

# A practical approach to commercial arbitration system in Pakistan

파키스탄의 상사중재제도에 관한 실무적 접근

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## Abstract

The commercial arbitration is considered an effective and rapid means in solving problems and finding solutions for disputes between the business partners. For the development of commercial arbitration, there is a need to study arbitration in practice as well as in theory.

This paper analyse the situation of commercial arbitration system in Pakistan both with respect to domestic laws and international laws applicable in Pakistan. The Arbitration Bill 2009 aims to consolidate law relating domestic arbitration, international commercial arbitration, recognition and enforcement of foreign arbitral awards as well as settlement of international investment disputes. Pakistan while defending investment claims and in order to restore investor's confidence, in 2011, Pakistan introduced a law to secure foreign investments.

This study explains the relationship of old and new Pakistani arbitration laws and elaborates the changes brought about by the new enactments and gives a comprehensive analysis of Pakistani arbitration laws, rules and procedures dealing with arbitration agreements and awards. In the absence of relevant trade information in Pakistan, this paper is designed to meet the needs of a Korean international trade scholars to obtain an understanding of Pakistani commercial arbitration system quickly.

**Key Words** : Pakistan, Commercial Arbitration, Arbitration Act, The Arbitration Bill 2009

## I. Introduction

International commercial transactions have been enormously growing since the latter half of the twentieth century. Globalization has been significantly contributing to this trend. Pakistan is well placed as a transit route for East-West trade in this era of increasing globalization. Pakistan sits on one of the most important trade routes of the world. This area has traditionally been a centre for exchange of cultures and commerce of South, South East, West and Central Asia. With the growth in the number of transnational transactions, trade disputes between the parties located in different countries have also visibly increased.

Pakistan's arbitration systems should definitely be modernized, made attractive to foreigners as well as Pakistan's citizens, and given institutional support.<sup>1)</sup> In order to restore investors' confidence, the Pakistani government has enacted on April 28, 2011 a law to secure foreign investment. The purpose of this act is to implement the International Convention on the Settlement of Investment Disputes(ICSID) between states and nationals of other states, with an aim to bringing transparency in the settlement of investment disputes. The current legislation would prove instrumental in attracting foreign direct investment and further promote investment climate in Pakistan.

The arbitration system in Pakistan is not new, as it has been informally followed from ages in the shape of Panchayat<sup>2)</sup> and Jirga etc.<sup>3)</sup> 'Panchayat' has been at work in various parts of Pakistan but unfortunately this system has been ruthlessly misused. At some places, the vulnerable people have become the victim of this system and more strong and more influential people have remained above this system.

Pakistan have mostly been suspicious in their approach towards international commercial arbitration.<sup>4)</sup> As the governments change, the new regime routinely makes allegations of corruption in investment contracts against their predecessors in power and foreign investors. Due to prevalent corruption, the foreign investors may feel obliged to take benefit of under the table deals and bribe government officials to obtain contracts.

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1) Gordon Jaynes (2004), International Arbitration in Pakistan, Journal of International Arbitration, vol.21(1), pp. 83 - 89

2) refer to a group of respectable of the locality to decide upon the disputes between the locals of that area.

3) Sung-Kwon Won (2013), Overview of Alternative Dispute Resolution with special reference to arbitration laws in Pakistan, Journal of Arbitration Studies, vol.23 (3), pp.149-167

4) Abdulhay Sayed(2004), Corruption in International Trade and Commercial Arbitration, Kluwer Law International, p.71

In the case of an investment dispute, one of the critical questions is whether corruption claims can be adjudicated by Pakistani courts or international arbitration tribunals, the latter being preferred by foreign investors.<sup>5)</sup>

The purpose of this paper is to provide an overview of arbitration system in the Pakistan, with emphasis on the following issues, namely: applicable laws of arbitration and comparison between domestic and international commercial arbitration. This paper also analyses recent enactments that implement the New York(NY) Convention he ICSID Conventions in Pakistan, and explains the changes brought about by these enactments in the existing foreign arbitration regime.

