

# TRADE DISPUTE RESOLUTION ACT 2016

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## **ARRANGEMENT OF SECTIONS**

### **PART I**

#### ***Introductory and Scope***

SECTION

1. Short title and commencement
2. Extent
3. Scope of application
4. General principles
5. Non-Intervention
6. Exclusive jurisdiction of Commercial Benches

### **PART II**

#### ***The Trade Dispute Resolution Organisation (TDRO)***

7. Establishment of the TDRO
8. Functions of the TDRO
9. Executive Director General, Director General and other officers
10. Trade Dispute Resolution Fund
11. Accounts and audits
12. Annual Report

### **PART III**

#### ***General Scheme for Dispute Resolution***

13. Referral of Trade Disputes to the TDRO
14. Allocation by the TDRO
15. Appeal to a Commercial Bench

### **PART IV**

#### ***Inquiries by the TDRO***

16. Inquiries by the TDRO
17. Powers
18. Extent of powers
19. Review of the exercise of powers
20. Detailed rules, directions and guidelines

## **PART V**

### ***Preliminary Determinations by the TDRO***

21. Preliminary determinations
22. Procedure for preliminary determinations
23. Failure of parties to respond
24. Declarations, directions and recommendations
25. Reliance upon preliminary determinations
26. Detailed rules, directions and guidelines
27. Appeal of TDRO preliminary determinations
28. Procedure for appeals
29. Constitution of the TDRO Appeal Board
30. Further appeal to a Commercial Bench
31. Detailed rules, directions and guidelines regarding appeals

## **PART VI**

### ***Mediation and Conciliation of Trade Disputes***

32. References to mediation and conciliation
33. Regional Mediation Committees
34. Governing legal regime
35. Detailed rules, directions and guidelines
36. Approved mediators and conciliators
37. Capacity building

## **PART VII**

### ***Early Neutral Evaluation of Trade Disputes***

38. References to early neutral evaluation
39. Governing legal regime
40. Detailed rules, directions and guidelines
41. Approved evaluators

## **PART VIII**

### ***Arbitration of Trade Disputes***

42. References to arbitration
43. Exclusion of other arbitration laws
44. Approved arbitrators
45. Capacity building

## **PART IX**

### ***Commercial Benches of the High Court***

46. Constitution of Commercial Benches
47. References to a Commercial Bench
48. Governing rules

## **PART X**

### ***Singapore International Commercial Court***

49. References to the Singapore International Commercial Court
50. Refusal of references
51. No Appeal, review or challenge
52. Recognition and enforcement of judgments and orders
53. Grounds for refusing recognition or enforcement
54. Judgments or orders subject to review or appeal
55. Detailed rules, directions and guidelines

## **PART XI**

### ***Domestic and International Assistance by the TDRO***

56. Powers
57. Extent of powers

## **PART XII**

### ***Capacity Building, Training and Consultation Services***

58. Powers
59. Detailed rules, directions and guidelines

## **PART XIII**

### ***Supplementary Provisions***

60. Power to make rules, directions and guidelines
61. Removal of difficulties
62. Authorities to assist and aid TDRO
63. Mode of recovery
64. Immunity
65. Offences and obstruction under this Act
66. Repeal of Commercial Courts
67. Definitions

## **SCHEDULES:**

**First Schedule:** Regime for mediation, conciliation and early neutral evaluation of Trade Disputes

**Second Schedule:** Regime for arbitration of Trade Disputes

**Third Schedule:** Regime for Commercial Benches acting pursuant to this Act.

# **A**

## **Bill**

to provide for the establishment of a comprehensive regime and the introduction in Pakistan of internationally accepted standards for the swift and effective resolution of disputes relating to the international export and import of goods and services.

It is hereby enacted as follows:

### **PART I**

#### *Introductory and Scope*

**1. Short title and commencement –**

- (1) This Act may be called the Trade Dispute Resolution Act, 2016.
- (2) It shall come into force at once.

**2. Extent –** This Act extends to the whole of Pakistan.

**3. Scope of application –**

- (1) The powers conferred by this Act may be exercised in relation to any Trade Dispute as defined in section 3(2).

- (2) For the purposes of this Act, a Trade Dispute means any dispute or complaint concerning, relating to or arising out of the international export and import of goods and services conducted wholly or partially in or otherwise connected with the territory of Pakistan.<sup>1</sup>
- (3) For the avoidance of doubt, Trade Disputes include disputes or complaints within the scope of section 3(2) that concern, relate to or arise out of intellectual property rights.
- (4) The powers conferred by **Parts XI** and **XII** of this Act, and **Part XIII** in so far as they relate to **Parts XI** and **XII**, are not restricted to the territory of Pakistan.<sup>2</sup>
- (5) Unless otherwise agreed by all parties, no powers conferred by this Act shall be exercised in so far as this conflicts with:
  - (a) the exclusive jurisdiction of any competent court, tribunal or other body outside Pakistan, whether or not such jurisdiction has been invoked;<sup>3</sup> or

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<sup>1</sup> This limitation is required, in order to ensure that the powers conferred by this Act are not exercised extra-territorially, such as to conflict with the jurisdiction of competent courts, tribunals or other bodies in other countries. Any such extra-territoriality could be a breach of international comity, and criticised abroad. The reference to “*conducted ... partially in or otherwise connected with*” is important, as this extends the coverage of the Act to import and export activity that is conducted partly in Pakistan and partly abroad. The term “*conducted*” is also broader than “*performed*” which might import a narrow legal test. But the breadth of this coverage, in turn, also necessitates the caution in sub-section 3(5)(a). No nationality limitation (*i.e.* a restriction to Pakistani nationals or entities) has been included.

<sup>2</sup> The limitation does not restrict the exercise of powers under **Part XI** (Domestic and International Assistance) or **Part XII** (Capacity Building, Training and Consultation Services), which could apply to export and import activity involving Pakistani individuals and entities, without any activity in Pakistan itself.

<sup>3</sup> This limitation is required given the breadth of section 3(2), and as a further safeguard against interference in courts or tribunals abroad. This limitation only applies to courts, tribunals and other bodies “*outside Pakistan*”. It does not apply to courts, tribunals to other bodies within Pakistan, as this could substantially reduce the effect of this Act: any court, tribunal or other body that currently has jurisdiction over a dispute under existing law (*i.e.* by the application of existing Pakistan law, such as rules of jurisdiction applied by the Pakistan courts, and aside from an actual choice of court or arbitration agreement) would take precedence. Choice of court and arbitration agreements are protected under sub-section 3(5)(b).

- (b) a choice of court or arbitration agreement<sup>4</sup> (other than one facilitated by the TDRO pursuant to section 14(1)(e) of this Act).<sup>5</sup>
  - (6) Any of the provisions in this Act including the regimes in the First and Second Schedules may also be applied by agreement of all parties to any existing or future dispute<sup>6</sup> without any restriction as to territory.
  - (7) The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.
  - (8) The Schedules hereto constitute an integral part of this Act and all references to this Act shall be construed as including the same.
- 4. General principles** – The provisions of this Act are founded on the following principles and shall be construed accordingly:<sup>7</sup>
- (1) it is essential for the promotion of trade in Pakistan, for the protection of all trading interests and for the improvement of Pakistan’s standing internationally that there be a regime for the swift, efficient and effective resolution of trade disputes;
  - (2) it is essential that the regime:
    - (a) be comprehensive and flexible allowing for a full range of dispute resolution methods, cooperation and assistance;
    - (b) be consistent with internationally accepted standards;

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<sup>4</sup> As a policy matter, it is suggested that the TDRO not be permitted to intervene in cases where the parties have made an agreement to refer any disputes to arbitration or a particular court (including the SICC). This is also reflected in section 13(1).

<sup>5</sup> This carve-out is required since the TDRO has powers in section 14(3) and (4) to intervene in an arbitration that has been facilitated by the TDRO.

<sup>6</sup> This wording allows for / encourages parties to refer to the provisions of this Act in their contracts, as well as contracting into the provisions of the Act after a dispute or difference has arisen.

<sup>7</sup> This introductory provision sets out the key foundations upon which the Act is framed. It is designed to assist Courts in understanding and interpreting the law, by reference to its objects, purposes and “spirit”. It follows the very good experience with s.1 of the English Arbitration Act 1996 (which has also been followed by many other countries in drafting their legislation).

- (c) include specialised Commercial Benches with an exclusive supervisory and enforcement jurisdiction and a streamlined procedure for the purposes of this Act;
- (d) be insulated from interference by other courts or tribunals;
- (e) be protected from the delays, obstruction and inefficiencies that have become prevalent in existing dispute resolution mechanisms;
- (f) be complemented by a training, resource and consultation facility to allow for the implementation of best practices in trading and dispute resolution activity in Pakistan.

**5. Non-Intervention** – In matters governed by this Act, no court or tribunal should intervene except as provided by this Act or in support of the principles set out above.

**6. Exclusive jurisdiction of Commercial Benches** –

- (1) Within Pakistan, Commercial Benches of the High Court as constituted pursuant to section 46 of this Act or otherwise in existence<sup>8</sup> shall have, in the first instance, original and exclusive jurisdiction over all matters with respect to this Act, including all issues concerning its interpretation and application.<sup>9</sup>
- (2) Any other first instance court within Pakistan before which matters under or concerning this Act are raised shall immediately stay its proceedings and refer the matter to a Commercial Bench.<sup>10</sup>

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<sup>8</sup> This wording is designed to allow for the Commercial bench that is already in existence in the Sindh High Court.

<sup>9</sup> Consideration needs to be given to whether the Divisional Bench stage should be retained, and if so whether it can be made a specialised Commercial Appellate Division (as have been established in India), or perhaps include at least one commercial judge.

<sup>10</sup> The idea here is to promote a uniform jurisprudence under this Act, and to prevent non-specialised courts from interfering with the operation of the Act (and to deter parties from seeking to circumvent or stalling the Act's operation by way of applications to local courts).

## PART II

### *The Trade Dispute Resolution Organisation (TDRO)*

#### **7. Establishment of the TDRO –**

- (1) An organisation to be known as the Trade Dispute Resolution Organisation (TDRO) is hereby established to carry out the objectives of this Act.
- (2) The TDRO shall be a functionally autonomous body with delegated authority from the Ministry of Commerce and having perpetual succession and a common seal with powers subject to the provisions of this Act:
  - (a) by the said name, to sue and be sued;
  - (b) to enter into contracts, acquire, purchase, take, hold, enjoy, convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of or deal with any movable or immovable property of every description or any interest vested in it upon such terms as it deems fit;
  - (c) to enter into contracts for the supply of goods or services or materials or for the execution of works as may be necessary for the discharge of any of its duties and functions;
  - (d) to exercise all functions, powers and discretions available to it under this Act;
  - (e) to administer and coordinate all government and private sector organisations for realising the objectives of this Act and all rules, regulations, directions and guidelines made thereunder;
  - (f) to carry out such other works or activities as may be deemed by it necessary with a view to making the best use of its assets;
  - (g) to control, manage, supervise, direct and coordinate the working of all offices established under this Act;

(h) to perform and carry out any other acts, things or functions relating to trade dispute resolution, contract enforcement and quality assurance assigned to it by the Federal Government.

(3) The head office of the TDRO shall be in Islamabad.

(4) Subject to the approval of the Federal Government, the TDRO may establish as many regional offices, at such locations in Pakistan, as it considers appropriate.

**8. Functions of the TDRO** – The functions of the TDRO shall be as set out in this Act, including (without limitation):

(1) to provide a comprehensive regime for the swift and effective resolution of disputes relating to the international export and import of goods and services, including:

(a) a referral and allocation system, as provided in **Part III** of this Act, to allow and facilitate Pakistani and foreign importers and exporters access to a range of mechanisms in accordance with international standards including:

(i) the conduct of inquiries by the TDRO itself or in association with other agencies as provided in **Part IV** of this Act;

(ii) the issuance of preliminary determinations by the TDRO itself as provided in **Part V** of this Act;

(iii) mediation and conciliation in accordance with the UNCITRAL Model Law on International Commercial Conciliation as provided in **Part VI** of this Act;

(iv) early neutral evaluation in accordance with the UNCITRAL Model Law on International Commercial Conciliation as provided in **Part VII** of this Act;

- (v) arbitration in accordance with the UNCITRAL Model Law on International Commercial Arbitration, as provided in **Part VIII** of this Act;
  - (vi) resolution by a Commercial Bench applying a specially streamlined modern procedure as provided in **Part IX** of this Act;
  - (vii) resolution by the Singapore International Commercial Court as provided in **Part X** of this Act;
  - (viii) resolution by any other court, tribunal, body, institution or agency whether in Pakistan or abroad;
  - (ix) other co-operation and assistance by the TDRO or representative offices, embassies and missions abroad or otherwise pursuant to **Part XI** of this Act;
- (b) monitoring of the conduct of dispute resolution mechanisms, and intervention in the event of delay, as provided in sections 14(3), (4) and (5) of this Act;
  - (c) maintaining the highest standards amongst all mediators, conciliators, early neutral evaluators and arbitrators as provided in sections 36, 41 and 44 of this Act;
  - (d) establishing and promoting arbitration and alternative dispute resolution institutions within Pakistan as provided in sections 37 and 45 of this Act;
- (2) to engage in capacity-building, training and consultation services for the development and promotion of international standards and best practices in international trade, dispute resolution and all matters incidental thereto as provided in **Part XII** of this Act;

- (3) Overall, by the exercise of its powers under this Act, to facilitate and enhance international trade involving Pakistani entities; to bridge the trust deficit between local and foreign businessmen; and to improve the international standing and reputation of Pakistan in matters of trade.

