of the country to be eligible for treaty protection. Given how vaguely ISDS tribunals have interpreted this requirement,<sup>27</sup> the text gives much discretion to ISDS tribunals.

A very important element missing in India's review of BITs has been to prudently study the actual reasons why so many ISDS claims have been brought against India? A careful study of high profile claims against India shows that many of them were or are an outcome of bad regulation, regulatory abuse or even institutional inertia by the Indian State. Here are some examples. First, the White industries brought an ISDS case against India because the Indian judiciary could not decide on the enforcement of a commercial arbitration award for nine long years. Second, the Mauritius investors of Devas Multimedia and Deutsche Telekom brought ISDS cases

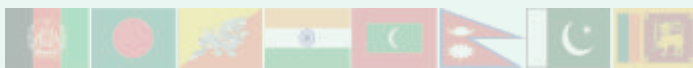
<sup>23</sup> Government of India, Ministry of Finance, Department of Economic Affairs, *Office Memorandum - Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties*, (Feb. 8, 2016), [http://indiainbusiness.nic.in/newdesign/upload/Consolidated\\_Interpretive-Statement.pdf](http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf).

<sup>24</sup> Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments, signed on 4 October 2017 available at <https://dea.gov.in/sites/default/files/JIN%20with%20Bangladesh.pdf> accessed on 15 March 2019.

<sup>25</sup> Joint Interpretative Declaration Between the Republic of India and the Republic of Colombia Regarding the Agreement for the Promotion and Protection of Investments Between India and Colombia signed on 10 November 2009, signed on 4 October 2018 available at <https://dea.gov.in/sites/default/files/JID%20with%20Colombia.pdf> accessed on 16 March 2019.

<sup>26</sup> See Ranjan and Anand 2017.

<sup>27</sup> For instance, the tribunal in *LESI v Algeria* held that it is difficult to ascertain whether an investment has contributed to the development of the host State - See *LESI SpA et Astaldi SpA v. Algeria ICSID Case No ARB/05/3, Decision on Jurisdiction*, 12 July 2006, para 113. Some tribunals suggest that it is enough if the investment contributes in one way or another for this requirement to be met – See *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, *Annulment proceeding*, 9 February 2004, para 33. While some other tribunals have held that for this requirement to be met, the contribution of investment should be 'significant' – See *Malaysian Historical Salvors v Malaysia*, ICSID Case No ARB/05/10, *Award on Jurisdiction*, 17 May 2007, para 124.



against India, because the Indian government suddenly cancelled spectrum licenses purportedly for defence and other societal purposes. Two ISDS tribunals ruled against India with one very clearly stating that India had acted in “*willful disregard of due process of law*” in cancelling these licenses.<sup>28</sup>

Third, foreign investors like Vodafone and Cairn Energy have brought ISDS claims against India because India amended the income tax law in 2012 making its application retrospective from 1961. Furthermore, this amendment was brought just weeks after the ruling of the Supreme Court of India in favour of Vodafone in a tax matter against the Indian government.<sup>29</sup> Fourth, Nissan, a Japanese company, has brought an ISDS claim against India under the investment chapter of the India-Japan FTA because the Tamil Nadu government, a state in southern India, lured Nissan into building a car plant by promising tax concessions only to later go back on its promise.<sup>30</sup> Fifth, RAKIA, an UAE company, has brought an ISDS case against India under the India-UAE BIT because the Andhra Pradesh government, another state in southern India, cancelled the memorandum of understanding with the foreign investor according to which it was supposed to supply bauxite to the company for its business purposes.<sup>31</sup>

None of these cases show a genuine and direct conflict between investment protection and host State's right to regulate and act in public interest. All these cases could have been avoided if the Indian State was more circumspect either in adopting its regulations or in conduct of its business. To bemoan these claims suggests not accepting to be governed by rule of law and telling foreign investors to accept whatever treatment is dished out to them.

## Conclusion: Way Forward

Indian BIT practice needs to evolve keeping two things in mind. First, India's desire to increase foreign investment inflows especially under projects like Make in India.<sup>32</sup> While the role of BITs in attracting foreign investment should not be exaggerated, there is evidence to show that BITs in India have played an important role in attracting foreign investment.<sup>33</sup> The significance of BITs for foreign investors in India also assumes importance because India does not enjoy the reputation of being a friendly place to do business. Second, today, India is not just an importer but also an exporter of capital. India's overseas foreign direct investment has increased from less than \$1 billion in 2000-01 to more than \$21 billion in 2015-16.<sup>34</sup> A BIT that tilts towards host State's regulatory power will reduce protection for Indian companies abroad.

Apart from these economic justifications, India also needs to look at BITs as an integral part of the larger international rule of law<sup>35</sup> framework. BITs by imposing conditions on host State's exercise of public power *vis-à-vis* foreign investors and by creating a mechanism of holding host State's accountable through an independent dispute resolution system play an important role in furthering international rule of law and create a rule-based global order for States to conduct their international investment relations.<sup>36</sup>

However, the existence of BITs cannot be justified merely by using the language of international rule of law. Even the first generation BITs modelled on *laissez faire* liberalism contained these characteristics. Yet, most countries including India contested these treaties because imposed too many constraints on exercise of their public power. Further, many developing countries like India were not convinced how fair and impartial the dispute settlement

<sup>28</sup> See *Devas v India and Deutsche Telekom v India*.

<sup>29</sup> *Vodafone International Holdings BV v Union of India*, Civil Appeal No 733 of 2012, 20 January, 2012, In the Supreme Court of India, <https://indiankanoon.org/doc/115852355/> accessed on 17 March 2019.