This paper review the realities of Pakistani commercial arbitration practice, i.e. how commercial arbitration is conducted, and the principles pertaining to the arbitration agreement, the formation, functions and role of the arbitration tribunal, and the effect and importance of the arbitration award. The main focus is identifying various problem areas in the commercial arbitration in Pakistan so that suitable changes and improvements may be discussed.

## II. Legal framework for commercial arbitration

Generally, the legal framework of the commercial arbitration in Pakistan encompasses local arbitration, international arbitrations, and investment treaty arbitrations.<sup>6)</sup>

The local arbitration comprises Pakistani law as the governing law of arbitration with the venue of arbitration in the regions of Pakistan. On the other hand, the international arbitrations comprise of a foreign law as the governing law of arbitrations with venue of arbitration outside the regions of Pakistan though the subject matter of the arbitration having links with the Pakistani Law. Lastly, the investment treaty arbitrations comprise of bilateral investment treaties signed between Pakistan and Foreign country.

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5) Umer Akram Chaudhry (2011), Arbitrability of Corruption Claims in Pakistan,  
<http://translexblog.wordpress.com/2011/12/27/arbitration-corruption-pakistan/>

6) Mujtaba Jamal, Fareed Yaldrum and Sara Hayat (2013), European Lawyer Reference Series, Arbitration Regime in Pakistan, p.1

## 1. Domestic arbitration statuses in Pakistan

### 1) The Arbitration Act 1940

In domestic field Pakistan followed the Arbitration Act 1940 for the resolution of disputes, the one adopted before the independence of Pakistan. Sole purpose of the Arbitration Act 1940 is to curtail litigation in courts and promote settlement of disputes amicably through persons in whom both the parties repose their confidence.

This Act provides a method whereby parties to the arbitration can jointly appoint an arbitrator or each party can appoint an arbitrator who joins a neutral arbitrator.

The Act provides three classes of arbitration. First, Arbitration proceedings without the intervention of the court. Second, Arbitration proceedings with the intervention of the court, where either party to the arbitration can make an application to the court for the appointment of the arbitrator. Third, Arbitration proceeding in the pending suits, the party to the suit apply to the court to refer the matter to the arbitration and the court then appoint the arbitrator.

In Pakistan, other than the code of civil procedure, the law which determines procedure for the arbitrators is the Arbitration Act 1940. Pakistani arbitration is governed under the Arbitration Act 1940 (a pre-partition enactment which still continues in force). It is the principal legislation governing arbitration in Pakistan which provides a balance between the informality, flexibility and efficiency of arbitration proceedings, as well as, the authenticity, protection and support of the court.<sup>7)</sup>

Arbitration Act 1940 is based on the early English Arbitration Act (pre-partition enactment) and is not based on the UNCITRAL Model Law on international commercial arbitration. Furthermore, the Arbitration Act 1940 provides a piece of legislation that provides the freedom to the parties to mutually agree upon the modalities of the arbitration. However, the Arbitration Act 1940, in the absence of a comprehensive arbitration agreement, does not provide exact and specific guidance to the parties thereby leaving many gaps and limitations which the court may have to fill to reach to conclusions.

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7) *ibid.* p.1

## **2) The code of civil procedure 1908**

The code of civil procedure was enacted in 1908 replacing the Indian Arbitration Act 1899. The provisions of code of civil procedure 1908 are applicable to all the legal proceedings before the court of the state and to all appeals under this act.

For the purpose of arbitration proceedings, the court shall have the same power of making the laws and orders related to any of the matters set out in the second schedule as it has for the purpose of any proceedings in the court. In addition, the code of civil procedure 1908 will be applicable to take prejudice any power that may have been enacted by the arbitrator or any third party or umpire for making the orders with respect to any of such matters.