**9. Executive Director General, Director General and other officers –**

- (1) The Federal Government may, by notification in the Official Gazette, appoint or empower:
  - (a) an officer to be Executive Director General
  - (b) one or more officers to be Director General<sup>11</sup>to perform the functions assigned to each under this Act.
- (2) A person shall not be appointed as Executive Director General unless he or she is a Commerce and Trade Group officer of not below the rank of BPS-21/22.
- (3) A person shall not be appointed as Director General unless he or she is a Commerce and Trade Group officer of not below the rank of BPS-20/21.
- (4) All posts in BPS-17 and above in the TDRO shall be encadred for the Commerce and Trade Group of the Civil Service of Pakistan.
- (5) The Executive Director General shall be the head of the TDRO with overall responsibility for the administration of its affairs.
- (6) The Federal Government may appoint or empower such other officers with such designations as it deems fit to perform, under the supervision and direction of the Executive Director General, such functions as he or she may, from time to time, authorise them to discharge.

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<sup>11</sup> It is important that there be separate defined positions of Executive Director General and Director General, so that there can be an internal appeals procedure within the TDRO with respect to TDRO inquiries and preliminary determinations, in which decisions of a Director General can be reviewed by a more senior officer who has not had any role in the initial process.

- (7) The Executive Director General may, by general or special order in writing and subject to any conditions or limitations, delegate any of his or her powers, functions or duties as he or she may deem fit, from time to time, to any subordinate officer.<sup>12</sup>
- (8) Each Director General shall have the functions provided for by this Act and all rules made hereunder and such other functions as the Executive Director General may from time to time authorise him or her to discharge.
- (9) The TDRO may from time to time make rules, directions and guidelines pursuant to section 60 detailing the functions, responsibilities, duties and powers of each of its officers, and all related matters.<sup>13</sup>

#### **10. Trade Dispute Resolution Fund –**

- (1) There shall be established a non-lapsable fund to be known as the Trade Dispute Resolution Fund which shall vest in the TDRO, and shall be utilised by it, as may be necessary, for the purpose of carrying out its functions under this Act and for the welfare of the employees of the TDRO.
- (2) The Fund shall consist of:
  - (a) a one-time initial grant from the Export Development Fund as seed money;
  - (b) yearly allocations or grants by the Federal Government;
  - (c) aid and donations from national or international agencies with the approval of the Federal Government;
  - (d) revenue earned from the levy of charges, fees, penalties etc.; and
  - (e) income and profits derived from investments.

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<sup>12</sup> See s.22 of the Trade Organisation Act 2013; s.43 of the Employees Old Age Benefit Institution Act; s.8 of the Drug Regulatory Authority of Pakistan.

<sup>13</sup> Query whether this is a sufficient statement of the TDRO's constitution, and the powers and functions of each of its officers, or whether more detail is required here.

- (3) The TDRO may levy such charges or fees as it considers appropriate for services and facilities provided by it and its constituent offices;
- (4) The TRDO may open and maintain accounts, in local and foreign currency, in any scheduled bank in Pakistan, which shall be operated in accordance with the directions of the Federal Government.
- (5) The Federal Government shall make rules and regulations for the utilisation of the Fund.

**11. Accounts and audits –**

- (1) The TDRO shall cause proper accounts to be kept and, as soon as practicable after the end of each financial year, shall cause to be prepared for that financial year a statement of accounts which shall include a balance sheet and an account of income and expenditure.
- (2) Within sixty days after the end of each financial year, TDRO's annual financial statements shall be audited by the Auditor-General of Pakistan or by a firm of chartered accountants nominated by the Auditor-General of Pakistan.

**12. Annual Report –** Within ninety days from the end of each financial year, the TDRO shall submit to the Federal Government an annual report of its work and activities

## PART III

### *General Scheme for Dispute Resolution*

#### **13. Referral of Trade Disputes to the TDRO –**

- (1) Any Trade Dispute:
  - (a) within the scope of application of this Act as set out in section 3;<sup>14</sup> and
  - (b) involving claims of not less than the minimum value, in cash or kind, as prescribed from time to time in rules, directions or guidelines made pursuant to section 60 of this Act; and
  - (c) which is not the subject of a choice of court or arbitration agreement (other than one facilitated by the TDRO pursuant to section 14(1)(e) of this Act)

may be referred to the TDRO by a party to the dispute for resolution under this Act.<sup>15</sup>

- (2) The restriction in sub-section (1)(c) above shall not apply if all parties to the dispute so agree.
- (3) Where a party to the dispute is located outside Pakistan, it may make a referral pursuant to section 13(1) at a Pakistan embassy or mission abroad, which shall be empowered to collect all relevant documentation; to conduct an initial inquiry into and verification of the matter and the party making the referral.
- (4) The TDRO may from time to time make rules, directions and guidelines pursuant to section 60 detailing the procedure for the referral of disputes, and all related matters.

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<sup>14</sup> *i.e.* a trade dispute with some connection to Pakistan, or referred by agreement of all parties.

<sup>15</sup> This excludes *suo moto* activity by the TDRO. The TDRO may only act if a party to a dispute makes a reference to it.

- (5) The TDRO shall be entitled to refuse any referral if, in its discretion:
- (a) any requirements of this Act have not been satisfied;
  - (b) the existence of competing proceedings elsewhere, or the availability of a competent forum elsewhere, renders acceptance of a referral inappropriate;
  - (c) the claim is manifestly frivolous or abusive, or involves any fraud, illegality or other wrongdoing.

**14. Allocation by the TDRO –**

- (1) Upon acceptance of a referral under section 13, and subject to sub-section (2), the TDRO may in its discretion do any one or more of the following (in any order):
- (a) proceed to an inquiry pursuant to **Part IV** of this Act;
  - (b) upon the conclusion of an inquiry pursuant to **Part IV**, issue preliminary determinations pursuant to **Part V** of this Act;
  - (c) refer the matter to mediation or conciliation pursuant to **Part VI** of this Act;<sup>16</sup>
  - (d) refer the matter to early neutral evaluation<sup>17</sup> pursuant to **Part VII** of this Act;
  - (e) seek to secure an agreement<sup>18</sup> from all parties to refer the matter to arbitration pursuant to **Part VIII** of this Act;

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<sup>16</sup>There is scope to include a power in detailed rules to be made under the Third Schedule to empower Commercial Benches to impose cost penalties on parties who unreasonably refuse to participate (in good faith) in an ADR process. This is now common in England and the US, and renders the ADR process far more effective.

<sup>17</sup> This process of alternative dispute resolution is explained below.

<sup>18</sup> Unlike other ADR options, arbitration has to be entirely consensual, in order to ensure that any arbitral award is enforceable under the New York Convention 1958. This Convention does not cover compulsory arbitration.

- (f) refer the matter to a Commercial Bench pursuant to **Part IX** of this Act;
  - (g) seek to secure an agreement from all parties to refer the matter to the Singapore International Commercial Court, pursuant to **Part X** of this Act;<sup>19</sup>
  - (h) refer the matter to any other court, tribunal, body, institution or agency, whether in Pakistan or abroad;
  - (i) provide other co-operation or assistance either by itself or through representative offices, embassies and missions abroad or otherwise pursuant to **Part XI** of this Act;
  - (j) take any other action or combination of actions it sees fit within the scope of its powers under this Act.
- (2) In exercising its discretion under sub-section (1), the TDRO shall take into account:<sup>20</sup>
- (a) the amount in dispute;
  - (b) the nature and legal or factual complexity of the dispute;
  - (c) the location of the parties;
  - (d) the commercial position as between the parties, and any particular requirements they may have with respect to dispute resolution such as speed, cost effectiveness, confidentiality and enforceability.
- (3) In the case of any reference under sections 14(1)(c) and (d), and any agreement facilitated by the TDRO under section 14(1)(e), the TDRO may direct at any stage that the matter be finally resolved within a specified time period.

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<sup>19</sup> For an explanation of the Singapore International Commercial Court, see: <http://www.sicc.gov.sg>. As with arbitration, this option is only possible if all parties agree.

<sup>20</sup> This has been added, to avoid a challenge to the Act on the basis that there is an absence of discernible principles by which the executive discretion is to be exercised (as per *Waris Meah v the State of Pakistan* PLD 1957 SC 157).

- (4) If any time limit imposed under section 14(3) is not complied with, and unless otherwise agreed by all parties to the dispute at any time, the mediation, conciliation, early neutral evaluation or arbitration proceedings shall be terminated and the matter shall then revert to the TDRO, pending any further direction by the TDRO.
  - (5) Any time limit imposed under section 14(3) may be extended at any stage by direction of the TDRO, or by agreement of all parties.
- 15. Appeal to a Commercial Bench** – Any person aggrieved by any decision of the TDRO under this Part may file an appeal to a Commercial Bench within 30 days of issuance of the decision in question, subject to any extension of this time limit by the Commercial Bench in question.<sup>21</sup>

## **PART IV**

### *Inquiries by the TDRO*

**16. Inquiries by the TDRO –**

- (1) The TDRO shall be entitled to conduct an inquiry into any Trade Dispute within the scope of application of this Act as set out in section 3,<sup>22</sup> which has been referred to it under section 13, where it appears to the TDRO that such an inquiry would be to the interest of an aggrieved party to the dispute or the public.
- (2) All inquiries under this Part shall be conducted by a Director General or any other officers or persons authorised by him or her and all references to “the TDRO” in this Part shall be construed accordingly.<sup>23</sup>

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<sup>21</sup> This is designed to avoid any judicial review applications under Article 199 of the Constitution, and any other constitutional challenges based upon an excess of executive power. To be considered.

<sup>22</sup> *i.e.* a trade dispute with some connection to Pakistan, or referred by agreement of all parties.

<sup>23</sup> It is important that the investigations are not carried out by the Executive Director General himself / herself, so that the Executive Director General can act as a senior reviewing officer under sections 19 and 27-29 below.

- 17. Powers** – For the purposes of any inquiries under this Part, the TDRO shall have power to refer the matter to, and seek assistance from:
- (1) any department or agency of government;
  - (2) any regional or local body or regional or local chamber of commerce or other equivalent entity;
  - (3) any court or tribunal;
  - (4) any bank, financial institution, person, authority, institution or department in the public or private sector;
  - (5) any trade officers abroad, Pakistan embassy or mission abroad;
  - (6) any other entity, authority, institution or agency within or outside Pakistan.
- 18. Extent of powers** – The powers provided for in this Part may be exercised within Pakistan and, in so far as permitted by local law, in any foreign jurisdiction, with or without the assistance of any Pakistan embassy or mission abroad.
- 19. Review of the exercise of powers** – Any person or entity who may be adversely affected by the conduct of any inquiry or the exercise of any power under this Part shall be entitled to a prompt review of the same by the Executive Director General.
- 20. Detailed rules, directions and guidelines** – The TDRO shall from time to time make rules, directions and guidelines pursuant to section 60 detailing the procedure for the conduct of inquiries, the procedure for review pursuant to section 19 and all related matters.

## PART V

### *Preliminary Determinations by the TDRO*

- 21. Preliminary determinations** – Upon the conclusion of an inquiry by or on behalf of the TDRO under **Part IV**, the TDRO may proceed to issue a preliminary determination in respect of the matter referred to it.
- 22. Procedure for preliminary determinations** – All preliminary determinations:
- (1) shall be made by a Director General;<sup>24</sup>
  - (2) shall only be made once every party to the dispute or complaint has had a reasonable opportunity of putting its case, commenting on the results of the TDRO inquiry and responding to any allegations made against it;
  - (3) shall be made in writing and include reasons for each finding made;
  - (4) shall be served upon all parties to the dispute or complaint without delay.
- 23. Failure of parties to respond** – In the event that any person or entity against whom allegations are made fails to respond or avail itself of any opportunity pursuant to section 22(2), a Director General may nevertheless proceed to a preliminary determination.
- 24. Declarations, directions and recommendations** – A Director General may, in a preliminary determination:
- (1) make a declaration as to any matter referred to the TDRO including (without limitation) a declaration:
    - (a) as to any party's misconduct or liability;
    - (b) that the complaint is unfounded or that any allegation be dismissed;

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<sup>24</sup> This is to allow for a more senior officer (*i.e.* the Executive Director General) to conduct an appeal.

- (c) that, for any reason, no action need be taken in respect of the matter referred;
- (2) direct that the inquiry or referral to TDRO be terminated without imposing any terms;
- (3) direct that the inquiry or referral to TDRO be terminated or stayed on terms including, without limitation:
  - (a) the conclusion of a consent order by any party to the dispute or complaint against whom adverse findings have or may be made;<sup>25</sup>
  - (b) the conclusion of a consent order by all relevant parties by which the matter be referred to mediation, conciliation, early neutral evaluation, arbitration, court or any other forum;
  - (c) the conclusion of a settlement agreement by all relevant parties;
- (4) direct that the matter be allocated to a different forum or be referred elsewhere pursuant to section 14 above;
- (5) recommend that, upon application by a party to a competent court or tribunal, the said court or tribunal:
  - (a) require a party to the dispute or complaint to do or refrain from doing any act or thing;
  - (b) order such party to pay a fine;
  - (c) issue a warning notice of suspension or cancellation of a party's National Tax Number (NTN), Sales Tax Number (STN) or Web Based One Customs (WeBOC) registration or any other measure deemed appropriate which shall be valid for any period the court or tribunal might direct, pending compliance with any order;

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<sup>25</sup> See US Federal Trade Commission (FTC) investigations and ability to enforce consent orders.