<sup>30</sup> *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37 available at <https://investmentpolicyhub.unctad.org/ISDS/Details/828> accessed on 18 March 2019.

<sup>31</sup> *Ras-Al-Khaimah Investment Authority v. India*, <https://investmentpolicyhub.unctad.org/ISDS/Details/767>, accessed on 17 March 2019

<sup>32</sup> For more on 'Make in India' see About 'Make in India' available at <http://www.makeinindia.com/home> accessed on 19 March 2019.

<sup>33</sup> Niti Bhasin and Rinku Manocha. 2016. 'Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India', *Vikalpa: The Journal for Decision Makers*, 14:275.

<sup>34</sup> See Reserve Bank of India, Data on Overseas Investment, [https://www.rbi.org.in/Scripts/Data\\_Overseas\\_Investment.aspx](https://www.rbi.org.in/Scripts/Data_Overseas_Investment.aspx).

<sup>35</sup> Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331; André Nollkaemper, *National Courts and the International Rule of Law* (Oxford; New York, Oxford University Press, 2011) 1

<sup>36</sup> Also see Stephan Schill and V Djanic. 2018. "Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law", *ICSID Review – Foreign Investment Law Journal* 33: 29



system is. Therefore, for the wider acceptability and sustainability of BITs as tools that advance international rule of law, they need to be remodelled using the compromise of embedded liberalism.<sup>37</sup> The compromise of embedded liberalism will require that BITs should reconcile investment protection with host State's right to regulate. Thus, while BITs may impose limits on host State's exercise of public power for the protection of foreign investment, at the same time, should allow the host State to deviate from their investment protection obligations for compelling public policy reasons such as protection of public health and environment. Likewise, BITs should continue to hold host State's accountable for the exercise of their public power through ISDS or any other international dispute settlement forum. However, for States to readily submit themselves to the jurisdiction of such tribunals, the working of the tribunals should be fair and transparent.

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India, as a responsible, member of the comity of nations that has always furthered the cause of a rule-based global order should play an important role in this by redesigning its BITs keeping these principles in mind.

India, as a responsible, member of the comity of nations that has always furthered the cause of a rule-based global

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Maldives International Arbitration Centre conducted the first session of the Introduction to International Arbitration Course on 05 March 2020. The session was done in partnership with the Chartered Institute of Arbitrators (CIArb).

<sup>37</sup> See Catherine Titi. 2018. Embedded Liberalism and IIAs: The Future of the Right to Regulate, with Reflections on WTO Law in Gillian Moon and Lisa Toohey (eds) 20 Years of Domestic Policy Under WTO Law: The Embedded Liberalism Compromise Revisited, Cambridge University Press, 122-136.





**Barrister Yousaf Khosa**  
Partner at RIAA Barker Gillette, Pakistan  
Arbitrator, SAARC Arbitration Council



## Arbitration, ADR and/or the benefits of Arbitration on Foreign Direct Investment in Pakistan and/or the SAARC Members States

This article explores the different ambits of international commercial arbitration and any impact whatsoever it may and/or may not have on foreign direct investment. It also investigates the legal arbitration framework in Pakistan and how regional cooperation via SAARC can assist in achieving strategically beneficial results.

Over the years, arbitration has attained a noteworthy prominence in transactions both national and international especially when compared with any other means of dispute resolution and certainly against litigation. It has become one of the most preferred dispute resolution mechanisms yielding a highly reliable and feasible substitution for the more orthodox litigation process.<sup>1</sup> The extent and popularity of international arbitration as a medium for facilitating a private and unbiased platform has received stupendous cognizance in the world over. The magnitude of this narrative has had an extraordinary vogue in the world's judicial affairs; where the settlement of disputes oscillates between different commercial disciplines. Proponents speak of unique characteristics offered by international arbitration in the form of global enforceability and an omnipresent recognition of the arbitral award.<sup>2</sup> Pakistan, like most of the other countries of SAARC has ratified the New York Convention in their domestic laws providing unhindered enforcement procedures as if it was a decree issued by the local court while at the same time ensuring that there are no conflict of laws issues cropping up either. Plain, clean, speedy, professionally determined arbitration awards putting end to commercial disputes which used to end up being buried under courts files in litigations going on for

decades.

In the current Covid-19 climate, the exponential popularity of arbitration cannot be emphasized enough. As the world adopts social distancing techniques, courts are conducting proceedings virtually to reduce traffic into court premises. Adjudicators all over the world are discerning the flexibility and freedom of choice propounded by arbitrations. Some see it as the current most effective, efficient and accessible platform facilitating dispute settlement that can even be conducted virtually either fully or in piecemeal depending on the parties and the arbitral tribunal.<sup>3</sup>

According to a theoretical study conducted by Andrew Myburgh and Jordi Paniagua, on the relationship between FDI and international arbitration, results suggested that increase in accessibility to international commercial arbitration has both a direct link and positive effect on FDI.<sup>4</sup> When considering this effect, it is largely on the intensive margin, i.e. the effect is largely on volume of investment rather than on the number of projects. Additionally, this effect was felt strongest in countries that were susceptible to formidably weaker institutions that invested in larger projects.<sup>5</sup> Such an interdependence is reliant on the option to access an organized system of adjudicatory rules and procedures, and in some instances, free from the shackles of where the dispute may actually arise. Such measures reassure foreign interests that may not see a certain domestic legal system equipped with the understanding of the workings of an arbitration process;

<sup>1</sup> Lew, Julian D. M., Loukas A. Mistelis, and Stefan Kroll. 2003. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International