## **3) The Arbitration (protocol and convention) Act, 1937**

The Act of 1937 dealt with the execution of foreign arbitral awards. This act has been repealed by the Recognition and Enforcement of (Arbitration Agreement and Foreign Arbitral) Awards Ordinance 2005, Pakistan, which came into force to incorporate the NY Convention of 1958 in to the laws of Pakistan.

Most of the litigation related to foreign arbitration took place under the Act of 1937, so it is very important to comment on it. This act was pursuant to the Geneva Protocol on arbitration clauses of 1923 and Geneva Convention on Execution of Foreign Arbitral Awards of 1927 (the Geneva Convention).

This act has a limited scope and applied to a very particular class of foreign arbitral awards. The word 'foreign award' was narrowly defined in the section 2 of the act. The courts of Pakistan has interpreted the term 'foreign arbitration' as an arbitration of foreign land, by the foreign arbitrators, to which the foreign laws were applied and in which a foreign national was involved. Thus certain parameters should be fulfilled to consider an award as a foreign award under this act.

## **2. International conventions applicable in Pakistan**

Pakistan has recently made extensive reforms of its arbitration laws, which relate to both international investment and commercial arbitration. These reforms amend laws on the enforcement

and recognition of foreign arbitration agreements and awards in Pakistan and aim to modernize the applicable laws as well as fulfill Pakistan's obligations under the NY and the ICSID Conventions.<sup>8)</sup>

### 1) The NY Convention regime

Pakistan is preparing the enactment of two statutes relating to international arbitration. First, a law to enforce the NY Convention has been passed by the national assembly and is currently pending consideration before the senate. Second, a new arbitration act, based on the UNCITRAL model law, is pending before the national assembly.<sup>9)</sup>

The NY Convention was signed by the Pakistan on 30th December 1958 after becoming the party to convention on the Recognition and Enforcement of Foreign Arbitral Awards in the same year.

However, the convention was ratified and sanctioned with significant delays on 14th July 2005. The convention was being implemented, until recently, across the country through successive ad hoc presidential decrees, called Ordinances. This includes the ordinances such as the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2010 which was formally made public on 20th April 2010 and subsequently expired on 17th August 2010.

The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance of 2010 is a holistic piece of legislation that covers the use of arbitration, conciliation and alternative dispute resolution within and outside Pakistan, including promulgating a domestic law implementing the ICSID between states and nationals of other states of 1966, or Washington Convention.<sup>10)</sup>

The scope of application of the NY Convention was meant to cover a confluence of different forms of international commercial arbitrations. Unfortunately, the Convention left it up to member states to define when an arbitral award would be foreign or domestic. a character determinative test of whether an award can be regarded as foreign or domestic is vital to clear up the loopholes in the law on international commercial arbitration that currently exists in the law. As regards foreign arbitral awards the law till recently had been Arbitration (protocol and convention) Act.<sup>11)</sup>

8) Ahmad Ali Ghouri (2013), Law and Practice of Foreign Arbitration and Enforcement of Foreign Arbitral Awards in Pakistan, Springer Briefs in Law, p.1

9) Laurence Burger and Ijaz Ahmed, Pakistan enacts a statute to implement The ICSID Convention, the Kluwer Arbitration Blog, June 16, 2011.

10) Shahid Jamil (2007), 'Pakistan and ICSID: A Step in the Right Direction; Arbitration, vol. 73, pp.228-230.

## 2) ICSID regime

This Act was signed by Pakistan on 6th July 1965 and ratified it on 15th September 1966. The Washington Convention, unlike Pakistani law, has not enacted any legislation until the promulgation of the Arbitration (International Investment Disputes) Ordinance 2007 in order to enact the laws of Washington Convention into the municipal laws of Pakistan.

The Washington Convention, like the NY Convention, was too initially implemented in Pakistan through the process of successive ad hoc ordinances. However, a permanent legislation on 28th April 2011 was enacted to implement the Washington Convention by the parliament under the act of Arbitration International Investment Disputes 2011.<sup>12)</sup>

Section 3 of the Arbitration International Investment Disputes Act entitles a person seeking enforcement and recognition of an arbitral award issued by the ICSID to have the arbitral awards registered in a local high court subject to evidence related to any matters which may be prescribed.