- (d) in the event of non-compliance pursuant to section 23(5)(c) above, direct any relevant authority to cancel the National Tax Number (NTN), Sales Tax Number (STN) or Web Based One Customs (WeBOC) registration of the party in question or implement any other measure of which a warning notice has been provided;<sup>26</sup>
- (e) freeze or attach any property belonging to the party in question or any person controlling the party in question.<sup>27</sup>

**25. Reliance upon preliminary determinations** – Any party to the dispute or complaint may rely upon the TDRO’s preliminary determinations in any court or tribunal, in support of any proceedings, and any such court or tribunal may take the preliminary determination into account to the extent it considers appropriate.

**26. Detailed rules, directions and guidelines** – The TDRO shall from time to time make rules, directions and guidelines pursuant to section 60 detailing the procedure for issuance of preliminary determinations and all related matters.

**27. Appeal of TDRO preliminary determinations** –<sup>28</sup>

- (1) Any preliminary determination under this Part may be appealed on any grounds by any party affected by the same to the TDRO Appeal Board.

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<sup>26</sup> This is similar to the Indian Handbook of Procedures (Vol.1), Appendix 16(A)(i) which allows the DG of Foreign Trade to cancel an Importer/Exporter number: “Section 8 empowers the Director General of Foreign Trade to suspend or cancel the Importer/ Exporter Code Number which is a prerequisite for any export or import, where the Director General of Foreign Trade has inter-alia reason to believe (a) that the exporter has committed an economic offence as specified by the Government or (b) that any person has made an export/import in a manner gravely prejudicial to the trade relations of India with any foreign country or to the interests of other persons engaged in imports or exports or has brought disrepute to the credit or the goods of the country.”

<sup>27</sup> The term “freeze” is defined in broad terms in section 67.

<sup>28</sup> The right of appeal ensures an essential protection for the individual against decisions that may not be in compliance with relevant laws and regulations, or suffer from errors or omissions. At the same time, the review of challenged decisions by a competent authority and the verdicts of these reviews can be a suitable means of ensuring uniform application of the Act and rules and guidelines made under it. These TDRO preliminary determinations may constitute legal or *de facto* precedents or official interpretations that will assist in similar situations in the future. See *e.g.* the General Annex – Chapter 10 (Appeals in Customs Matters) of the Kyoto Convention of the WTO. The provisions contained in Chapter 10 provide for a transparent and multi-stage appeal process, intended to prevent the perception of victimisation by those affected by decisions. Furthermore, the availability of an independent judicial review as a final avenue of appeal is designed to instil confidence on the part of the public and the trade, in government institutions (and here, it is hoped, in the TDRO). For more information, see “appeal and review procedures” at [www.wcoomd.org](http://www.wcoomd.org).

- (2) The Executive Director General shall constitute a panel comprising three individuals drawn from the TDRO Appeal Board for each appeal (the “Appellate Panel”), with one member designated as Chair. No member of any Appellate Panel shall have had any involvement in the preliminary determination appealed. If no Appellate Panel can be constituted in light of this restriction, the Executive Director General may appoint *ad hoc* members from outside the TDRO Appeal Board for this purpose.
- (3) The Appellate Panel shall be entitled to conduct, in so far as it considers it appropriate, a full re-hearing and re-consideration of the preliminary determination appealed.
- (4) Any appeal under this section shall be filed with the TDRO within 30 days of receipt of the preliminary determination in question, subject to any extension of this time limit by the Appellate Panel.

**28. Procedure for the determination of appeals – All findings on appeal:**

- (1) shall only be made once every party to the dispute or complaint has had a reasonable opportunity of putting its case and commenting upon the matters raised in the appeal;
- (2) shall be made unanimously or by a majority of votes. In the event that there is no majority, the decision of the Chair of the Appellate Panel shall prevail;
- (3) shall be made in writing and include reasons for each determination made;
- (4) shall be served upon all parties to the dispute or complaint without delay.

**29. Constitution of the TDRO Appeal Board –**

- (1) The TDRO Appeal Board shall be established, from time to time, by the Executive Director General as a standing body and shall comprise:<sup>29</sup>

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<sup>29</sup> To be considered. Given the likely number of appeals, the TDRO Appeal Board may well need to be larger.

- (a) a Chairperson who shall be a retired Judge of the High Court or Supreme Court or any serving or retired Commerce and Trade Group officer in BPS-21;
- (b) the Executive Director General;
- (c) as many technical members as may be required, all of whom shall be persons of ability, integrity and have special knowledge and professional experience of not less than ten years in international trade, economics, law, finance and accountancy;<sup>30</sup>
- (d) a Registrar who shall be a Commerce and Trade Group officer of not below the rank of BPS-20.

(2) All members of the TDRO Appeal Board:

- (a) shall hold office for a period of three years, shall be eligible for reappointment for a similar term and shall cease to hold office on attaining the age of seventy years or the expiry of the term whichever is earlier;<sup>31</sup>
- (b) shall be entitled to such remuneration and other terms and conditions of service as the TDRO may, by rules, prescribe.<sup>32</sup>

**30. Further appeal to a Commercial Bench** – Any person aggrieved by any decision of the Appellate Panel may file an appeal to a Commercial Bench within 30 days of issuance of the decision in question, subject to any extension of this time limit by the Commercial Bench in question.<sup>33</sup>

**31. Detailed rules, directions and guidelines regarding appeals –**

- (1) The TDRO shall from time to time make rules, directions and guidelines pursuant to section 60 detailing the procedure for the constitution and

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<sup>30</sup> Article 43, CCP 2010.

<sup>31</sup> Article 43, CCP 2010.

<sup>32</sup> Article 43, CCP 2010.

<sup>33</sup> Article 44, CCP 2010.

operation of the TDRO Appeal Board and all related matters including (without limitation) all procedural and evidential matters.

- (2) The Federal Government may<sup>34</sup> from time to time make rules, directions and guidelines detailing the procedure with respect to the appeal of decisions of the Appellate Panel to a Commercial Bench.<sup>35</sup>

## PART VI

### *Mediation and Conciliation of Trade Disputes*

**32. References to mediation and conciliation**<sup>36</sup> – Any Trade Dispute within the scope of application of this Act as set out in section 3<sup>37</sup> which has been referred to the TDRO under section 13 may be referred to mediation or conciliation at any time:

- (1) by agreement of all parties to the dispute; or
- (2) unless otherwise agreed by the parties, by the TDRO pursuant to section 14(1).

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<sup>34</sup> This is a “may” rather than a “shall” as in the previous sub-section, given that such rules, directions and guidelines might be made by the Commercial Benches themselves.

<sup>35</sup> Responsibility for this is given to the Federal Government, not the TDRO, since the TDRO may be a party to these appeal proceedings.

<sup>36</sup> Mediation and conciliation are both similar types of ADR. Paragraph 7 of the *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation* provides the following explanation of these various terms: “In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution. The Model Law uses the term ‘conciliation’ to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person. In some cases, the different expressions seem to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used. In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties. To the extent that ‘alternative dispute resolution’ (ADR) procedures are characterized by the features mentioned in this paragraph, they are covered by the Model Law (see A/CN.9/WG.II/WP.108, para. 14)...”

<sup>37</sup> *i.e.* a trade dispute with some connection to Pakistan, or referred by agreement of all parties.

**33. Regional Mediation Committees –**

- (1) The TDRO may from time to time form and register Regional Mediation Committees.
  - (2) Each Regional Mediation Committee:
    - (a) shall comprise serving or retired members of trade bodies registered with the Directorate General of Trade Organisations, Ministry of Commerce;
    - (b) shall provide mediation, conciliation and other alternative dispute resolution services for the amicable settlement of Trade Disputes;
    - (c) shall be a private sector entity for which the government shall have no liability whatsoever with regard to its composition, functioning, role or any act or omission;
    - (d) shall be constituted and function in accordance with Terms of Reference which the TDRO, from time to time, shall notify.<sup>38</sup>
- 34. Governing legal regime –** All mediations and conciliations conducted pursuant to section 32 shall be subject to the provisions in the **First Schedule**.
- 35. Detailed rules, directions and guidelines –** The TDRO may from time to time make rules, directions and guidelines pursuant to section 60 detailing the procedure for the conduct of mediations and conciliations and all related matters.
- 36. Approved mediators and conciliators –** The TDRO may maintain registers of approved and disapproved mediators and conciliators and may, from time to time make rules, directions and guidelines pursuant to section 60 for such approval and

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<sup>38</sup> The detailed rules for the establishment and operation of Regional Conciliation Committees has been left for “Terms of Reference”, which can be published and amended from time to time by the TDRO.

disapproval.<sup>39</sup> No disapproved mediator or conciliator may be appointed under this Act.

- 37. Capacity building** – The TDRO may, from time to time, undertake any steps to establish and promote mediation, conciliation and other alternative dispute resolution institutions, and other related services, within Pakistan.

## PART VII

### *Early Neutral Evaluation of Trade Disputes*

- 38. References to early neutral evaluation** – Any Trade Dispute within the scope of application of this Act as set out in section 3<sup>40</sup> which has been referred to the TDRO under section 13 may be referred to early neutral evaluation<sup>41</sup> at any time:

- (1) by agreement of all parties to the dispute; or
- (2) unless otherwise agreed by the parties, by the TDRO pursuant to section 14(1).

- 39. Governing legal regime** – All early neutral evaluations conducted pursuant to section 38 shall be subject to the provisions in the **First Schedule**.

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<sup>39</sup> In allowing for both approval and “disapproval”, the TDRO will be able to “black list” conciliators who are considered ineffective, incompetent, or otherwise unable to meet the highest standards. This should act as a powerful incentive for conciliators.

<sup>40</sup> *i.e.* a trade dispute with some connection to Pakistan, or referred by agreement of all parties.

<sup>41</sup> “Early neutral evaluation” is a form of ADR, at the mid-point between mediation and binding adjudicative procedures such as arbitration. This is a flexible and informal process, with no fixed procedural or evidentiary rules, in which an experienced lawyer considers the parties respective cases (on the papers alone, or with the benefit of oral presentations, and at any stage of the dispute), and gives an early, quick, non-binding indication as to what the outcome would be if the matter were to be finally adjudicated in arbitration or court. It is a modern and proven method of alternative dispute resolution, which is often far more effective than simple conciliation / mediation, since it serves as an objective, neutral “reality check” for parties who have become stubborn or entrenched in their positions, wrongly believing, or having been wrongly advised, that they have a strong case, and are therefore unwilling to negotiate, mediate, or settle. The process is also extremely effective in narrowing issues in dispute, and shortening / focusing any subsequent arbitration or litigation. Including this process in the Act would constitute a ground-breaking development, which is likely to attract a very positive reaction internationally.

- 40. Detailed rules, directions and guidelines** – The TDRO may from time to time make rules, directions and guidelines pursuant to section 60 detailing the procedure for early neutral evaluations and all related matters.
- 41. Approved evaluators** – The TDRO may maintain registers of approved and disapproved evaluators, and may from time to time make rules, directions and guidelines pursuant to section 60 for such approval and disapproval.<sup>42</sup> No disapproved evaluator may be appointed under this Act.

## PART VIII

### *Arbitration of Trade Disputes*

- 42. References to arbitration** – Any parties may agree<sup>43</sup> at any time to refer existing or future disputes<sup>44</sup> to arbitration pursuant to the provisions of the **Second Schedule**.
- 43. Exclusion of other arbitration laws** – Save as provided in the **Second Schedule**:
- (1) the Arbitration Act 1940 (X of 1940), any amendment, modification or re-enactment thereof and any other Pakistan arbitration legislation shall have no application to any arbitration under section 42.
  - (2) no court shall intervene in or take any other step with respect to any arbitration under section 42.<sup>45</sup>

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<sup>42</sup> In allowing for both approval and “disapproval”, the TDRO will be able to “black list” evaluators who are considered ineffective, incompetent, or otherwise unable to meet the highest standards. This should act as a powerful incentive for evaluators.

<sup>43</sup> Unlike mediation, conciliation, early neutral evaluation and references to Commercial Benches, arbitration can only take place if all parties agree. The TDRO will be able to encourage references to arbitration, but will not be entitled to compel such, absent agreement of all parties.

<sup>44</sup> This has been phrased in broad terms, to allow for the inclusion of Second Schedule arbitration agreements in contracts for future disputes, as well as the *ad hoc* reference of existing disputes to Second Schedule arbitration. This has also been drafted in terms of any “disputes” – not just “Trade Disputes” – to encourage widespread use of the modern arbitration regime in the Second Schedule, if desired. Of course, if a dispute which is not a “Trade Dispute” as defined in this Act is referred to Second Schedule arbitration by agreement of the parties, the other provisions of the Act which are restricted to “Trade Disputes”, and the functions of the TDRO, will not apply.

<sup>45</sup> This is to avoid the notorious delays, inefficiencies and other difficulties now common in arbitration in Pakistan under the current legislation, many of which arise by virtue of inappropriate applications to, and interference by, the courts.

- 44. Approved arbitrators** – The TDRO may maintain registers of approved and disapproved arbitrators, and may from time to time make rules, directions and guidelines pursuant to section 60 for such approval and disapproval.<sup>46</sup> No disapproved arbitrator may be appointed under this Act.
- 45. Capacity building** – The TDRO may, from time to time, undertake any steps to establish and promote autonomous arbitration institutions and other related services within Pakistan.