<sup>2</sup> Alamdari H., Bahar (2016) *The emerging popularity of international arbitration in banking and financial sector – Is this a fashionable trend or a viable replacement?* Doctoral thesis, University of London

<sup>3</sup> Ram S., 'Role of virtual arbitration during the Covid-19 pandemic' < <https://www.soolegal.com/roar/role-of-virtual-arbitration-during-the-covid-19-pandemic> >

<sup>4</sup> Myburgh A., and Paniagua J. 'Does international commercial arbitration promote foreign direct investment?' [2016] *The Journal of Law and Economics*

<sup>5</sup> Ibid.





enforceability issues; perceived corruption of domestic judges and administrative personnel.<sup>6</sup> Further, both parties can select arbitrators specialized in commercial law or the specific industrial or technology sector. According to Bernstein, it can “provid[e] for the appointment of industry expert arbitrators, who can make many factual determinations more accurately . . . than a judge or jury”.<sup>7</sup>

Predictable, speedy, specialized and cost-effective adjudication system is therefore at the core of boosting FDI in any country and this is more so the case SAARC countries. Over the years a number of SAARC countries have indeed worked hard in removing all the hurdles for FDI while at the same time trying to balance the same with the national identities and domestic corporate norms.

In Pakistan, The Arbitration Act, 1940 ("**Arbitration Act**") and the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("**Foreign Awards Act**") are the two main pieces of legislation for the arbitration framework dealing with domestic and foreign arbitrations respectively. The seat of arbitration being determinative of which law would apply. The Arbitration **Act** provides for arbitration with and without the intervention of the court depending on whether or not the parties are willing to resort to arbitration. Whereas Foreign Awards Act provides for all the arbitrations outside Pakistan.

International arbitrations are usually held under foreign arbitration laws, and the awards may then be enforced in Pakistan. The Foreign Awards Act incorporates the New York Convention into domestic laws of Pakistan, facilitating the enforcement of foreign arbitral awards in Pakistan.<sup>8</sup> Arbitrations arising from investment treaty arbitrations, however, are covered by the ICSID Convention and are regulated by the Arbitration (International Investment Disputes) Act 2011 (the 'Investment Disputes Act') which specifically provides that the provisions of the Arbitration Act shall not apply to

proceedings pursuant to the ICSID Convention (section 7).<sup>9</sup> The courts would usually stay a court action in favour of arbitration under section 34 of the 1940 Act. The foundations of **Section 34 Arbitration Act** can be seen in **Article 8 UNCITRAL (United Nations Commission on International Trade Law) Model Law, Article II of New York Convention 1954 as duly reflected in the Foreign Awards Act**. Both create an obligation upon a court in which proceedings have been commenced by a party, in breach of an arbitration agreement, to refer the parties to arbitration, if so requested by the other party, unless the court finds that the agreement is “*null and void, inoperative or incapable of being performed*” (**Article 8, UNCITRAL Model Law and Article II, New York Convention 1954**). The existence of an agreement to arbitrate will not prevent either party from commencing judicial proceedings in court in a domestic arbitration under the Arbitration Act. However, the issue of proceedings in court by one party will usually amount to a waiver of that party's right to have the same dispute determined by arbitration if the defendant is content to have proceedings in court and does not file objection under Section 34 of Arbitration Act. The Arbitration Act although continues in theory to suggest that under Section 34 of the Arbitration Act a court would have discretion whether or not to stay the court proceedings but the overwhelming binding caselaw has now been developed in Pakistan that the court would not ordinarily allow the parties to an arbitration agreement to wriggle out of it except for compelling reasons. In case of foreign arbitration, application can be by the party against whom legal proceedings have been initiated in courts of Pakistan under Section 4 of the Foreign Awards Act to have the court proceedings stayed and the court does not have a discretion.

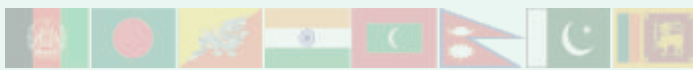
The most convenient way to resolve disputes would be to ideally refer them to a domestic court, but the expansive popularity of international commercial arbitration to resolve disputes has quadrupled over the last few decades. Regardless, this method is open to both

<sup>6</sup> PwC. 2013. International Arbitration Survey 2013: Corporate choices in International Arbitration <<http://www.pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml>>

<sup>7</sup> Bernstein, Lisa. 2001. 'Private commercial law in the cotton industry: Creating cooperation through rules, norms, and institutions' Michigan Law Review. 99:1724–1790

<sup>8</sup> Jamal M, Yaldram F & Hayat S., 'Pakistan – MJLA -Legal'<[http://www.mjlalegal.com/uploads/1/7/8/7/17874169/pakistan\\_chapter\\_-\\_arbitration\\_world\\_-\\_2012.pdf](http://www.mjlalegal.com/uploads/1/7/8/7/17874169/pakistan_chapter_-_arbitration_world_-_2012.pdf)>

<sup>9</sup> Legal'<[http://www.mjlalegal.com/uploads/1/7/8/7/17874169/pakistan\\_chapter\\_-\\_arbitration\\_world\\_-\\_2012.pdf](http://www.mjlalegal.com/uploads/1/7/8/7/17874169/pakistan_chapter_-_arbitration_world_-_2012.pdf)>



strengths and shortcomings. The neutral mindset of arbitrators, an organized arbitral process coupled with the flexibility to choose specialized experts and confidentiality of the proceedings are some of the more delectable features that parties find coercively attractive!