To sum up, the ICSID facilitates conciliation and arbitration on investment disputes between the contracting states and nationals of other contracting states.

## III. Understanding of new proposed legislations

Despite numerous developments in arbitration in Pakistan, where legislation either addressed the domestic aspect of arbitration or purely followed the international aspect of it making the system unclear, the proposed Bill of 2009 is an appreciated step towards the modern arbitration system to achieve international standards of arbitration.

The Pakistani government is very keen to promote a modern arbitration system, and the courts have also supported and encouraged arbitration by declaring the procedure just, proper, equitable and in consonance with the spirit of the arbitration agreement. The Arbitration Bill 2009 consists of six parts and two schedules addressing arbitration, conciliation, enforcement of domestic and foreign arbitral awards and the establishment of an independent institution and its composition.

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11) See section 283 of Companies Ordinance, 1984.

12) Mansoor Hassan Khan (2014), The Asia-Pacific Arbitration Review

## 1. The Arbitration Bill 2009

In order to restore investors' confidence, the Pakistani government has enacted on April 28, 2011 a law to secure foreign investment. The purpose of the act is to implement the ICSID between states and nationals of other states, with an aim to bringing transparency in the settlement of investment disputes.<sup>13)</sup>

The national assembly of Pakistan introduced the Arbitration Bill 2009 which aspires to implement the UNCITRAL model law on the international commercial arbitration into Pakistan. The current act is the result of a government sponsored bill introduced in Parliament in 2010 which attaches the ICSID Convention as a schedule.

The Arbitration Bill 2009 is intended to supersede and build on the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance of 2009, which implemented the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, or NY Convention, into Pakistani law.<sup>14)</sup>

The legislation would prove instrumental in attracting foreign direct investment and further promote investment climate in Pakistan. Section 2(1)(i) of The Arbitration Bill, 2009 defines international commercial arbitration as: international commercial arbitration means an arbitration relating to certain disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in Pakistan where at least one of the parties is (i) an individual who is a national of any country, or habitually resident in another country other than Pakistan; or (ii) a body corporate which is incorporated outside Pakistan in any other country; or (iii) a company or an association of persons or a body of individuals whose principal office or central management and control is exercised from outside Pakistan in any country other; or (iv) the government of a foreign country.

Now, international commercial arbitrations taking place within Pakistan are also covered by the Arbitration Bill 2009. The Arbitration Bill 2009 provides certain enabling provisions in respect of such arbitrations and gives supervisory powers over such arbitrations to Pakistani courts largely in accordance with the UNCITRAL model law.

Such provisions and powers include, amongst other things, giving the parties the power to

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13) Laurence Burger and Ijaz Ahmed (2011). op. cit.

14) Shahid Jamil (2008), 'Pakistan's Implementation of the New York Convention', *Arbitration*, vol. 74, pp.170-180.



obtain interim measures<sup>15)</sup> before or during arbitral proceedings; the Chief Justice of Pakistan having powers to appoint arbitrators; supervisory powers of Pakistani courts over the appointment and challenge of arbitrators; giving arbitral tribunals the power to rule on their own jurisdiction; rules governing the conduct of arbitrations; court assistance in taking evidence; powers to arbitrators to decide a case *ex aequo et bono* or as *amiable compositeur* if authorized by the parties; and to apply the substantive law of any country chosen by the parties.<sup>16)</sup>

## 2. Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011

This is repealed by Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 except for the cases of foreign arbitral awards made in state and foreign arbitral awards made before July 14th 2005 which is neither a party to the NY Convention regime nor modified by the government of Pakistan for the purposes of the new act.

In addition, ICSID Convention covers the arbitrations arising from investment treaty arbitrations. These are generally regulated by the International Investment Disputes Arbitration Act 2011 that specifically offers that the provisions of Arbitration Act 1940 should not cover the proceedings pursuant to the ICSID Convention section 7.