## **PART IX**

### *Commercial Benches of the High Court*

- 46. Constitution of Commercial Benches** – There shall be in each High Court one or more benches, each known as a Commercial Bench, to be constituted by the Chief Justice of the High Court to exercise the jurisdiction vested in the High Court under this Act.
- 47. References to a Commercial Bench** –
- (1) Any Trade Dispute within the scope of application of this Act as set out in section 3<sup>47</sup> which has been referred to the TDRO under section 13 may be referred to a Commercial Bench at any time:
- (a) by agreement of all parties to the dispute,<sup>48</sup> or
- (b) (unless otherwise agreed by the parties) by the TDRO pursuant to section 14(1).

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<sup>46</sup> In allowing for both approval and “disapproval”, the TDRO will be able to “black list” arbitrators who are considered ineffective, incompetent, or otherwise unable to meet the highest standards. This should act as a powerful incentive for arbitrators.

<sup>47</sup> *i.e.* a trade dispute with some connection to Pakistan, or referred by agreement of all parties.

<sup>48</sup> This excludes unilateral references to a Commercial Bench by one party.

- (2) Any issue arising out of or in connection with the interpretation and application of this Act may be referred by the TDRO or any party to a Commercial Bench at any time.<sup>49</sup>
- (3) References may also be made to a Commercial Bench by the TDRO or by any party in so far as other provisions of this Act so permit.<sup>50</sup>

**48. Governing rules** – For the purposes of all matters under or concerning this Act, all proceedings in every Commercial Bench shall be governed exclusively by the provisions of the **Third Schedule** and all rules, directions and guidelines made from time to time thereunder. Any provisions of any Pakistan legislation, rules or procedures<sup>51</sup> that are inconsistent with the provisions of the **Third Schedule** or any rules, directions and guidelines made thereunder are hereby excluded.

## **PART X**

### ***Singapore International Commercial Court***

**49. References to the Singapore International Commercial Court** – Any Trade Dispute within the scope of application of this Act as set out in section 3<sup>52</sup> which has been referred to the TDRO under section 13 may be referred to the Singapore International Commercial Court at any time by the TDRO pursuant to section 14(1), provided that all parties to the dispute so agree, and conclude a written jurisdiction agreement to this effect.<sup>53</sup>

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<sup>49</sup> This allows for unilateral references to a Commercial Bench by one party.

<sup>50</sup> Many paragraphs of the Second Schedule (arbitration) provide for references to a Commercial Bench by a party.

<sup>51</sup> A detailed check will be needed in due course to determine whether any civil procedure legislation or other court procedures or rules need to be excluded, in order to preserve the modern, streamlined procedure which is envisaged by the Third Schedule and subsequent Rules to be promulgated under this Act.

<sup>52</sup> *i.e.* a trade dispute with some connection to Pakistan, or referred by agreement of all parties.

<sup>53</sup> Unlike mediation, conciliation, early neutral evaluation and references to Commercial Benches, references to the SICC can only take place if all parties agree, and conclude a formal written jurisdiction agreement. The TDRO will be able to encourage and facilitate such agreements, but will not be entitled to compel such. Further, a written jurisdiction agreement is required by the Rules of Court of the SICC itself (Order 110, rule 7(1)). Written agreements providing for either the “exclusive” or “non-exclusive” jurisdiction of the SICC will suffice, but an agreement for the “exclusive” jurisdiction of the SICC is likely to be more beneficial, since Singapore has now

- 50. Refusal of references** – If for any reason a reference by agreement under section 49 is refused by the Singapore International Commercial Court, and if any party does not consent to a transfer of their dispute to the Singapore High Court under the Singapore Rules of Court,<sup>54</sup> the matter shall return to the TDRO, and be re-allocated or addressed otherwise under this Act.
- 51. No appeal, review or challenge** – Subject to section 53, all judgments and orders issued by the Singapore International Commercial Court or the Singapore Court of Appeal in a matter referred by agreement under section 49 shall not be subject to any appeal, review or any other challenge in the courts of Pakistan.
- 52. Recognition and enforcement of judgments and orders** – Subject to section 53, any judgment<sup>55</sup> or order issued by the Singapore International Commercial Court or the Singapore Court of Appeal in a matter referred under section 49:
- (1) shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in Pakistan; and
  - (2) shall, by leave of the Pakistan court, be enforced in the same manner, and given the same effect, as a judgment or order of the Pakistan courts.
- 53. Grounds for refusing recognition or enforcement** – Recognition or enforcement of any judgment or order issued by the Singapore International Commercial Court or the Singapore Court of Appeal in a matter referred under section 49 may only be refused if –<sup>56</sup>

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ratified the Hague Convention on Choice of Court Agreements (30 June 2005), so any judgment of the SICC based upon an “exclusive” jurisdiction agreement will be enforceable in all Convention countries.

<sup>54</sup> Order 110, rule 10(3) of the Singapore Rules of Court provides that where the SICC decides that it has no jurisdiction or declines to assume jurisdiction, it must transfer the case to the Singapore High Court if, among other things, “all parties consent to the proceedings being heard in the High Court.”

<sup>55</sup> Note that the definition of “judgment” in section 67 includes interim measures of protection. This is significant, as it will allow for interim measures issued by the SICC to be recognised and enforced in Pakistan.

<sup>56</sup> This is a narrower version of Art 9 of the Hague Convention on Choice of Court Agreements (30 June 2005). The provisions here, being in line with current international standards, are intended to take the place of those that would otherwise apply in s.13 of the Code of Civil Procedure (grounds on which a foreign judgment may be held inconclusive / not enforceable).

- (1) the jurisdiction agreement concluded pursuant to section 49 was null and void, unless the Singapore International Commercial Court or the Singapore Court of Appeal has determined that the agreement is valid;
- (2) the judgment or order was obtained by fraud in connection with a matter of procedure;
- (3) recognition or enforcement would be manifestly incompatible with the public policy of Pakistan;
- (4) the judgment or order is inconsistent with a judgment given in Pakistan in a dispute between the same parties; or
- (5) the judgment or order is inconsistent with an earlier judgment or order given in another State between the same parties on the same cause of action, provided that the earlier judgment or order fulfils the conditions necessary for its recognition and enforcement in Pakistan.

**54. Judgments or orders subject to review or appeal** – Recognition or enforcement may be postponed or refused if the judgment or order of the Singapore International Commercial Court or the Singapore Court of Appeal is the subject of review or appeal in Singapore or if the time limit for seeking such review or appeal has not expired. A refusal under this section does not prevent a subsequent application for recognition or enforcement of the judgment or order.

**55. Detailed rules, directions and guidelines** –

- (1) The TDRO pursuant to section 60, or the Federal Government, may from time to time make rules, directions and guidelines detailing the procedure for:
  - (a) references to the Singapore International Commercial Court;
  - (b) the recognition and enforcement of judgments and orders of the Singapore International Commercial Court and the Singapore Court of Appeal;

- (c) the operation of the Singapore International Commercial Court within the territory of Pakistan.
- (2) All matters referred to the Singapore International Commercial Court under section 49 shall be subject to all rules, directions and guidelines that apply to that court and appeals to the Singapore Court of Appeal.

## **PART XI**

### *Domestic and International Assistance by the TDRO*

**56. Powers** – In addition to the powers conferred by other Parts of this Act, the TDRO shall be entitled to provide any other form of assistance in relation to the resolution of any Trade Dispute within the scope of application of this Act as set out in section 3.<sup>57</sup> Such assistance may include without limitation:

- (1) maintaining and publishing a register of “black-listed” importers and exporters, comprising those against whom adverse findings have been made by any court, tribunal, the TDRO or any other body;
- (2) maintaining a database of “high risk places”, being international locations with a high prevalence of disputes, or fraud or other lack of security in their domestic or international markets along with unsatisfactory dispute resolution mechanisms;
- (3) applying to intervene, whether as *amicus curiae* or otherwise, in any proceedings concerning a Trade Dispute within the scope of application of this Act before any forum to expedite the same or to provide expertise or for any other reason;
- (4) taking any available step before any forum or with any agency to secure the enforcement of any agreement, award, judgment, order, direction or adjudication;

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<sup>57</sup> *i.e.* a trade dispute with some connection to Pakistan, or referred by agreement of all parties. Note: unlike other sections above (*e.g.* section 16(1)), the words “which has been referred to it under section 13” have been omitted here, to allow for assistance by the TDRO in a broader range of disputes.

- (5) assisting with the service of documents including in foreign jurisdictions through embassies, missions or other agencies abroad;
- (6) assisting with the taking of evidence abroad whether through embassies or missions or otherwise;
- (7) making representations to, seeking assistance from or liaising with any government, institution, or agency;
- (8) publishing any allegations, preliminary or other determinations, or findings;
- (9) cooperating with any authority or international organisation in Pakistan or abroad in any program or agreement for the resolution of Trade Disputes or related issues.<sup>58</sup>

**57. Extent of powers** – The TDRO may exercise its powers under section 56:

- (1) within Pakistan; and
- (2) in any foreign jurisdiction with or without the assistance of any Pakistan embassy or mission abroad in so far as permitted by local law.

## **PART XII**

### *Capacity Building, Training and Consultation Services*

**58. Powers** – The TDRO may, from time to time, provide capacity building, training and consultation services for the development and promotion of international standards and best practices in international trade, dispute resolution and all matters incidental thereto including without limitation:

- (1) establishing and maintaining support desks and other facilities in Pakistan embassies and missions abroad;

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<sup>58</sup> See s.39 of the Drug Regulatory Authority of Pakistan.

- (2) entering into arrangements with foreign agencies or international organisations for the exchange of information, technical know-how, expertise and capacity building;<sup>59</sup>
- (3) maintaining databases and other publicly accessible information resources;
- (4) organising and participating in international seminars, meetings, workshops, conferences and training, education and awareness programmes;<sup>60</sup>
- (5) participating in and liaising with international bodies and agencies concerned with the harmonisation and reform of international trade laws and practices including (without limitation) UNCITRAL, UNCTAD, WTO, WIPO and the ICC.<sup>61</sup>
- (6) designing and conducting programmes for continuing professional development (“CPD”);
- (7) conducting and publishing research;
- (8) forming and promoting dispute resolution committees in trade bodies;
- (9) developing and publishing model clauses and contracts, standard import and export documents and procedures, model dispute resolution clauses and other materials;
- (10) advising the Federal and Provincial Governments on trade and dispute resolution policies, the negotiation of international trade agreements, the harmonisation of trade laws, contract enforcement and quality assurance and all matters ancillary thereto;
- (11) advising any person or entity with respect to compliance with the provisions of this Act or any rules or orders made thereunder.<sup>62</sup>

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<sup>59</sup> See s.6(2)(c) Pakistan Environmental Protection Act 1997.

<sup>60</sup> See s.6(2)(c) Pakistan Environmental Protection Act 1997.

<sup>61</sup> Should any further bodies be added here?

<sup>62</sup> See s.28(1)(d) Competition Commission Act, 2010.

- 59. Detailed rules, directions and guidelines** – The TDRO may, from time to time make rules, directions and guidelines pursuant to section 60 for the implementation of its powers under this Part and all related matters.

## **PART XIII**

### *Supplementary Provisions*

- 60. Power to make rules, directions and guidelines** – With the exception of those matters covered by section 31(2) of this Act and paragraph 9 of the **Third Schedule**,<sup>63</sup> the TDRO may, from time to time, with the approval of the Federal Government and by notification in the Official Gazette make rules, directions and guidelines for carrying out the purposes of any aspect of this Act.
- 61. Removal of difficulties** – If any difficulty arises in giving effect to any provision of this Act, the Federal Government may, for the purposes of removing such difficulty, make such Order as it considers expedient by notification in the Official Gazette and any such Order shall be given effect as a part of the provisions of this Act.
- 62. Authorities to assist and aid TDRO** – All law enforcement agencies and authorities in the Federation and the Provinces shall be under an obligation to provide and render full and complete assistance to the TDRO as and when the Executive Director General may deem fit and proper to require for carrying out the purposes of this Act.
- 63. Mode of recovery** – Any amount recoverable under this Act may be recovered as an arrear of land revenue.<sup>64</sup>

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<sup>63</sup> The effect of this carve out is that the TDRO will not be entitled to make rules, directions or guidelines on any aspect of the Commercial Bench, or appeals to the Supreme Court from the TDRO Appeal Board since the TDRO could be a party to proceedings in these fora.

<sup>64</sup> See s.29 of the Trade Organisation Act 2013; s.32 of the Employees Old Age Benefit Institution Act; s.33 of the Drug Regulatory Authority of Pakistan. There could be other amounts recoverable under the Act (*e.g.* arising out of an Arbitration Award or other determination), which would be covered by this provision.

**64. Immunity** – No suit, prosecution or any other proceedings shall lie against the Federal Government, Provincial Government, Executive Director General, Director General or any other officer or member of the TDRO, or any other person, in relation to any act or omission in the exercise of powers and duties under this Act or the rules made hereunder, save for conscious and deliberate wrongdoing.

**65. Offences and obstruction under this Act –**

(1) Any person or entity who:

(a) for the purpose of obtaining any benefit or avoiding any liability, whether for himself or itself or for some other person, under this Act:

(i) knowingly makes or causes to be made any false statement or false representation; or

(ii) produces or furnishes or causes or knowingly allows to be produced or furnished any document or information which he or it knows to be false in any material respect; or

(iii) fails to pay any amount which, under this Act, he or it is liable to pay; or

(b) obstructs any officer or person exercising any powers or fulfilling any functions under or in relation to this Act; or

(c) contravenes or disregards any provision of this Act or any rule or order made or any direction or instruction given thereunder;

shall be taken to be in contempt of court for the purposes of the Contempt of Court Ordinance, 2003 (IV of 2003) and any amendment, modification or re-enactment of the same and shall be subject to the initiation of proceedings by the TDRO under the said Ordinance (as amended, modified or re-enacted) for contempt of court.