There are still negative aspects that need exploring. One of the benefits behind choice of international commercial arbitration is the need of a neutral decision especially if the party against whom claim is lodged is a public body of that country where enforcement is required. That domestic courts may exercise bias, lack competence, resources or the required experience. However, a bare perusal of international arbitration forums propagates the difficulty in alienating fraud, bias or misconduct. Hence, there is a possibility that arbitrators on international forums could exercise financial, personal or professional bias, just like in domestic courts.<sup>10</sup> It has to be understood that arbitrators are not subject to appellate review, strict disclosure obligations or judicial institutional controls, and such contentions are used to argue that arbitrators should be held to the same standard as judges.<sup>11</sup>

Independence, neutrality and impartiality are often understood as the same under a narrow construct of the words. According to Ronán Feehily, one has to accept that experts in particular industries will have contacts and relations with the parties and their counsels, and that a disqualification of such experts to preserve impartiality would deprive the parties of competent experienced specialists to arbitrate over the dispute.<sup>12</sup>

The arbitral award is binding rather than a recommendation. Hence, it is not to be confused with the decision of a domestic court. Instead, this is enforceable both nationally and internationally.<sup>13</sup> However, many scholars suggest that arbitral decision-making is biased, apparently favouring investors and multinationals against states and weaker parties such as consumers and

employees.<sup>14</sup>

Hiring international lawyers in western capitals accompanied with budgetary constraints and constant exchange rate disadvantages create financial pressures for Pakistan which is already beset by an unstable economy. According to Tariq Hassan, former advisor to Finance Minister, Pakistan, postulates the view of some arbitration experts that suggest a regional approach as a possible solution to avoid the high cost of arbitration.<sup>15</sup> This is a critical consideration that can become a turning point in Pakistan's international arbitration record and devise strategies to improve Pakistan's success rate in the future.<sup>16</sup> This is the approach that is essence of SAARC arbitration amongst SAARC member countries.

Such regional disputes that are intertwined with complex political affairs, combined with somewhat hostile historical backdrops are in need of intermediary cooperation that can be facilitated by a regional arbitration institution such as SAARC's Arbitration Council, SARCO. The 'Agreement for Establishment of SAARC Arbitration Council', SARCO aims to furnish favorable conditions, conducive to fostering investment and financial growth of Member States by providing a regional forum for settlement of disputes.<sup>17</sup>

Article II of the Agreement, specifically provides that it will act as a coordinating agency in the SAARC dispute resolution system primarily focusing on conflict resolution, rather than propose fragmented solutions. That specialized bodies, custom cropped to formulate mechanisms, purpose built to resolve specific disputes will be catered to Member States. Needless to say, that such measures are contingent upon Pakistan strengthening and promoting both laws and procedures for establishing institutional legislative frameworks that adopt a holistic approach to international commercial arbitration.<sup>18</sup> SARCO boasts of detailed Arbitration Rules

<sup>10</sup> Commonwealth Coatings Corporation v. Continental Casualty Company 393 U.S. 145, 147–48 (1968)

<sup>11</sup> Franck S., The Role of International Arbitrators, 12 ILSA J. INT'L & COMP. L. 499 (2006).

<sup>12</sup> Feehily R., 'Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest For Arbitral Justice' [2019] Penn State Journal of Law & International Affairs 7(1)

<sup>13</sup> Brekoulakis, S., 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' [2013] Journal of International Dispute Settlement 4(3)

<sup>14</sup> Harten G., Perceived bias in Investment Treaty Arbitration, in Michael Waibel and others (eds)

<sup>15</sup> Hassan, T. 'A developing country perspective of international arbitration' [2002] Journal of International Arbitration 19(6)

<sup>16</sup> Ahmed R., 'A culture of arbitration' (The News 2 May 2020) <<https://www.thenews.com.pk/print/328637-a-culture-of-arbitration>>

<sup>17</sup> Download Agreement for Establishment of SARCO here [http://saarc-sec.org/digital\\_library/detail\\_menu/agreement-for-establishment-of-saarc-arbitration-council](http://saarc-sec.org/digital_library/detail_menu/agreement-for-establishment-of-saarc-arbitration-council).

<sup>18</sup> Hassan, T. 'A developing country perspective of international arbitration' [2002] Journal of International Arbitration 19(6)



that are regularly updated and provide an organized structural framework on the methods to conduct dispute resolution process, avoid ambiguity while maintaining the discretion within the authority of the disputing parties, hence maintaining party autonomy.

The intensity and frequency of international commercial arbitrations can impact FDI into a country. For a developing country like Pakistan, FDI is imperative for sustainable growth. Arbitrations conducted in international forums against foreign investors present a reliable scheme for conflict resolution with greater possibility for enforcement of arbitral awards. At the same time, such adjudicatory mediums come with their own steep price tags, a damaged reputation, and a possible financial penalty that can trigger an economic pandemonium for a developing country. Pakistan should identify possible nuisances that can irritate the continuity of a possible FDI project in the very beginning rather than indulge in expensive arbitrations afterwards.

SARCO can provide a regional cooperative alliance for Member States that are embroiled in disputes,

consequently threatening peace in the region. Supplying specialist services by furnishing tailored conciliatory bodies while empowering the disputing parties to autonomously decide on the course of arbitration can increase the success rate of such adjudicatory measures. international forums against foreign investors present a reliable scheme for conflict resolution with greater possibility for enforcement of arbitral awards. At the same time, such adjudicatory mediums come with their own steep price tags, a damaged reputation, and a possible financial penalty that can trigger an economic pandemonium for a developing country. Pakistan should identify possible nuisances that can irritate the continuity of a possible FDI project in the very beginning rather than indulge in expensive arbitrations afterwards.