Since 2005 the government of Pakistan kept the ordinance alive through consecutive Ordinances. On 15th July 2011 this ordinance got the permanent basis in the municipal laws of Pakistan through an act namely Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011.

Section 4 of this act deals with the enforcement of arbitral agreements as mentioned in the Article II (3) of the NY Convention. Certain judgments of Pakistani courts confused the international business community, like supreme court in the case of *Eckhardt & Co Marine GMBH, West Germany V Muhammad Hanif*<sup>17)</sup> refused to enforce foreign arbitration agreement. Each case has different facts and grant or refusal of stay is dependent upon particular facts and

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15) One of the reasons for the failure of arbitration in Pakistan is the inefficacious law on interim measures. see more at Ikram Ullah (2013), *Interim Measures in Arbitration under the Pakistani Legal Regime*, *Arbitration International*, vol.29(4), pp.653 - 670.

16) Shahid Jamil (2010), *Pakistani arbitration: towards the Model Law*, *Arbitration News*, Vol.15(1), pp.103-107

17) *Eckhardt & Co Marine GMBH, West Germany v Muhammad Hanif*, PLD 1993 Supreme Court 42

circumstances of each cases.

The court can make objective assessment and come to the conclusion whether stay of legal proceedings can be granted or refused. This judgment raised a question in the international business community that whether the arbitration agreement is enforceable in Pakistan but to tackle this, the ordinance in Section 4(2) stated that arbitration agreement is enforceable unless, it is null and void, inoperative or incapable of being performed.

International commercial arbitrations taking place within Pakistan are also covered by the Bill. The Bill provides certain enabling provisions in respect of such arbitrations and gives supervisory powers over such arbitrations to Pakistani courts largely in accordance with the UNCITRAL model law.

A new arbitration act should be passed to implement the UNCITRAL model law on International Commercial Arbitration (the model law) into Pakistan. Although it purports to implement the model law, the Bill is in fact a modified version of the Indian Arbitration Act 1996 (the Indian Act). Although it is still very much in draft form its initiation is a positive sign for international commercial arbitration in Pakistan.

This was subsequently re-promulgated from time to time before the enactment of the convention act, the Recognition and Enforcement (Arbitration Agreements Foreign Arbitral Awards) Act of 2011 which implements the NY Convention in Pakistan (“Convention Act”) and is limited to the enforcement of “foreign arbitral awards.”

This has brought about a qualitative change in respect of foreign arbitral awards. In Pakistan after the enactment of the Recognition and enforcement of (Arbitral Awards and Foreign Arbitral Awards) Act (2011), the courts have begun to deviate substantially from its earlier stand under the Arbitration Protocol and Convention Act (1937) in defining the scope and meaning of international commercial arbitration.

## IV. Practical approach to arbitrating the jurisdiction in Pakistan

### 1. Arbitrating the jurisdiction

#### 1) The appointment of arbitral tribunal

In the appointment of arbitral tribunal, the 1940 Act does not place any express restrictions on the rights of parties to appoint their umpires or arbitrators. The parties may name the arbitration in the agreement of the arbitration or define the procedure for his/her appointment. Pursuant to section 3, if the arbitration agreement is silent about the number of arbitrators, the first schedule of arbitration shall be referred to a sole arbitrator. In addition, a court is empowered under the section 8 of 1940 Act to appoint any arbitrator or umpire if the parties fail to do so by consensus.<sup>18)</sup>

In addition, the courts generally consider the applications for removal of umpires or arbitrators under the section 11 of the 1940 Act on the basis of facts of case. The courts will grant the applications for removal if persuaded that the omission/acts complained of constitute misconduct on the part of arbitrator and resulted in miscarried of justice (for example in the case of (Adamjee Insurance Company Limited v RB Industries Limited (1981) CLC [Karachi] 923); Abdul Hamid Butt v Government of West Pakistan (1975) PLD Lahore 1427).<sup>19)</sup>