- (2) Proceedings pursuant to section 65(1) may be initiated before a Commercial Bench or any other competent court in Pakistan, or (in so far as permitted by local law) in any foreign jurisdiction.

**66. Repeal of Commercial Courts** – Sections 5A, 5B and 5C of the Imports and Exports (Control) Act, 1950 (Act No. XXXIX of 1950) as amended are hereby repealed.

**67. Definitions** – In this Act:<sup>65</sup>

“**arbitration**” means any arbitration pursuant to the Second Schedule whether or not administered by a permanent arbitral institution;

“**arbitration agreement**” means an agreement by parties to submit to arbitration pursuant to the Second Schedule all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not;

“**arbitral tribunal**” means a sole arbitrator or a panel of arbitrators;

“**CLOUT database**” means the database of case law on UNCITRAL texts (CLOUT), maintained by UNCITRAL and accessible *inter alia* on the website of UNCITRAL;

“**Commercial Bench**” means a commercial bench of the High Court as constituted pursuant to section 46 of this Act or otherwise in existence;

“**conciliation**” means a process whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. Conciliation closely resembles mediation, but may involve a more directive and interventionist approach by the conciliator. The conciliator does not have the authority to impose upon the parties a solution to the dispute;

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<sup>65</sup> Unlike traditional legislative drafting in Pakistan, a modern drafting scheme is proposed, whereby definitions are placed at the end (see *e.g.* s.82 of the English Arbitration Act 1996).

“**conciliator**” means a sole conciliator or two or more conciliators as the case may be;

“**costs of the arbitration**” means the costs of any arbitral institution in discharging its functions, the fees and expenses of the arbitral tribunal, the legal and other expenses of parties and any other expenses related to the arbitration;

“**data message**” means information generated, sent, received or stored by electronic, magnetic, optical or similar means and includes electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

“**DGTO**” means the Directorate General of Trade Organisations, Ministry of Commerce;

“**Director General**” means the Directors General of TDRO and includes any officer empowered by the Federal Government, from time to time, to perform this function;

“**dispute**” includes any difference and any complaint;

“**early neutral evaluation**” means a non-binding, impartial assessment of the strengths and weaknesses of the respective cases of parties to a dispute;

“**electronic communication**” means any communication between parties by means of a data message;

“**Executive Director General**” means the functional head of TDRO and includes any officer empowered by the Federal Government, from time to time, to perform this function.

“**export**” is as defined in the Imports and Exports (Control) Act, 1950 (Act No. XXXIX of 1950) as amended;

“**freeze**” includes any attachment, sealing, prohibiting, holding, controlling or managing of any property either through a receiver or otherwise and in case it is deemed necessary the disposal thereof by sale through auction;

“**goods**” includes without limitation any tradable item, raw material, product or by-product which is sold for consideration and has an actual or potential customs classification;

“**ICC**” means the International Chamber of Commerce;

“**import**” is as defined in the Imports and Exports (Control) Act, 1950 (Act No. XXXIX of 1950) as amended;

“**international export or import**” means trade across international borders;

“**Judge**”, unless otherwise provided, means a judicial member of a Commercial Bench including a part-time<sup>66</sup> judicial member;

“**judgment**” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), and including interim measures of protection;<sup>67</sup>

“**juridical seat**” means the juridical seat of an arbitration referred to in paragraph 11 of the Second Schedule;

“**mediation**” means a process whereby parties request a third person or persons (“the mediator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. Mediation closely resembles conciliation, but may involve a less directive and interventionist approach by the mediator. The mediator does not have the authority to impose upon the parties a solution to the dispute;

“**mediator**” means a sole mediator or two or more mediators as the case may be;

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<sup>66</sup> To be considered – see the proposed provision on part-time judges in the Third Schedule.

<sup>67</sup> This replicates Art 4(1) of the Hague Convention on Choice of Court Agreements (30 June 2005), but includes interim measures of protection. This is significant, as it will allow for interim measures issued by the SICCC to be recognised and enforced in Pakistan.

“**Model Law on International Commercial Arbitration**” means the Model Law on International Commercial Arbitration adopted by UNCITRAL on 21 June 1985 as amended on 7 July 2006;

“**Model Law on International Commercial Conciliation**” means the Model Law on International Commercial Conciliation adopted by UNCITRAL on 24 June 2002;

“**Model Law jurisdictions**” means jurisdictions which have or have substantially adopted the Model Law on International Commercial Arbitration;

“**New York Convention**” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York on 10 June 1958 as implemented into the law of Pakistan by the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (Act No. XVII of 2011), and any amendment, modification or re-enactment of the same;

“**Person**” includes, in case of a company or body corporate, the sponsors, Chairman, Chief Executive, Managing Director by whatever name called and guarantors of the company or body corporate and in the case of any firm, partnership or sole proprietorship the partners, proprietor or any person having any interest in the said firm, partnership or proprietorship concern or direction or control thereof;

“**Property**” includes any or all movable and immovable properties situated within or outside Pakistan.

“**Regional Mediation Committee**” means a committee constituted under section 33 of this Act;

“**services**” means, without limitation, a service of whatever type or any description whether industrial, trade, professional or otherwise;

“**Singapore Court of Appeal**” means the Court of Appeal as established pursuant to the Singapore Supreme Court of Judicature Act (Chapter 322), and any amendment, modification or re-enactment of the same;

**“Singapore International Commercial Court” (SICC)** means the Singapore International Commercial Court as established pursuant to the Singapore Supreme Court of Judicature Act (Chapter 322), and any amendment, modification or re-enactment of the same;

**“Singapore Rules of Court”** mean the rules of court made in accordance with the provisions of the Singapore Supreme Court of Judicature Act (Chapter 322);

**“TDRO”** means the Trade Dispute Resolution Organisation established under this Act.

**“trade body”** means any entity registered for the purpose of managing trading matters or registered with the office of the DGTO under the Trade Organizations Act 2013 and any amendment, modification or re-enactment of the same;

**“Trade Dispute”** has the meaning set out in sections 3(2) and 3(3);

**“UNCITRAL”** means the United Nations Commission on International Trade Law;

**“UNCTAD”** means the United Nations Conference on Trade and Development;

**“WIPO”** means the World Intellectual property Organisation;

**“WTO”** means the World Trade Organisation.

# FIRST SCHEDULE

## MEDIATION, CONCILIATION AND EARLY NEUTRAL EVALUATION OF TRADE DISPUTES<sup>68</sup>

### Table of Provisions

#### *Paragraph*

1. Application
2. International origin and general principles
3. Variation by agreement
4. Commencement of proceedings
5. Suspension of limitation period
6. Number and appointment of mediators, conciliators and evaluators
7. Conduct of mediation, conciliation and early neutral evaluation
8. Communication between mediator, conciliator, or evaluator and parties
9. Disclosure of information
10. Confidentiality
11. Admissibility of evidence in other proceedings
12. Termination of proceedings
13. Mediator, conciliator and evaluator acting as arbitrator
14. Resort to arbitral or judicial proceedings
15. Enforceability of settlement agreement
16. Immunity

1. **Application** – Subject to sections 35 and 40,<sup>69</sup> this Schedule applies to all mediations and conciliations conducted pursuant to **Part VI** of this Act, and all early neutral evaluations conducted pursuant to **Part VII** of this Act.

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<sup>68</sup> Pursuant to **Parts VI** and **VII** of this Act, this Schedule enacts into Pakistan Law, for the limited purpose of Trade Disputes within the scope of this Act, the UNCITRAL Model Law on International Commercial Conciliation. The Model Law was adopted by UNCITRAL on 24 June 2002, and provides uniform and internationally accepted rules in respect of the conciliation process, to encourage the use of conciliation, and to ensure greater predictability and certainty in its use. The term “*conciliation*” was used by UNCITRAL to encompass all forms of ADR that involve negotiations facilitated by a neutral third party, including mediation, conciliation (being a form of mediation) and early neutral evaluation. In particular, the Model Law is designed to avoid uncertainty resulting from an absence of statutory provisions. It addresses key procedural aspects of conciliation (and all other related forms of ADR), including appointment of conciliators; commencement and termination of conciliation; conduct of the conciliation; communication between the conciliator and other parties; confidentiality and admissibility of evidence in other proceedings; as well as post-conciliation issues, such as the conciliator acting as arbitrator, and enforceability of settlement agreements. Further background to and explanation of this Model Law is available on the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)). For clarity, the applicability of this Model Law to mediation and early neutral evaluation has been made express in the text.

<sup>69</sup> This carve out would allow the TDRO to promulgate special mediation, conciliation, early neutral evaluation or other ADR regimes or procedures, if it so chose.

**2. International origin and general principles –**

- (1) This Schedule implements the Model Law on International Commercial Conciliation.
- (2) In applying and interpreting the provisions of this Schedule:
  - (a) regard shall be had to the international origin of the Model Law on International Commercial Conciliation, and to the need to promote uniformity in its application internationally, and as between jurisdictions that have implemented it;
  - (b) any question concerning matters governed by the Model Law on International Commercial Conciliation which is not expressly settled in that Law shall be settled in conformity with the general principles on which that Law is based; and
  - (c) recourse shall be had to international materials relating to the Model Law on International Commercial Conciliation and to its interpretation, including –
    - (i) relevant reports of UNCITRAL;
    - (ii) relevant reports and analytical commentaries of the UNCITRAL Secretariat;
    - (iii) relevant case law from other jurisdictions that have implemented this Law, including the case law reported by UNCITRAL in its CLOUT database; and
    - (iv) textbooks, articles and doctrinal commentaries on the Model Law on International Commercial Conciliation.

**3. Variation by agreement –** Except for the provisions of paragraphs 2 and 7(3), the parties may agree to exclude or vary any of the provisions of this Schedule.

**4. Commencement of proceedings –**

- (1) Mediation, conciliation and early neutral evaluation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in such proceedings or the TDRO makes a direction pursuant to section 14(1)(c) or 14(1)(d) of this Act.
- (2) If a party that invited another party to mediate, conciliate or submit to an early neutral evaluation does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent or within such other period of time as specified in the invitation the party may elect to treat this as a rejection of the invitation.

**5. Suspension of limitation period –**

- (1) When the mediation, conciliation or early neutral evaluation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the proceedings is suspended.
- (2) Where the mediation, conciliation or early neutral evaluation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation, conciliation or early neutral evaluation ended without a settlement agreement.

**6. Number and appointment of mediators, conciliators, and evaluators –**

- (1) There shall be one mediator, conciliator or evaluator, unless the parties agree or the TDRO directs that there shall be two or more.
- (2) The parties shall endeavour to reach agreement on each mediator, conciliator or evaluator, unless a different procedure for the appointment has been agreed upon or directed by the TDRO.
- (3) The parties may seek the assistance of an institution or person in connection with the appointment of mediators, conciliators or evaluators. In particular:

- (a) a party may request such an institution or person to recommend suitable persons to act as mediator, conciliator or evaluator; or
  - (b) the parties may agree that the appointment of one or more mediators, conciliators or evaluators be made directly by such an institution or person.
- (4) In recommending or appointing individuals to act as mediator, conciliator or evaluator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial person.
- (5) When a person is approached in connection with his or her possible appointment as mediator, conciliator or evaluator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, conciliator or evaluator, from the time of his or her appointment and throughout the proceedings, shall, without delay, disclose any such circumstances to the parties unless they have already been informed of them by him or her.

**7. Conduct of mediation, conciliation or early neutral evaluation –**

- (1) The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation, conciliation or early neutral evaluation is to be conducted.
- (2) Failing agreement on the manner in which the mediation, conciliation or early neutral evaluation is to be conducted, the mediator, conciliator or evaluator may conduct the proceedings in such a manner as he or she considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

- (3) In any case, in conducting the proceedings, the mediator, conciliator or evaluator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.
  - (4) The mediator, conciliator or evaluator may, at any stage of the proceedings, make proposals for a settlement of the dispute.
8. **Communication between mediator, conciliator or evaluator and parties** – The mediator, conciliator or evaluator may meet or communicate with the parties together or with each of them separately.
9. **Disclosure of information** – When the mediator, conciliator or evaluator receives information concerning the dispute from a party, he or she may disclose the substance of that information to any other party to the mediation, conciliation or early neutral evaluation. However, when a party gives any information to the mediator, conciliator or evaluator subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation, conciliation or early neutral evaluation.
10. **Confidentiality** – Unless otherwise agreed by the parties, all information relating to the mediation, conciliation or early neutral evaluation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.
11. **Admissibility of evidence in other proceedings** –
  - (1) A party to the mediation, conciliation or early neutral evaluation proceedings, the mediator, conciliator or evaluator, and any third person including those involved in the administration of the mediation, conciliation or early neutral evaluation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

- (a) An invitation by a party to engage in mediation, conciliation or early neutral evaluation proceedings or the fact that a party was willing to participate in such proceedings;
  - (b) Views expressed or suggestions made by a party in the mediation, conciliation or early neutral evaluation in respect of a possible settlement of the dispute;
  - (c) Statements or admissions made by a party in the course of the mediation, conciliation or early neutral evaluation proceedings;
  - (d) Proposals made by the mediator, conciliator or evaluator;
  - (e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator, conciliator or evaluator;
  - (f) A document prepared solely for purposes of the mediation, conciliation or early neutral evaluation proceedings.
- (2) Sub-paragraph 1 of this paragraph applies irrespective of the form of the information or evidence referred to therein.
- (3) The disclosure of the information referred to in sub-paragraph 1 of this paragraph shall not be ordered by an arbitral tribunal, court or other competent governmental authority and if such information is offered as evidence in contravention of sub-paragraph 1 of this paragraph that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.
- (4) The provisions of sub-paragraphs 1, 2 and 3 of this paragraph apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation, conciliation or early neutral evaluation proceedings.
- (5) Subject to the limitations of sub-paragraph 1 of this paragraph, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not

become inadmissible as a consequence of having been used in a mediation, conciliation or early neutral evaluation.