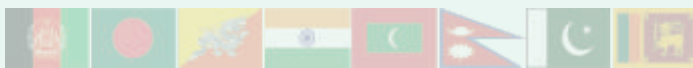
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SARCO sponsored the Victor's Moot Court Competition 2020 which was to be organized by the Sri Lanka Law College in Colombo. This event was scheduled for 20-22 March 2020 but has been deferred to 2021 due to the challenges faced because of the COVID-19 pandemic.





**Sajid Zahid**, Member, ICC, ICA and Co-chair,  
Arbitration & ADR Commission Of ICC Pakistan<sup>1</sup>  
Arbitrator, SAARC Arbitration Council



## The challenges of the superior Courts of Pakistan to determine and implement the true intent of the 1958 New York Convention<sup>2</sup>

As is well known, the **Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011** ("the 2011 Act") statutorily enforces the 1958 New York Convention. The said Act was promulgated *"...to provide for the recognition and enforcement of arbitration agreements and foreign arbitral awards..."*. Section 2(d) of the 2011 Act defines the Court as *"...a High Court and such other superior court in Pakistan as maybe notified by the Federal Government in the official Gazette."* Section 2(d) read with Section 3 of the 2011 Act provides that the High Court exercises *"exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act [i.e. the 2011 Act]"*.

In a recent case decided in early 2018, pertaining to a foreign arbitral award of the International Cotton Association Limited ("ICAL") under the English law, the Defendant had raised certain preliminary objections regarding the maintainability of the suit. To address the same, the Court framed the Issues (points in controversy for a trial), as against following the procedure laid out in the 2011 Act for enforcement of the award in the same manner as a judgment or order of a Court in Pakistan as required in terms of Section 6 of the 2011 Act read with Article V of the New York Convention. In so doing, the Court was of the view that since the preliminary issues raised by the Defendant *"...involve investigation into the disputed questions..."*, it required the framing of the issues by the Court for recording of the evidence of the parties and following the procedure prescribed for a decision of the suit. The Court specifically took the view that it was within its competence to frame the Issues and record evidence if the facts of the particular case so demanded, which may not be in every case.

**The above case is perceived to be an aberration to the Courts' pro-active attitude of enforcing foreign arbitral awards and arbitration agreements.** The typical attitude of the Courts in Pakistan is illustrated in a recent case of the High Court of Sindh, involving enforcement of a foreign arbitral award under the 2011 Act. The Court in the said case whilst recognizing and enforcing the said award by the issuance of a decree held that,

*"... a review of the ... provision of law shows that a foreign arbitral award, as long as it is enforceable, is to be treated as binding for all purposes on the persons between whom it was made. ..."* (Emphasis is mine). Section 7 of the 2011 Act expressly states that the recognition and enforcement of a foreign arbitral award shall not be refused, except in accordance with Article V of the 1958 New York Convention. The said Article V lists seven grounds for which proof will be required from the party against whom the said award is sought to be enforced. The said grounds include objections pertaining to the arbitration agreement being not valid under the applicable law; or the parties lacked capacity to enter into the arbitration agreement; proper notice was not given for the appointment of an arbitrator or of the arbitration proceedings; the award deals with matters not falling within the terms of the arbitration agreement; the award has not yet become binding on the parties; or the award would be contrary to the public policy of the country where the enforcement is sought.

In addition to the above, a recent milestone case of the Lahore High Court is the Orient Case, between **Orient Power Company (Private) Limited ("Orient") vs. Sui Northern Gas Pipelines Limited ("Sui Northern")**. In the Orient Case, an Application was filed by Sui Northern under Section 6 of the 2011 Act to recognize and enforce the foreign arbitral award. The Application under Section 6 of the Act was allowed and the award was recognized and the Court declared the award to be binding on the parties. Orient subsequently challenged the same before the Division Court of the Lahore High Court.

During the hearing, the Counsel for the Orient argued that Orient had a right to invoke a remedy under the **Pakistan Arbitration Act 1940 ("1940 Act")**. The Counsel submitted that along with a High Court, the civil court also had concurrent jurisdiction to review the award. Based on the same, the Court must harmoniously construe both the laws to ensure that Orient is not denied any right that is available under the law.

<sup>1</sup> The author is a senior Barrister-at-Law and Advocate, Supreme Court of Pakistan

<sup>2</sup> The assistance of Mr. Jawad Raja, Barrister-at-Law is greatly appreciated.



Conversely, the Counsel for Sui Northern argued that the Award is a foreign arbitral award and this fact has been conceded to and accepted by Orient. He further argued that in terms thereof the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards under the 2011 Act. Hence the relevant Court for enforcement is the High Court. As per Section 6 of the 2011 Act, the enforcement of foreign arbitral award is such that it is to be recognized and enforced in the same manner as a judgment or order of a Pakistani Court. Therefore, the 2011 Act is the applicable law and the 1940 Act is totally irrelevant for the purposes of enforcement of a foreign award.

The Court in the Orient Case addressed the issue whether there is a concurrent jurisdiction between the High Court and civil court to enforce a foreign arbitral award under the 2011 Act and the 1940 Act. In so doing, it held that the purpose of the 2011 Act is to facilitate the recognition and enforcement of foreign arbitral awards and thereby also curtail litigation related to foreign arbitral awards as this would delay the enforcement of the said awards and negate the very purpose for using arbitration as a dispute resolution mechanism. The New York Convention is based on a pro-enforcement policy and safeguards the enforcement of foreign arbitral awards.