#### 2) Confidentiality of arbitration proceedings

Under the 1940 Act, there are no express provisions that could declare the arbitration law proceedings as such confidential. Hence, it would be justified and reasonable to assert that arbitration proceedings conducted are not confidential under the 1940 Act. At the request of any party to the arbitration agreement or any person claiming under such party, the arbitrators are required to file the award in court together with any documents or dispositions that may have been undertaken and proved before them.<sup>20)</sup>

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18) Mujtaba Jamal, Fareed Yaldrum and Sara Hayat (2013), op. cit. p.3

19) ibid. p.5

20) ibid. p.5

### 3) Role and interference of the national courts

If a party to an arbitration agreement refuses to go to arbitration, the other party can seek intervention of the court to compel a reference to arbitration procedure. The Arbitration Act 1940 is totally inadequate, in regard to matters of procedure. Of course the arbitrator must observe the essentials of natural justice, failing which, the arbitrator's award can be set aside for misconduct.<sup>21)</sup>

In the case of court intervention under section 33 of the Arbitration Act, competence principle has to uphold otherwise it would be subject to international criticism<sup>22)</sup> as in case of Hub Power Company Case v WAPDA.<sup>23)</sup> Courts in Pakistan proceed under Article V of the NY Convention to reject and to enforce the award, if the arbitral tribunal is not competent.

Under the under section 34 of 1940 Act, the courts would usually stay a court action in favour of the arbitration. The section 34 of the act indicates that the application of the party regarding the agreement of the arbitration (i.e. before filling a written statement or taking any other steps in the proceedings), the judicial authority and judge may stay proceedings against the party if it is satisfied that there is no sufficient reasons as to why the matter may not be referred to the arbitration.<sup>24)</sup>

Further, the general approach of the courts is to uphold a valid arbitration and direct the parties to resolve their disputes in accordance with the provisions of the agreement. However, the matters involving the cases of public policy and criminality cannot be referred by the court as arbitration (e.g. The HUB Power Company Limited v Pakistan WAPDA (2000) PLD SC 841; Eckhardt and Company, Marine GMBH v Muhammad Hanif (1993) PLD SC 42).<sup>25)</sup>

The courts also play a significant role by in case when plaintiff sues an arbitrable claim is accused. They follow the principle that a plaintiff who sues on an arbitrable claim unconditionally, without having initiated the arbitration of the claim as well as demanding the specific performance related to the agreement of arbitration and creates in the defendant the right selection so that defendant could insist upon arbitration (e.g. Conticot SA Co. v Farooq Corporation (1999) CLC [Karachi] 1018; Societe Generale De Surveillance SA v Pakistan (2002)).<sup>26)</sup>

21) Choi You-Jin, Vishnu Konoorayar Konoorillam and Jaya Vsudevan Suseela (2012), International Commercial Arbitration in South Asia: A Comparative Study, Korea Legislation Research Institution, 법제교류연구 12-21(6), p.88

22) See e.g. the strong critique in the leading textbook Redfern and Hunter (2004), The Law and Practice of International Commercial Arbitration (4th ed., Sweet & Maxwell), pp.33-38.

23) National Judicial Committee of Pakistan, International Judicial Conference 13-15 April, 2012

24) Mujtaba Jamal, Fareed Yaldrum and Sara Hayat (2013), p.6

25) *ibid.* p.7

26) Martin Lau (2003), Note on Société Générale de Surveillance SA v. Pakistan, through Secretary, Ministry of Finance,

#### 4) The award

Under the 1940 Act, the award must be pronounced within the time limits specified in the agreements of the arbitrations or failing such agreement within the four months of the commencement of hearing. The time limit, however, can be extended by the court under the cases of certain circumstances by following the section 28 first schedule. Moreover, the awards must be in writing and signed by the arbitrators. The majority of views would be prevailed if there are more than one arbitrator.