**12. Termination of proceedings** – The mediation, conciliation or early neutral evaluation proceedings are terminated:

- (1) By the conclusion of a settlement agreement by the parties on the date of the agreement;
- (2) By a declaration of the mediator, conciliator or evaluator, after consultation with the parties, to the effect that further efforts at settlement are no longer justified, on the date of the declaration;
- (3) By a declaration of the parties addressed to the mediator, conciliator or evaluator to the effect that the proceedings are terminated on the date of the declaration;
- (4) By a declaration of a party to the other party or parties and the mediator, conciliator or evaluator (if appointed), to the effect that the proceedings are terminated on the date of the declaration; or
- (5) By a declaration of the TDRO.

**13. Mediator, conciliator or evaluator acting as arbitrator** – Unless otherwise agreed by the parties, the mediator, conciliator or evaluator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation, conciliation or early neutral evaluation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

**14. Resort to arbitral or judicial proceedings** – Where the parties have agreed, or the TDRO has directed, that the dispute be referred to mediation, conciliation or early neutral evaluation, and where the parties have expressly undertaken or the TDRO has directed that no arbitral or judicial proceedings with respect to the dispute shall be initiated during a specified period of time or until a specified event has occurred, such

an undertaking or direction shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with or the TDRO directs otherwise, except to the extent necessary for a party in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate, conciliate or submit to early neutral evaluation, or as a termination of mediation, conciliation or early neutral evaluation proceedings.

- 15. Enforceability of settlement agreement** – If the parties conclude an agreement settling a dispute, that settlement agreement shall be binding and enforceable.<sup>70</sup>
  
- 16. Immunity** – the parties shall indemnify and hold harmless the mediator, conciliator and evaluator from all costs, claims, causes of action or proceedings which they have, may now have or might have in the future in respect of and arising from the mediation, conciliation or early neutral evaluation process.<sup>71</sup>

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<sup>70</sup> A specific and simplified regime can be included in the Commercial Bench provisions in the Third Schedule for the fast-track enforcement of settlement agreements.

<sup>71</sup> This provision does not appear in the UNCITRAL Model Law on International Commercial Conciliation, but has been added in order prevent attempts by parties to disrupt the dispute resolution scheme.

## SECOND SCHEDULE

### ARBITRATION OF TRADE DISPUTES<sup>72</sup>

#### Table of Provisions

##### *Paragraph*

#### **PART A – PRELIMINARY**

1. International origin and general principles
2. Interpretation

#### **PART B – SCOPE OF APPLICATION**

3. Application
4. Determination of threshold issues

#### **PART C – INITIATION OF PROCEEDINGS**

5. Arbitration agreement
6. Failure to comply with a TDRO time-limit
7. Substantive claim before court
8. Compatibility of interim measures
9. Death or bankruptcy or winding up of party
10. Commencement of proceedings
11. Juridical seat

#### **PART D - THE ARBITRAL TRIBUNAL**

12. Number of arbitrators
13. Appointment of arbitrators
14. Grounds for challenge of arbitrator
15. Procedure for challenge of arbitrator
16. Failure or inability to act
17. Replacement of arbitrator
18. Hearing following replacement of arbitrator

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<sup>72</sup> Pursuant to **Part VIII** of this Act, this Schedule enacts into Pakistan Law, for the limited purpose of Trade Disputes within the scope of this Act, a “state of the art” international arbitration law, implementing the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006. The version of the UNCITRAL Model Law adopted here closely tracks the Mauritius International Arbitration Act 2008 (Act No. 37 of 2008, as amended by the International Arbitration (Miscellaneous Provisions) Act 2013), which is widely acknowledged as an international standard. Further background to and explanation of this Model Law is available on the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)). The Act – in **Part VIII** – disapplies the existing Pakistan legislation on arbitration for the purposes of all arbitrations conducted under this schedule (since the existing law is entirely outdated, and has proven to be ineffective in maintaining an efficient arbitration system). The TDRO will want to publish a suggested Model Arbitration Agreement, to facilitate parties to contract into this regime.

19. Fees and expenses of arbitrators
20. Protection from liability and finality of decisions
21. Competence as to jurisdiction

#### **PART E - INTERIM MEASURES**

22. Interim measures by Tribunal
23. Recognition and enforcement of interim measures
24. Powers of Commercial Bench to issue interim measures

#### **PART F - CONDUCT OF ARBITRAL PROCEEDINGS**

25. Duties and powers of arbitral tribunal
26. Statements of claim and defence
27. Hearing
28. Default of party
29. Appointment of expert
30. Court assistance in taking evidence
31. Power of Commercial Bench to extend time limits
32. Representation

#### **PART G - THE AWARD**

33. Rules applicable to substance of dispute
34. Remedies and costs
35. Decision making by panel of arbitrators
36. Settlement
37. Form and contents of award
38. Termination of proceedings
39. Correction, interpretation and additional award
40. Exclusive recourse against award
41. Order setting aside arbitral award
42. Recognition and enforcement

#### **PART H – MISCELLANEOUS**

43. Provisions subject to agreement
44. Date of receipt of documents
45. Counterclaims
46. Waiver of right to object
47. Limitation and prescription
48. Witness statements

## **PART A - PRELIMINARY**

### **1. International origin and general principles –**

- (1)** This Schedule implements the Model Law on International Commercial Arbitration.
- (2)** In applying and interpreting the provisions of this Schedule –
  - (a)** regard shall be had to the international origin of the Model Law on International Commercial Arbitration, and to the need to promote uniformity in its application internationally, and as between Model Law jurisdictions;
  - (b)** any question concerning matters governed by the Model Law on International Commercial Arbitration which is not expressly settled in that Law shall be settled in conformity with the general principles on which that Law is based; and
  - (c)** recourse shall be had to international materials relating to the Model Law on International Commercial Arbitration and to its interpretation, including –
    - (i)** relevant reports of UNCITRAL;
    - (ii)** relevant reports and analytical commentaries of the UNCITRAL Secretariat;
    - (iii)** relevant case law from other Model Law jurisdictions, including the case law reported by UNCITRAL in its CLOUT database; and
    - (iv)** textbooks, articles and doctrinal commentaries on the Model Law on International Commercial Arbitration.

## 2. Interpretation –

(1) In:

- (a) applying and interpreting the provisions of this Schedule, and
- (b) developing the law applicable to the arbitration of international trade disputes in Pakistan under this Act, and
- (c) applying the provisions of the New York Convention in relation to any matter within the scope of this Act

no recourse shall be had to, and no account shall be taken of, the law or procedure relating to any other type of arbitration in Pakistan, any other Pakistan arbitration legislation, or any judgments based upon such legislation.

(2) In particular, and for the avoidance of doubt:

- (a) any existing rules concerning the reliance on evidence, the service of proceedings out of the jurisdiction of Pakistan, or any other matter shall not apply to applications made to a court, or matters arising, under this Act, or the New York Convention when applied to matters within the scope of this Act;
- (b) specific rules of court may be made pursuant to paragraph 9 of the **Third Schedule** setting out a comprehensive and stand-alone procedural code for the applications and matters referred to in sub-paragraph (a); and
- (c) rules made pursuant to sub-paragraph (b) may make provision for, amongst other things:
  - (i) the hearing of the applications and matters by designated judges so that they are determined by judges with specialist knowledge in the field of international trade and international arbitration;

- (ii) the service of proceedings out of the jurisdiction by electronic means or courier;
- (iii) the payment of security for costs; and
- (iv) the assessment and payment by the parties and their legal representatives of costs arising out of the applications and matters.

## **PART B – SCOPE OF APPLICATION**

### **3. Application –**

- (1) Subject to sub-paragraph (2), this Schedule shall apply to any dispute where all parties to the dispute have so agreed in conformity with paragraph 5.
- (2) The provisions of this Schedule shall not apply in so far as they conflict with the mandatory provisions of:
  - (a) any law that governs the arbitration by virtue of a choice of juridical seat pursuant to paragraph 11 of this Schedule;
  - (b) any other Pakistan arbitration law that applies in cases outside the scope of this Act.

### **4. Determination of threshold issues –**

- (1) Subject to paragraph 11(1), any issue as to whether this Schedule or any of its provisions applies to an arbitration shall be determined by the arbitral tribunal.
- (2) Where an issue referred to in sub-paragraph (1) arises before any court:
  - (a) where the arbitral tribunal has been constituted, the court shall decline to decide the issue, and refer it to the arbitral tribunal for determination;

- (b) where the arbitral tribunal has not yet been constituted, the court may make a provisional determination on the issue, pending determination by the arbitral tribunal once constituted.

## **PART C - INITIATION OF PROCEEDINGS**

### **5. Arbitration agreement –**

- (1) An arbitration agreement:
  - (a) may be in the form of an arbitration clause in a contract or other legal instrument or in the form of a separate agreement; and
  - (b) shall be in writing.
- (2) An arbitration agreement is in writing where:
  - (a) its contents are recorded in any form, whether or not the arbitration agreement or the contract has been concluded orally, by conduct, or by other means;
  - (b) it is concluded by an electronic communication and the information contained in it is accessible so as to be usable for subsequent reference; or
  - (c) it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- (3) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement in writing where the reference is such as to make that clause part of the contract.

### **6. Failure to comply with a TDRO time-limit –** Unless otherwise agreed, or directed by the TDRO pursuant to section 14(4) of this Act, no arbitration proceedings may be

commenced or continued in the event that a time limit imposed pursuant to sections 14(3) to 14(5) of this Act has been exceeded.

**7. Substantive claim before court –**

- (1) Where an action is brought before any court, and a party contends that the action is the subject of an arbitration agreement governed by this Schedule, that court shall automatically transfer the action to a Commercial Bench, provided that that party so requests not later than when submitting its first statement on the substance of the dispute.
- (2) A Commercial Bench shall, on a transfer under sub-paragraph (1), refer the parties to arbitration unless a party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.
- (3) Where a Commercial Bench finds that the agreement is null and void, inoperative or incapable of being performed, it may, in its discretion, transfer the matter back to the court which made the transfer.
- (4) Where an action referred to in sub-paragraph (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and one or more awards may be made, while the issue is pending before any court.

**8. Compatibility of interim measures –**

- (1) It is not incompatible with an arbitration agreement governed by this Schedule for a party to request, before or during arbitral proceedings, from a Commercial Bench or a court in a foreign state an interim measure of protection in support of arbitration, and for the court in question to grant such a measure.

- (2) An application to a Commercial Bench under sub-paragraph (1) shall be made and determined in accordance with paragraph 24.

**9. Death or bankruptcy or winding up of party –**

- (1) Unless otherwise agreed by the parties, an arbitration agreement governed by this Schedule is not discharged by the death, bankruptcy or winding up of a party and may be enforced by or against the representatives of that party.
- (2) Sub-paragraph (1) shall not affect the operation of any enactment by virtue of which a substantive right or obligation is extinguished by death, bankruptcy or winding up.

**10. Commencement of proceedings –** Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request by one party for that dispute to be referred to arbitration is received by the other party.

**11. Juridical seat –** Unless otherwise agreed by the parties:

- (1) the juridical seat of the arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case;
- (2) notwithstanding sub-paragraph (1), the arbitral tribunal may meet at such geographical location as it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods or other property or documents.

**PART D – THE ARBITRAL TRIBUNAL**

**12. Number of arbitrators –** Unless otherwise agreed by the parties –

- (1) the number of arbitrators shall be three; and

- (2) an agreement that the number of arbitrators shall be an even number shall be understood as requiring the appointment of an additional arbitrator as presiding arbitrator.

### **13. Appointment of arbitrators –**

- (1) Unless otherwise agreed by the parties, no person shall be precluded by reason of his nationality from acting as an arbitrator.
- (2) Subject to sub-paragraphs (4) and (5), the parties are free to agree on a procedure for appointing the arbitral tribunal.
- (3) Insofar as there is no agreement pursuant to sub-paragraph (2):
  - (a) in an arbitration with three arbitrators:
    - (i) each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator who shall act as presiding arbitrator; and
    - (ii) where a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or where the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, on the request of a party, by a Commercial Bench;
  - (b) in an arbitration with a sole arbitrator, where the parties have failed to agree on the arbitrator within 30 days of receipt of a request from a party, he shall be appointed, on the request of a party, by a Commercial Bench;
  - (c) where the arbitral tribunal is to be composed of a number of arbitrators other than one or 3, the arbitrators shall be appointed according to the method agreed upon by the parties, or, if those methods fail, in accordance with sub-paragraphs (4) and (5); and

(d) where there are multiple claimants or respondents, the multiple claimants, jointly, and the multiple respondents, jointly, shall each appoint an arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator who shall act as presiding arbitrator or, if this method of appointment fails, the appointment shall be made in accordance with sub-paragraphs (4) and (5).