Accordingly, the Court noted that it is totally impractical to allow a party to seek enforcement of a foreign arbitral award before the High Court, while at the same time allow the parties a remedy before the civil court to enforce the same award. The outcome will not only cause conflicting judgments but also create uncertainty so far as the award is concerned. For instance the High Court may decide to enforce the award whereas the civil court may decide to set it aside under the 1940 Act. It could also mean that one party invokes the jurisdiction of the civil court to file objections against the foreign award, whilst the other party invokes the jurisdiction of the High Court for recognition and enforcement of an award, as in this case. *“This results in absurdity running contrary to the intent and purpose of the [2011] Act....”* Therefore in view of the aforesaid, the Court ruled that the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards and it follows that the civil court cannot have concurrent jurisdiction under the 1940 Act.

### **Conclusion:**

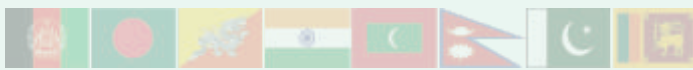
As will be apparent from the above, the enforceability of a foreign arbitral award under Section 6 of the 2011 Act, (subject only to Section 7 of the said Act), was somewhat muddled by certain decisions of our Courts discussed above. Instead of recognizing and enforcing the foreign award in the same

manner as a judgment or order of a Court in Pakistan, they chose to apply the domestic law of arbitration i.e. the 1940 Act to the objections raised by the opposite party, by framing 'Issues' (Points of controversy), which would entail the recording of evidence, thereby subjecting a foreign arbitral award to what effectively constitutes a 'retrial'. This as noted above, is clearly not in consonance with the New York Convention and the 2011 Act.

It is gratifying to note that the Lahore High Court (Division Bench) restored the true intent in letter and spirit of the New York Convention and the 2011 Act by clearly ruling that for the enforceability of a foreign arbitral award, the 1940 Act is not applicable and as such, there is no question of a concurrent jurisdiction between a High Court and a civil court, when examining a foreign arbitral award. It is respectfully stated that any decision to the contrary would have negated the very foundations of the New York Convention's application to foreign arbitral awards in Pakistan and the 2011 Act.

It is our understanding that the decision of the Orient's case was pursued in an Appeal before the Hon'ble Supreme Court, which is now reserved for a decision. It will have to be seen what position the Hon'ble Supreme Court takes in the matter.

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# Recognition and Enforcement of Foreign Arbitral Awards in Pakistan



Syed Mustafa Mahdi <sup>1</sup>

Imran Tariq Mir <sup>2</sup>

## Abstract

The arbitration law pertaining to domestic arbitration in Pakistan is now somewhat settled with some notable precedents laid down by the superior courts. Following the ratification of the New York Convention 1958 (the “**New York Convention**”) in Pakistan on 12 October, 2005 domestic legislation had to implement it in order to enforce the New York Convention as Pakistan is a dualist state. For this purpose, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 was passed, with re-enactments in 2006 to 2010, until the final Act enactment in 2011. Through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (“**REA 2011**”) international arbitration has been codified in a way that not only provides certainty to the process but also enables international investors to find themselves in a familiar arbitral jurisdiction. This article shall discuss the legislative developments with respect to the legal framework for enforcement of foreign arbitral awards in Pakistan and canvasses some of the landmark cases reported in various law journals of Pakistan.

## Abbreviations

CLC: Civil Law Cases

CLD: Corporate Law Decisions

MLD: Monthly Law Digest

PLD: All Pakistan Legal Decisions

SCMR: Supreme Court Monthly Review

YLR: Yearly Law Reporter

## Introduction

With the promulgation of REA 2011 an evolution in arbitration took place in Pakistan. The REA 2011 was a critical advance towards the recognition and enforcement of arbitration agreements and foreign arbitral awards in accordance with the New York Convention. At first, the New York Convention was upheld in 2005 under a Presidential Ordinance.

The enforcement of the New York Convention as Pakistan law in 2011 was met with cautious optimism. The Ex-Chief Justice of Pakistan, Justice (R) Mian Saqib Nisar, in his article '*International Arbitration in the context of Globalization: A Pakistani Perspective*' has expressed contentment towards the 2005 Ordinance for Enforcement of Foreign Arbitral Awards being close to the purpose of the New York Convention, though he highlights that there is still a need to fill the gaps in procedure and limiting the power of the courts to exercise jurisdiction in acting as the appellate forum for the award. Although, still riddled with delays, the High Courts in Pakistan are enforcing foreign awards under the 2011 Act by ordering that a decree be drawn up in terms of the award for execution as held in **FAL Oil Company Ltd v Pakistan State Oil Company Ltd (PLD 2014 Sindh 427)**.

Moreover, in the currently pending case of **Taisei Corporation v AM Construction Private Limited**, the Supreme Court of Pakistan is dealing with the question of the applicability of REA 2011 to an award made pursuant to the New York Convention but emanating from an arbitration agreement governed by the laws of Pakistan. The case is before the Supreme Court as the High Courts have taken the view that in such a case where an arbitration agreement is governed by the laws of Pakistan, the Award, regardless of it being a foreign award, shall be treated as a domestic award and be governed by the **Arbitration Act 1940 (the “1940 Act”)** rather than REA

<sup>1</sup> The Author is an Advocate of the High Courts of Pakistan, FCI Arb (UK), FMI Arb (UK), FMI Arb (MY), LLM (UK), MBA.

