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A Fresh Look at Arbitration in the Commonwealth: The Opportunity to Shape the Future

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The Commonwealth is a voluntary association of 53 independent countries, comprising large and small, developed and developing, landlocked and island economies. It is home to about 2.4 billion people with not only shared but also very distinct history, culture, values, languages and legal traditions. The shared Commonwealth heritage leads to close diplomatic and commercial relationships, which is ultimately reflected in levels of intra-Commonwealth trade and foreign direct investment (FDI). Indeed, despite being a voluntary association and not a trading bloc, the value of intra-Commonwealth trade in goods and services is reported to have tripled between 2000 and 2016 – from about US$200 billion to about US$600 billion. Intra-Commonwealth trade and greenfield FDI is estimated to exceed US$ 1 trillion by 2020.

Boosting economic growth and development of member states remains a top priority for the Commonwealth Heads of Government. There is a growing appetite to harness and strengthen what has now come to be termed the “Commonwealth effect” or “advantage”- this is an inherent 19 per cent trading costs savings realized from bilateral trade between Commonwealth member states.

These commercial relationships require effective dispute resolution mechanisms, especially considering the magnitude of trade involved. It is recalled that an effective dispute resolution mechanism remains fundamental to sustained economic growth. It is therefore surprising that little attention has been paid to international commercial arbitration in the Commonwealth. Hence, the Resolution by the Senior Officials of Commonwealth Law Ministries, at their meeting in London in October 2018, requesting the Commonwealth Secretariat to conduct a study on accessing international commercial arbitration across the Commonwealth is timely and most welcome.

The Study will perform an expansive review of the existing arbitral landscape in each member state of the Commonwealth. It will seek to understand the use of international commercial arbitration in addressing commercial disputes across the Commonwealth, as well as ways in which member countries may strengthen the accessibility and effectiveness of international commercial arbitration.

Intra-Commonwealth trade and investment

Intra-Commonwealth trade has seen a steady rise in recent years. According to 2018

Commonwealth Trade Review, intra-Commonwealth exports of goods and services stood at US$560 billion in 2016. This constitutes approximately 20 per cent of Commonwealth members' total trade. Singapore, Malaysia and India were major drivers of this growth, recording shares of intra-Commonwealth exports, between 19.4 per cent, and 14.2 per cent. These countries were closely followed by Australia and the United Kingdom. In terms of imports, the United Kingdom, India and Singapore were the largest importers from within the Commonwealth.

As for FDI, Commonwealth member countries invest in each other more than the rest of the world. Cumulative intra-Commonwealth greenfield investment from 2003 to 2017 is estimated to have generated 1.4 million jobs through 10,000 projects and has been valued at about US$700 billion. In 2016, the top sources of intra-Commonwealth investment were the United Kingdom at 26 per cent, India at 19 per cent, Malaysia at 14 per cent and Singapore at 14 per cent, whereas the top destinations for investment were India, Bangladesh, Singapore, Nigeria and Sri Lanka (in that order).

Commonwealth least developed countries (LDC) have also been recipients of intra-Commonwealth FDI flows. Between 2003 and 2016, an average of 13 per cent of intra-commonwealth FDI has been invested in Commonwealth LDCs, aggregating a total of about US$81 billion. 89 per cent of this total is split between five Commonwealth LDCs – Papua New Guinea, Bangladesh, Mozambique, Uganda, Tanzania and Zambia (in that order). The rest is split among other LDCs – Kiribati, Lesotho, Malawi, Rwanda, Sierra Leone, Solomon Islands, the Gambia, Tuvalu, and Vanuatu. Overall, there is a considerable flow of goods and services, and investments between Commonwealth developed and developing countries (2015 Commonwealth Trade Review; 2018 Commonwealth Trade Review).

The dispute resolution landscape across the Commonwealth

Despite the burgeoning intra-Commonwealth trade, together with the ease and advantages it provides, there is still a huge disparity across the 53 Commonwealth countries in the accessibility and effectiveness of dispute resolution mechanisms.

In some states, contract enforcement procedures are very costly, slow and inefficient: court systems are overburdened, and commercial cases languish for years before they are resolved; political interference with the judiciary persists at the expense of judicial independence/impartiality; or there is a simple lack of requisite expertise. In others, commercial disputes are resolved in a timely and cost-effective manner. According to the World Bank's *Doing Business* rankings, it takes about 4 years to enforce a contract in first-instance courts in countries like Trinidad and Tobago, Bangladesh and India, compared to the just under 10 months it takes to do so in Singapore, New Zealand and Rwanda.