(4) Where, under an appointment procedure agreed upon by the parties:

(a) a party fails to act as required under that procedure;

(b) the parties, or any arbitrators already appointed, are unable to reach an agreement expected of them under that procedure; or

(c) a third party, including an arbitral institution, fails to perform any function entrusted to it under that procedure,

any party may request a Commercial Bench to take any necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) In the event of any other failure to constitute the arbitral tribunal, any party may request a Commercial Bench to take any necessary measures, unless the agreement on the appointment procedure provides other means for resolving the failure.

(6) The measures which a Commercial Bench may take under sub-paragraphs (4) and (5) shall include –

(a) giving directions as to the making of any necessary appointments;

(b) directing that the arbitral tribunal shall be constituted by such appointments (or anyone or more of them) as have been made;

(c) revoking any appointment already made;

(d) appointing or reappointing any or all of the arbitrators; and

(e) designating any arbitrator as the presiding arbitrator.

- (7) A Commercial Bench, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third or presiding arbitrator, shall also take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

**14. Grounds for challenge of arbitrator –**

- (1) Where a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstance likely to give rise to justifiable doubts as to his impartiality or independence.
- (2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any circumstance referred to in sub-paragraph (1) to the parties unless they have already been informed of it by him.
- (3) Subject to sub-paragraph (4), an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.
- (4) A party may challenge an arbitrator appointed by him, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

**15. Procedure for challenge of arbitrator –**

- (1) Subject to sub-paragraphs (3) and (4), the parties are free to agree on a procedure for challenging an arbitrator.
- (2) Failing an agreement pursuant to sub-paragraph (1):
  - (a) a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in paragraph 14(3),

send a written statement of the reasons for the challenge to the arbitral tribunal; and

(b) unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) Where a challenge under any procedure agreed by the parties or under the procedure set out in sub-paragraph (2) is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request a Commercial Bench to decide on the challenge.

(4) While a request under sub-paragraph (3) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make one or more awards.

#### **16. Failure or inability to act –**

(1) Where an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for any other reason fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination.

(2) Where a controversy remains concerning any ground referred to in sub-paragraph (1), any party may request a Commercial Bench to decide on the termination of the mandate.

(3) Where, under this paragraph or paragraph 15, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this paragraph or paragraph 14(3).

#### **17. Replacement of arbitrator –**

(1) Where the mandate of an arbitrator terminates under paragraphs 15 or 16, or because of his withdrawal from office for any other reason, or because of the revocation of his mandate by agreement of the parties, or in any other case

of termination of his mandate save under paragraph 13(6), a substitute arbitrator shall, subject to this paragraph, be appointed according to the procedure that was applicable to the appointment of the arbitrator being replaced.

- (2) Unless otherwise agreed by the parties, where a party or the other members of the arbitral tribunal consider that an arbitrator has resigned for unacceptable reasons or refuses or fails to act without undue delay, that party or the other members of the arbitral tribunal may apply to a Commercial Bench to request the replacement of the arbitrator or the authorisation for the other members of the arbitral tribunal to continue the arbitration without the participation of that arbitrator.
- (3) In determining how and whether to act under sub-paragraph (2), a Commercial Bench shall take into account the stage of the arbitration, any explanation made by the arbitrator for his conduct and such other matters as it considers appropriate in the circumstances of the case.
- (4) Where, following an application under sub-paragraph (2), a Commercial Bench decides that the arbitrator is to be replaced, the Commercial Bench shall decide whether the replacement should be made applying the procedure that was applicable to the appointment of the arbitrator being replaced or whether the Commercial Bench should itself appoint the substitute arbitrator having regard to paragraph 13(7).

**18. Hearing following replacement of arbitrator** – Unless otherwise agreed by the parties, where under paragraphs 15, 16 or 17 an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his functions, unless the arbitral tribunal decides that the proceedings should resume at an earlier stage.

**19. Fees and expenses of arbitrators –**

- (1) The parties shall be jointly and severally liable to pay to the arbitrators such reasonable fees and expenses as are appropriate in the circumstances.
- (2) Where the arbitrators' remuneration would otherwise be the subject of no other scrutiny by an arbitral institution chosen by the parties or otherwise, any party may apply to a Commercial Bench, on notice to the other parties and to the arbitrators, which may order that the amount of the arbitrators' fees and expenses be adjusted and fixed in such manner and upon such terms as it may direct.

**20. Protection from liability and finality of decisions –**

- (1) An arbitrator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator, save for conscious and deliberate wrongdoing.
- (2) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator shall not be liable:
  - (a) for anything done or omitted in the discharge or purported discharge of that function, save for conscious and deliberate wrongdoing;
  - (b) by reason of having appointed or nominated the said arbitrator, for anything done by the arbitrator or his employees or agents in the discharge or purported discharge of his functions as arbitrator.
- (3) Sub-paragraphs (1) and (2) also apply to employees or agents of an arbitrator and of an arbitral institution.

**21. Competence as to jurisdiction –**

- (1) An arbitral tribunal may rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement.

- (2) An arbitration clause which forms part of a contract shall be treated for the purposes of sub-paragraph (1) as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
- (3) Subject to sub-paragraph (6), a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
- (4) A party shall not be precluded from raising a plea that the arbitral tribunal does not have jurisdiction by the fact that it has appointed, or participated in the appointment of, an arbitrator.
- (5) Subject to sub-paragraph (6), a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
- (6) The arbitral tribunal may admit a later plea under sub-paragraphs (3) or (5) if it considers the delay justified.
- (7) The arbitral tribunal may rule on a plea referred to in sub-paragraphs (3), (4) or (5) as a preliminary question or in an award on the merits.
- (8) Where the arbitral tribunal rules on the plea as a preliminary question, any party may, within 30 days after having received notice of that ruling, request a Commercial Bench to decide the matter, and, while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make one or more awards.

## **PART E – INTERIM MEASURES**

### **22. Interim measures by arbitral tribunal –**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures in the form of an order or award,

by which, at any time before making the award by which the dispute is finally decided, the arbitral tribunal orders a party to –

- (a) maintain or restore the *status quo* pending determination of the dispute;
- (b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied;
- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
- (e) provide security for costs.

(2) The party requesting an interim measure under sub-paragraphs (1)(a), (b) or (c) shall satisfy the arbitral tribunal that:

- (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

(3) With regard to a request for an interim measure under sub-paragraph (1)(d) or (e), the requirements in sub-paragraph (2) shall apply only to the extent the arbitral tribunal considers appropriate.

(4) The arbitral tribunal's determination of the existence of a reasonable possibility of success on the merits under sub-paragraph (2)(b) shall not affect the arbitral tribunal's independence and impartiality, or its power to make any subsequent determination of the merits.

- (5) The arbitral tribunal may modify, suspend or terminate an interim measure it has granted on application of any party or, in exceptional circumstances and on prior notice to the parties, on the arbitral tribunal's own initiative.
- (6) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
- (7) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
- (8) The arbitral tribunal may, at any time in the arbitral proceedings, order the party who requested the interim measure to pay damages and costs to another party where the arbitral tribunal determines that, in the circumstances, the measure requested should not have been granted.

**23. Recognition and enforcement of interim measures –**

- (1) An interim measure granted by an arbitral tribunal shall, subject to this paragraph, be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced on application to a Commercial Bench, irrespective of the country in which it was issued.
- (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the Commercial Bench of any termination, suspension or modification of that measure.
- (3) The Commercial Bench may, on an application for recognition or enforcement of an interim measure and if it considers it appropriate, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.
- (4) Recognition or enforcement of an interim measure may be refused only:
  - (a) at the request of the party against whom it is invoked where the court is satisfied that:

- (i) the refusal is warranted on a ground set out in paragraph 40(2)(a);
  - (ii) the arbitral tribunal's decision with respect to the provision of security in connection with the measure issued by the arbitral tribunal has not been complied with; or
  - (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by a court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
- (b) where the court finds that:
- (i) the measure is incompatible with the powers conferred on the court, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own power and procedures for the purposes of enforcing that measure and without modifying its substance; or
  - (ii) any of the grounds set out in paragraph 40(2)(b) apply to the recognition and enforcement of the measure.
- (5) Any determination made by the court on any ground in sub-paragraph (4) shall be effective only for the purposes of the application to recognise and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

**24. Powers of Commercial Bench to issue interim measures –**

- (1) A Commercial Bench shall have the same power to issue an interim measure in relation to arbitration proceedings as it has in relation to proceedings in court, whether or not the juridical seat of the arbitration is in Pakistan.
- (2) Unless the parties otherwise agree:

- (a) The court shall exercise the power referred to in sub-paragraph (1) in such a manner as to support, and not to disrupt, the existing or contemplated arbitration proceedings.
- (b) Where the case is one of urgency, the court may, on the *ex parte* application of a party or proposed party to the arbitral proceedings, make such order as it thinks necessary.
- (c) Where the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings made:
  - (i) on notice to the other parties and to the arbitral tribunal; and
  - (ii) with the permission of the arbitral tribunal or the agreement in writing of the other parties.
- (d) The court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- (e) Where the court so orders, an order made by it under this paragraph shall cease to have effect on the order of the arbitral tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

## **PART F – CONDUCT OF ARBITRAL PROCEEDINGS**

### **25. Duties and powers of arbitral tribunal –**

- (1) Every arbitral tribunal shall:
  - (a) treat the parties with equality and give them a reasonable opportunity of presenting their case; and

- (b) adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay and expenses, so as to provide a fair and efficient means for the resolution of the dispute between the parties.
- (2) Subject to the provisions of this Schedule, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (3) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Schedule, conduct the arbitration in such manner as it considers appropriate, and determine all procedural and evidential matters including:
  - (a) where and when the proceedings are to be held;
  - (b) the language to be used in the proceedings;
  - (c) whether any written statement of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;
  - (d) whether any document should be disclosed between, and produced by, the parties and at what stage;
  - (e) whether any question should be put to and answered by the parties;
  - (f) whether to apply rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;
  - (g) whether and to what extent the arbitral tribunal should itself take the initiative in ascertaining the facts and the law; and
  - (h) whether and to what extent the arbitral tribunal should administer oaths or take affirmations from any witness for the purposes of his examination before the arbitral tribunal.

**26. Statements of claim and defence** – Subject to paragraph 25, and unless otherwise agreed by the parties:

- (1) within the time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting its claim, the points at issue and the relief or remedy sought, and the respondent shall state its defence in respect of these particulars;
- (2) any party may amend or supplement its claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

**27. Hearing** –

- (1) Subject to sub-paragraph (2), unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials only.
- (2) Unless otherwise agreed by the parties, the arbitral tribunal shall hold a hearing at an appropriate stage of the proceedings, if so requested by a party.
- (3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of goods, other property or documents.
- (4) Every statement, document or other information supplied to the arbitral tribunal by a party shall be communicated to all other parties.
- (5) Any further statement, document or information received by the arbitral tribunal (whether from an expert appointed by the arbitral tribunal under paragraph 29 or otherwise) on which the arbitral tribunal might rely in making its decision shall also be communicated by the arbitral tribunal to all parties.

**28. Default of party** – Unless otherwise agreed by the parties, where without showing sufficient cause:

- (1) a claimant fails to communicate its statement of claim in accordance with paragraph 26, the arbitral tribunal shall terminate the proceedings either completely or, where there are multiple claimants, in relation to the claimant in question, unless a counterclaim is pending against that claimant;
- (2) a respondent fails to communicate its statement of defence in accordance with paragraph 26, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of any of the claimant's allegations;
- (3) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make one or more awards on the evidence before it.

**29. Appointment of expert** – Unless otherwise agreed by the parties:

- (1) the arbitral tribunal may:
  - (a) appoint one or more experts to report to it on any specific issue to be determined by the arbitral tribunal; and
  - (b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents goods or other property for his inspection;
- (2) where a party so requests or the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

**30. Court assistance in taking evidence –**

- (1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from a Commercial Bench assistance in taking evidence.
- (2) For the purposes of sub-paragraph (1) the Commercial Bench may:
  - (a) issue a witness summons to compel the attendance of any person before an arbitral tribunal to give evidence or produce documents or other material; or
  - (b) order any witness to submit to examination on oath before the arbitral tribunal, or before an officer of the court, or any person for the use of the arbitral tribunal.

**31. Power of Commercial Bench to extend time limits –**

- (1) Unless the parties otherwise agree, a Commercial Bench may extend any time limit agreed by the parties in relation to any matter relating to the arbitral proceedings or specified in this Schedule as having effect in default of such agreement, including any time limit for commencing arbitral proceedings or for making an award.
- (2) An application for an order under sub-paragraph (1) may be made:
  - (a) by any party to the arbitral proceedings on notice to all other parties and to the arbitral tribunal (if already constituted); or
  - (b) by the arbitral tribunal on notice to the parties.
- (3) A Commercial Bench shall not exercise its power to extend a time limit unless it is satisfied that:
  - (a) any available recourse to the arbitral tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted;
  - (b) a substantial injustice would otherwise occur.

- (4) An order under this paragraph:
  - (a) may be made whether or not the time limit has already expired;
  - (b) may be made on such terms as the Commercial Bench thinks fit; and
  - (c) shall not affect the operation of any applicable rule of limitation or prescription.
  
32. **Representation** – Unless otherwise agreed by the parties, a party may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, who need not be qualified to practise law in Pakistan or in any other jurisdiction.