<sup>2</sup> The co-Author is an Advocate of the High Courts of Pakistan, LLM (UK), LPC (UK), LLB (UK).





2011. Other important questions, including what is a foreign award are also subject matter of this litigation in the Supreme Court. The apex court's determination on these important questions shall have a significant impact on the prevalence of and reliance on international arbitration as a method of resolving commercial disputes in Pakistan.

### The Foreign Award Act

- **Enforcement of Arbitration Agreement**

The **REA 2011** brought more certainty to parties wishing to implement the international arbitration agreements in Pakistan. **Section 4(2)** of the act has made this achievable in recent cases where judges have been seen to recognise such agreement and stay the proceeding in favour of arbitration proceedings. This is because **REA 2011** which has embedded the wording of the **New York Convention Article II (3)**. The aforementioned section guides the Pakistani Courts to elude disputes to arbitration where there is an arbitration agreement present between the parties. The one and only exception to this is when the Court finds that the agreement itself is invalid and void, broken or incapable of being performed.

This Article II (3) has already been interpreted, removing the Court's discretion of enforcing these foreign arbitration agreements, as well as their discretion to refuse agreements based on the argument that arbitration shall be inconvenient for the parties. **(2006 CLD Karachi 497); (2009 CLD Karachi 153)**.

Regrettably, a few Pakistani Courts have adopted this strategy in the past in the case of **Travel Automation (Pvt.) Ltd. v. Abacus International (Pvt.) Ltd. (2006 CLD Karachi 497)** and **Far Eastern Impex (Pvt.) Ltd. v. Quest International Nederland BV and Others, (2009 CLD Karachi 153)**, sabotaging the practicality of arbitration. While this methodology was in reality condemned and somewhat rectified by the Supreme Court in the case of **Eckhardt & Com Marine GMBH, West Germany v Mohammad Hanif (1993 PLD SC 42)**, the specificity lacked and the uncertainty could not be completely removed. Therefore, the **REA 2011** proved helpful with respect to removing such ambiguities.

- **Enforcement of Arbitral Award**

The actual enforcement of an arbitral award starts after the award has been rendered enforceable. The **New York Convention 1958** again shows intent to support the easy enforcement of foreign arbitral awards when it sets out in **Article III** that enforcement of foreign arbitral awards

would be done in the same manner as the enforcement of domestic arbitral awards, with regards to their procedure as well as the costs.

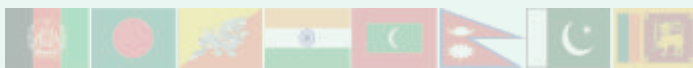
According to this **Article** and Pakistan's enactment of **REA 2011**, the enforcement of a foreign arbitral award would be carried out considering it as a domestic arbitral award under **Section 6** of the act. However, the issue that remains, even after the enactment of **REA 2011**, regarding the procedure that is to be followed for enforcement.

There are two methods for pursuing enforcement; i) the first being filing a civil suit for enforcement under **Section 6 of REA 2011** which gives options of appeal and gives the courts an option to exercise their discretion for the enforcement of awards. This method eradicates the purpose of the **New York Convention** which was the speedy enforcement of foreign arbitral awards and ii) the second, less common method, is a summary procedure under the **Civil Procedure Code 1908**, which lacks proper trial procedures and can leave lacunas when judgments are given.

In interpreting the prevention of enforcement of awards under **Article V** of the **New York Convention**, very few judgments have been handed out which favour enforcement and are according to the purpose of the **New York Convention**. One such recent judgment is **Abdullah v. Mssrs CNAN Group SPA, (2014 PLD 349)**, where the judge relied on the Yearbooks on Commercial Arbitration (YCA). The judgment stated the purpose of the New York Convention— and various commentaries on the subject including the **Global Commentary on New York Convention by Herbert Kronke 2010** and concluded that where

the award-debtor sought a declaratory and injunctive relief against the enforcement of the award under **Article V** of the **New York Convention**, the article must be interpreted narrowly and used as a shield and not a sword. This indicates that enforcement can only be prevented when the enforcement of the award is sought by the party in whose favour the award is made by the arbitration tribunal and that the **Article** does not favour the award-debtor to seek nullity of the award otherwise.

With regards to foreign arbitration agreements and awards, it is sufficient here to state that the arbitration agreements and awards between Pakistani parties and foreign parties may be able to take advantage of the REA and seek recognition and enforcement there under as if the same was a domestic arbitration agreement and award. Although there is no judgement passed where a



foreign award has been enforced and a lot of confusion as to interpretation of REA 2011 has been created.

Nevertheless, recently the Lahore High Court in the case of ***Orient Power Company (Private) Limited Versus Sui Northern Gas Pipelines Limited*** dismissed the appeal of the judgement debtor against recognition of a foreign award of the party enforcing the award under **REA 2011** and stated that High Court has exclusive jurisdiction to recognize and enforce a foreign arbitral award under the Act of 2011. By dismissing the appeal, they also agreed to the extent of recognition of award by learned Single Judge without subscribing to the reasons and observations given by the Sole Arbitrator, relating to application of Pakistan's Law and Public Policy.