These figures translate to very real effects on trade and commerce, as demonstrated by the 2018 Commonwealth Trade Review, which examined enforcement of contracts and efficiency of the court system as relevant governance indicators with potential impact on intra-Commonwealth trade. The Review found that efficient contract enforcement increases trade and investment, reduces trade costs and boosts business confidence. It also found that further trade gains could be realized from greater efficiency and that for every 10 per cent reduction in time taken to enforce a contract, there is a corresponding 6.4 per cent increase in intra-Commonwealth trade.

The Review found that contract enforcement is relatively efficient among Commonwealth states, requiring 20 per cent less time compared to the world average. Building on the existing efficiency, promoting international commercial arbitration as an effective dispute resolution mechanism for cross-border trade within the Commonwealth, will enhance the efficiency of contract enforcement even more. In particular, it will enable small and medium-size enterprises to circumvent the pitfalls of cross-border litigation. (*See* Born & Butler – UNCITRAL)

However, regarding (international) arbitration, unfortunately, there are also significant disparities amongst the 53 countries in their legal frameworks for international commercial arbitration. Save for a few Commonwealth jurisdictions, international commercial arbitration is not fully developed. In most jurisdictions, the arbitration legislation is outdated and contains obsolete provisions that are wholly unsuitable for modern commercial arbitration practice. Some states are yet to accede to the New York Convention. In others, the judicial approach to arbitration is unsupportive of arbitration and the arbitral institutional capabilities are generally weak.

Based on a preliminary and high-level review of the legal framework for arbitration in all 53 countries, this author found that 33.9 per cent of Commonwealth countries have not acceded to the New York Convention and about 58 per cent countries have outdated arbitral legislation. The 53 member countries can be *loosely* classified into three broad categories.

- The first category features member states with well-developed arbitration practice. Arbitration in these states is governed by a modern arbitration legislation partially or wholly based on the UNCITRAL Model law. These countries have acceded to the New York Convention. They have strong arbitral institutional capacity and the overall attitude of their judiciary is pro-arbitration. The countries include Australia, Canada, Mauritius, New Zealand, Nigeria, Singapore, South Africa and United Kingdom.
- In the second category, the countries have relatively modern arbitral legislation partially or wholly based on the UNCITRAL Model Law, are signatories to the New York Convention, but their overall arbitration practice is not as developed as in the first category. These countries include Bahamas, Bangladesh, Barbados, Brunei, Cyprus, Fiji, Ghana, India, Jamaica, Kenya, Malaysia, Malta, Mozambique, Rwanda, Sri Lanka, Uganda, and Zambia.
- The third category includes countries with no arbitral legislation, outdated arbitral legislation (such as those based on the repealed English Arbitrations Acts of 1889 or 1950), and/or are non-signatories to the New York Convention. They include Antigua and Barbuda, Belize, Botswana, Cameroon, Dominica, Gambia, Grenada, Guyana, the Kingdom of eSwatini (previously Swaziland), Kiribati, Lesotho, Malawi, Namibia, Nauru, Pakistan, Papua New Guinea, Saint Lucia, Samoa, Seychelles, Sierra Leone, Solomon Islands, St Kitts and Nevis, St Vincent and the Grenadines, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, and Vanuatu.

The present dispute resolution landscape across the Commonwealth is inadequate to sustain the needs of the burgeoning intra-Commonwealth trade. Absent significant legislative reforms, ineffective dispute resolution processes will continue to chip away at whatever gains the Commonwealth advantage provides. While reform of court systems in the individual member states may be unlikely in the near future, reform activities directed at strengthening international commercial arbitration practice are more targeted and can return appreciable gains more quickly.

It is on the above premise that the ongoing Commonwealth Secretariat's Study on the challenges to

accessing international commercial arbitration across the Commonwealth is applauded and will contribute to its development across the Commonwealth. The study will be authored by a group of distinguished arbitration experts, advised by a task force representing arbitration expertise from every region of the Commonwealth. More information on the Study can be found here. The Commonwealth have invited input to the Study through completion of a questionnaire by 10 May 2019: lawyers (conseil des parties; advogados), arbitrators (arbitres; arbitros) and academics (Universites; Universidades

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