## **PART G - THE AWARD**

### **33. Rules applicable to substance of dispute –**

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
- (2) Any designation of the law or legal system of a State shall be construed, unless otherwise expressly provided, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (3) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (4) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.
- (5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

### **34. Remedies and costs –**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal –

- (a) may make a declaration as to any matter to be determined in the proceedings; and
  - (b) may order the payment of a sum of money, in any currency; and
  - (c) has the same powers as a Court in Pakistan:
    - (i) to order a party to do or refrain from doing anything; and
    - (ii) to order specific performance of a contract; and
    - (iii) to order the rectification, setting aside or cancellation of a deed or other document; and
  - (d) may award simple or compound interest for such period and at such rate as it considers meets the justice of the case.
- (2) Unless otherwise agreed by the parties –
- (a) the costs of the arbitration shall be fixed and allocated by the arbitral tribunal in an award, applying the general principles that –
    - (i) costs should follow the event except where it appears to the arbitral tribunal that this rule should not apply or not apply fully in the circumstances of the case; and
    - (ii) the successful party should recover a reasonable amount reflecting the actual costs of the arbitration, and not only a nominal amount; and
  - (b) in the absence of an award fixing and allocating the costs of the arbitration, each party shall be responsible for its own costs, and shall bear in equal share the fees and expenses of the arbitral tribunal and any arbitral institution, and any other expenses related to the arbitration.

**35. Decision making by panel of arbitrators –**

- (1) Subject to sub-paragraphs (2) and (3), in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members.
- (2) Any question relating to procedure may be decided by a presiding arbitrator, if so authorised by the parties or by all members of the arbitral tribunal.
- (3) Unless otherwise agreed by the parties, where there is no majority, any decision shall be made by the presiding arbitrator alone.

**36. Settlement –**

- (1) Where during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall –
  - (a) be made in accordance with paragraph 37; and
  - (b) state that it is an award; and
  - (c) have the same status and effect as any other award on the merits of the case.

**37. Form and contents of award –**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the arbitration proceedings on different aspects of the matters to be determined.
- (2) The arbitral tribunal may, in particular, make an award relating to –
  - (a) any specific issue in the arbitration; or
  - (b) a part only of the claims or counterclaims submitted to it for decision.

- (3) An award shall be made in writing and shall be signed by the arbitrator or, in arbitral proceedings with more than one arbitrator, by the majority of all members of the arbitral tribunal or by the presiding arbitrator alone where he is acting pursuant to paragraph 35(3), provided that the reason for any omitted signature is stated.
- (4) An award shall state the reasons on which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under paragraph 36.
- (5) An award shall state the date on which the award was made and shall always be deemed to have been made at the juridical seat of the arbitration.
- (6) After an award is made, a copy signed by the arbitrators in accordance with sub-paragraph (3) shall be delivered to each party.
- (7) An award shall be final and binding on the parties and on any person claiming through or under them with respect to the matters determined therein, and may be relied upon by any of the parties in any proceedings before any arbitral tribunal or in any court of competent jurisdiction.
- (8) Except in relation to interim measures granted by the arbitral tribunal in the form of an award pursuant to paragraph 22, an award shall be final and binding on the arbitral tribunal with respect to the matters determined therein.
- (9) Where an award has been made, the arbitral tribunal shall not, except as provided in paragraphs 22(5), 39 or 40(5), vary, review, add to or revoke the award.

**38. Termination of proceedings –**

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with sub-paragraph (2).
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where:

- (a) all claimants withdraw their claim, unless a respondent objects and the arbitral tribunal recognises a legitimate interest on its part in obtaining a final settlement of the dispute;
  - (b) the parties agree on the termination of the proceedings; or
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) Subject to paragraphs 39 and 40(5), the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

**39. Correction, interpretation and additional award –**

- (1) Within 30 days of the receipt of an award, or such other period as may be agreed by the parties:
- (a) a party, with notice to all other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature; and
  - (b) if so agreed by the parties, a party, with notice to all other parties, may request the arbitral tribunal to give an interpretation of a specific part of the award.
- (2) Where the arbitral tribunal considers a request under sub-paragraph (1) to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request and any interpretation shall form part of the award.
- (3) The arbitral tribunal may correct any error of the type referred to in sub-paragraph (1)(a) on its own initiative within 30 days of the date of the award.
- (4) Unless otherwise agreed by the parties, within 30 days of receipt of an award, any party, with notice to all other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award, and where the arbitral tribunal considers the request to be justified:

- (a) it may issue further procedural directions or hold further hearings in relation to the claim omitted from the award if necessary; and
  - (b) it shall make the additional award within 60 days.
- (5) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under sub-paragraph (2) or (4).
- (6) Paragraph 37 shall apply to a correction or interpretation of the award or to an additional award.

**40. Exclusive recourse against award –**

- (1) Any recourse against an arbitral award under this Schedule may be made only by an application to a Commercial Bench for setting aside in accordance with this paragraph.
- (2) An arbitral award may be set aside by a Commercial Bench only where:
  - (a) the party making the application furnishes proof that:
    - (i) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Pakistan law; or
    - (ii) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or
    - (iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or



proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

- (6) Where an application is made to set aside an award, the Commercial Bench may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

**41. Order setting aside arbitral award** – The Commercial Bench may, where it makes an order setting aside an arbitral award or any part thereof under paragraph 40, and taking into account the grounds on which the award or the relevant part thereof has been set aside, give such other directives as it considers appropriate, including directives relating to:

- (1) the remittance of the matter to the arbitral tribunal;
- (2) the commencement of a new arbitration, including the time within which such arbitration shall be commenced;
- (3) the future conduct of any proceedings the parties to which were referred to arbitration under paragraph 7(2); or
- (4) the bringing of any action, including the time within which such action shall be brought, by any party to the arbitral award concerning any matter which was the subject of the arbitral award which was set aside by the Commercial Bench.

**42. Recognition and enforcement** – The New York Convention shall apply to the recognition and enforcement of awards rendered under this Schedule.

## PART H – MISCELLANEOUS

### **43. Provisions subject to agreement –**

- (1) Where a provision of this Schedule, save for paragraph 29, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination.
- (2) Where a provision of this Schedule refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.

### **44. Date of receipt of documents –** Unless otherwise agreed by the parties, any request or other written communication in an arbitration governed by this Schedule shall be deemed to have been received on the day on which it is delivered where:

- (1) it is delivered to the addressee personally or at its place of business, habitual residence or mailing address or, if none of these can be found after making a reasonable inquiry, it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it; or
- (2) it is delivered by any means of communication, electronic or otherwise, that provides a record of despatch and receipt of the communication, including delivery against receipt, registered post, courier, facsimile transmission, telex or telegram.

### **45. Counterclaims –** Where a provision of this Schedule, other than paragraphs 28(a) and 38(2)(a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to such counterclaim.

### **46. Waiver of right to object –** A party which knows, or could with reasonable diligence have known, that any provision of this Schedule from which the parties may agree to derogate, or any requirement under the arbitration agreement, has not been complied with, but proceeds with the arbitration proceedings without stating an objection to the

non-compliance within a reasonable time or such time as may have been agreed upon by the parties, shall be deemed to have waived its right to object.

**47. Limitation and prescription –**

- (1) No enactment relating to limitation or prescription in Pakistan shall apply to arbitration proceedings merely by reason of the fact that the juridical seat of the arbitration is Pakistan.
- (2) Unless otherwise agreed by the parties, the law or rules of law determined under paragraph 33 shall apply to any issue of limitation or prescription arising in arbitral proceedings under this Schedule.
- (3) A Commercial Bench may order that, in computing the time prescribed for the commencement of proceedings in respect of a dispute which was the subject of:
  - (a) an award which the Commercial Bench orders to be set aside or declares to be of no effect; or
  - (b) the affected part of an award which the Commercial Bench orders to be set aside in part or declares to be of no effect in part,

the period between the commencement of the arbitration proceedings and the date of an order under sub-paragraph (a) or (b) shall be excluded.

- 48. Witness statements –** Any person who, for the purposes of any proceedings governed by this Schedule, knowingly makes a witness statement which is false in any material respect shall commit an offence and shall, on conviction, be liable to a fine not exceeding PKR [        ] and to penal servitude for a term not exceeding [ 3 ] years.

## **THIRD SCHEDULE**

### **REGIME FOR COMMERCIAL BENCHES ACTING PURSUANT TO THIS ACT <sup>73</sup>**

#### Table of Provisions

*Paragraph*

#### **PART A – PRELIMINARY**

1. Application
2. Interpretation
3. Transfer of pending cases

#### **PART B – PROCEDURE OF THE COMMERCIAL BENCH**

4. Procedure
5. Powers
6. Rules of evidence
7. Standing of the TDRO before the Commercial Bench
8. Appeals against Court orders

#### **PART C – RULES, DIRECTIONS AND GUIDELINES**

9. Power to make rules, directions and guidelines.
10. Training and continuous education

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<sup>73</sup> The intention of this Third Schedule, and the detailed procedural rules that are to be promulgated hereunder in the future, is to create a “state of the art”, fast, efficient branch of the High Court, that avoids all the delays and problems of the current High Court.

## **PART A – PRELIMINARY**

- 1. Application** – For the purposes of all matters under or concerning this Act:
  - (1) all proceedings in every Commercial Bench shall be governed exclusively by the provisions of this Schedule and all rules, directions and guidelines made from time to time hereunder;
  - (2) any provisions of any Pakistan legislation, rules or procedures that are inconsistent with the provisions of this Schedule or any rules, directions or guidelines made hereunder are hereby excluded.
  
- 2. Interpretation** – In applying and interpreting the provisions of this Schedule and any rules, directions or guidelines made hereunder, regard shall be had to the general principles in sections 4 and 5 of this Act.
  
- 3. Transfer of pending cases** – Upon the establishment of a Commercial Bench in any given Province, all cases filed in any other court in that Province which fall within its jurisdiction under this Act shall be transferred to it immediately.

## **PART B – PROCEDURE OF THE COMMERCIAL BENCH**

- 4. Procedure** – For the purposes of all matters under or concerning this Act and notwithstanding anything contained in any other law:
  - (1) all matters coming before the Commercial Bench under this Act shall be disposed of and final judgment pronounced as expeditiously as possible but not later than ninety days from the date of presentation of the petition or application to the Court and, except in extraordinary circumstances and on grounds to be recorded, the Court shall hear the case from day-to-day;<sup>74</sup>

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<sup>74</sup> This is s.9(1) of the Companies Ordinance 1984 and the regime for the Company Bench.

- (2) the hearing of the matters referred to in sub-section (1) shall not be adjourned except for sufficient cause to be recorded or for more than fourteen days at any one time or for more than thirty days in all;<sup>75</sup>
- (3) the procedure of the Commercial Bench shall be prescribed in rules, directions and guidelines made, from time to time, under paragraph 9 of this Schedule;
- (4) the Commercial Bench shall only apply the provisions of and practices under the Code of Civil Procedure 1908 (Act No. V of 1908) and the Code of Criminal Procedure 1898 (Act No. V of 1898) if and insofar as:
  - (a) they concern a matter that is not addressed by any of the rules, directions or guidelines referred to in sub-paragraph (3); and
  - (b) the Commercial Bench considers that they are consistent with the general principles in sections 4 and 5 of this Act and in particular the requirement that there be a swift, efficient and effective resolution of trade disputes; the implementation of internationally accepted standards; the establishment of streamlined procedures; and the avoidance of delays, obstruction and inefficiencies.
- (5) Any matter of procedure that is not resolved by the application of sub-paragraphs (1) and (2) shall be resolved by the Commercial Bench in its discretion and in accordance with the general principles in sections 4 and 5 of this Act.

**5. Powers** – For the purposes of all matters within the scope of this Act, the Commercial Bench shall have all the powers provided for in rules, directions and guidelines made from time to time under paragraph 9 of this Schedule.

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<sup>75</sup> This is s.9(2) of the Companies Ordinance 1984 and the regime for the Company Bench.

**6. Rules of Evidence –**

- (1) Insofar as the rules, directions and guidelines made under paragraph 9 of this Schedule so provide, the Commercial Bench acting under this Act:
  - (a) shall not be bound to apply any rule of evidence under Pakistan law;
  - (b) may apply other rules of evidence whether such rules are found under any foreign law or otherwise;
  - (c) may order that any question of foreign law be determined on the basis of submissions instead of proof.
- (2) “Rule of evidence” mentioned above includes any rule of law relating to privilege or to the taking of evidence.

**7. Standing of the TDRO before Commercial Benches –** In all proceedings before the Commercial Bench under this Act where the TDRO is not a party and subject to any rules, directions and guidelines made under paragraph 9 of this Schedule, the TDRO shall have standing and be entitled to intervene as *amicus curiae*<sup>76</sup> and shall be entitled to receive copies of all pleadings and other documents filed by all parties for the purposes of the proceedings.

**8. Appeals against Court orders –**

- (1) Notwithstanding anything contained in any other law, appeals from the Commercial Bench shall lie in accordance with rules, directions and guidelines made pursuant to paragraph 9 of this Schedule.
- (2) All appeals preferred under sub-section (1) shall be finally disposed of by the Court hearing the appeal within ninety days of the submission of the appeal.<sup>77</sup>

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<sup>76</sup> The precise mechanics for this will need to be addressed in the detailed procedural rules to be made under paragraph 9.

<sup>77</sup> This is s.10 of the Companies Ordinance 1984 and the regime for the Company Bench.

## **PART C – RULES, DIRECTIONS AND GUIDELINES**

- 9. Power to make rules, directions and guidelines** – The Federal Government may, from time to time, by notification in the Official Gazette make rules, directions and guidelines on any aspect of the establishment, composition, administration and operation of the Commercial Bench and all related matters including (without limitation) all procedural and evidential matters.
  
- 10. Training and Continuous Education** – The Federal Government may prescribe requirements and establish facilities for on-going professional training of Judges of the Commercial Bench.

**\*\*\*\*\* *End of Draft* \*\*\*\*\***