• **Conclusion**

Considering how Pakistani courts and Pakistani laws have acted in enforcing foreign arbitral awards, the road to

enforcement seems uncertain but the aforementioned decision of the Lahore High Court gives a glimmer of hope towards certainty. On some occasions the courts have been seen to use their discretion here proper procedures have been lacking and at some points the courts have relied upon global commentaries and the **New York Convention** for highlighting the purpose and correct application of **REA 2011**. This shows that there is a lack of proper legislation for enforcement of foreign arbitral awards, especially with regards to the procedure of enforcement, even after the enactment of the 2011 Act and there seem to be too much discretion lying with the court for interpretation. Although Justice (R) Saqib Nisar in his article (mentioned above) expressed contentment towards the 2005 Ordinance for Enforcement of Foreign Arbitral Awards being close to the purpose of the New York Convention, there is still a need for filling the gaps in procedure and limiting the power of the courts to exercise jurisdiction in acting as the appellate forum for the award.

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Bhutan Alternative Dispute  
Resolution Centre (BADRC)  
Service Rules and Regulations  
2020 were launched by Mr.  
Chimi Dorji, Chief  
Administrator BADRC in  
Thimphu, Bhutan.





## SARCO Sponsors 10<sup>th</sup> Indian Vis Pre-Moot



SARCO sponsored the 10<sup>th</sup> Indian Willem C. Vis Pre Moot 2020 conducted by Jindal Global Law School (JGLS). The competition witnessed participation from 25 teams across India and one team from Nepal. Gujarat National Law University (GNLU) emerged the winners of the competition. Mr. Bharatendu Agarwal, Assistant Director (Law) attended the event as SARCO's representative and also judged one of the knockout rounds.

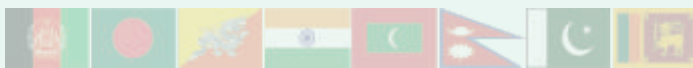


## Paper presentation on SAARC Arbitration Council (SARCO) in South Asian University (SAU)



Mr. Bharatendu Agarwal, Assistant Director (Law) presented a paper on *SAARC Arbitration Council (SARCO): South Asia's Permanent Court of Arbitration (PCA)* at the *International Conference on South Asia in the Era of International Courts and Tribunals* organized by the South Asian University (SAU) in New Delhi, India.





## Important updates from the SAARC region

### Afghanistan

1. Afghanistan Center for Commercial Dispute Resolution (ACDR) concluded a MoU with the National Procurement Authority (NPA) of Afghanistan. The MoU between NPA & ACDR will help resolve dispute over AFN 100,000,000 for contracts awarded by NPA.

2. Afghanistan Center for Commercial Dispute Resolution (ACDR) signed MoU with the Afghanistan Independent Bar Association (AIBA) to include two ADR subjects i.e. Arbitration and Mediation in the legal course of AIBA. This is a 6-month course and is a requirement for taking the bar license in Afghanistan.

### Bangladesh

1. The Supreme Court of Bangladesh's Special committee for judicial reforms, in its meeting, has proposed that operations of the Court be continued through audio and video conferencing in view of the COVID-19 pandemic.

2. Justice Retd. Abdur Rashid, Former Judge of the Supreme Court of Bangladesh has been appointed as Member at the Permanent Court of Arbitration (PCA) in Hague.

### India

1. The Supreme Court of India has through a circular dated 15 April 2020 issued the Standard Operating Procedures (SOPs) for the e-filing. This mechanism is been introduced in view of the COVID-19 pandemic and to ensure smooth court proceedings.

2. The Supreme Court of India has considered the validity of an agreed procedure to appoint arbitrators where one party has the unilateral right to appoint the arbitrators or to select the pool of arbitrators from which the tribunal must be constituted. The two relevant cases are:

- *Perkins Eastman Architects v HSCC (India)* (Arbitration Application No. 32 of 2019)
- Central Organisation for Railway Electrification

(“CORE”) v ECI-SPIC-SMO-MCML (“Contractor”)  
(Civil Appeal Nos. 9486-9487 of 2019)

### Maldives

1. The Maldives International Arbitration Centre (MIAC) has made amendment to the standard of admission for the registrar of arbitrators at the MIAC. This amendment contains, the revisited criteria, for inclusion of arbitrators at the MIAC based on qualification and experience.

2. In May 2020, the Maldives International Arbitration Centre published its Primary Panel of Arbitrators comprising renowned and experienced individuals in the field of international arbitration. The list can be viewed at <https://miac.gov.mv/primary-panel>

3. Parties are now able to submit a case to the Maldives International Arbitration Centre through the Centre’s website. A case submission can be made at <https://miac.gov.mv/case-reg>

4. The Maldives acceded to the Singapore Convention of Mediation on 7 August 2019.

### Pakistan

The Punjab province has enacted the Punjab Alternate Dispute Resolution Rules 2020 pursuant to Punjab Alternate Dispute Resolution Act of 2019.

### Sri Lanka

The Cabinet of Sri Lanka has decided that Government institutions that enter agreements in the future should include a clause stating that in case of arbitration, it should be undertaken at the Sri Lanka International Arbitration Centre (SLNAC).

Cabinet of Sri Lanka to include the dispute resolution clause of the Sri Lanka International Arbitration Centre (SLNAC) in future agreements.

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# DISPUTE RESOLUTION CLAUSES OF SARCO

The SAARC Arbitration Rules were updated in 2016. These rules recommend the inclusion of the following clause:

## MODEL ARBITRATION CLAUSE

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

Consider adding to model clause:

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

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

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The SAARC Conciliation Rules were updated in 2017. These rules provide a standard clause for inclusion by the parties in their contract/agreement for trade or services. The Clause states:

## MODEL CONCILIATION CLAUSE

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

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

📍 Plot No. 3-D, Street No. 67, Sector F-10/3,  
Islamabad, Pakistan

Telephone: 051-9266357-8, Email: [info@sarco.org.pk](mailto:info@sarco.org.pk)

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