The majority of views would be prevailed if there is more than one arbitrator. Subject to sub-section 4, the parties are free to agree on a procedure for challenging an arbitrator. Failing any agreement referred to in sub-section 1, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section 3 of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

Unless the arbitrator challenged under sub-section 2 withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section 2 is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. Where an arbitral award is made under sub-section 4, the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34. Where an arbitral award is set aside on an application made under sub-section 5, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

#### 5) Removal of arbitrators

A party can consult the court for the removal of an arbitrator under certain circumstances: (a) When the arbitrator fails to perform arbitration proceedings and fails to make an award; (b) Where the arbitrator or umpire has misconducted himself or the proceedings, e.g unreasonable delay, has not acted impartially, etc. The two terms are important: 'reasonable dispatch' and 'misconduct'. Both are of wide import and shall include instances where the arbitrator has not

acted impartially or has acted negligently and caused unreasonable delay or is unqualified by way of physical or mental incapacity.

The tribunal is empowered to make interim awards unless a different intention appears in the arbitration agreement Section 27 of the Arbitration Act. Pakistani Court has the power to grant such interim orders as it deems necessary at any time after the arbitration award is filed with the court where it is satisfied that: (a) there is a risk that the other party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award; (b) speedy execution of the award is just and necessary Section 18 of the Arbitration Act.

Further, the courts may also order the preservation, interim custody or sale of any goods that form part of the subject matter of the arbitration and order the detention, preservation or inspection of any property or thing that forms part of the subject matter of the arbitration.

The courts also have the power to grant anti-suit injunctions to honour the arbitration agreement between the parties if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement. The discretionary power of the courts under Section 34 of the Arbitration Act has been considerably curtailed by Section 4 of the Convention Act implementing Article II of the NY Convention which requires Pakistani courts to order anti-suit injunctions except where the same is null and void, inoperative or incapable of being performed.

Application of Article II of the NY Convention has been tested in a small body of case law which inter alia have upheld the sanctity of the arbitration agreement between the parties.

## **2. Practical guide for commercial arbitration**

### **1) Appeal procedure under arbitration system**

The award once given by an arbitrator or umpire is final and cannot be appealed on a point of law. However, the courts in Pakistan may remit an award where the award has left undetermined any matters that were referred to arbitration, or where it has determined any matters not referred to arbitration, or where it is so indefinite as to be inapplicable in practice. The court may also remit an award that does not give reasons in sufficient detail modify or correct an award on a matter that is not part of the referral to arbitration, or where the award is imperfect in form or

contains an obvious error or set aside.

Domestic award falling within the scope of the arbitration act may be unenforceable on one or more of the following grounds: an arbitrator or umpire has misconducted himself or the proceedings; an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid; and an award has been improperly procured or is otherwise invalid.

There is another serious shortcoming in the arbitration act in Pakistan. The term 'public policy' is not explained clearly. Public policy is equivalent to the "policy of the law" in letter and spirit. The meaning attributed to the phrase 'public policy' in Section 23 of the Contract Act 1872 would be relevant. The expression 'public policy' has been judicially interpreted by courts in the context of Section 23, it was observed that the term 'public policy' does not have any definition, since it is a variable quantity that varies with the habits, capacities and opportunities of the public.

The Supreme Court of Pakistan has further explained the limits of 'public policy' by holding that in the Pakistan constitutional set-up with the Objectives Resolution being its part, new situations with new principles of public policy with Islamic ethos/spirit would have to be defined and applied.<sup>27)</sup>

Pakistani courts have largely tried to give a restrictive construction to 'public policy'. Accordingly, they will hopefully not try to use the vagueness of the term to imply a generalized supervisory interest in the application of Pakistani substantive law in arbitration proceedings involving foreign parties. Such a result would not be in line with the spirit of the NY Convention.<sup>28)</sup>

Under Article 2-A of the constitution of Pakistan the Objectives Resolution has been made a substantive part of the Constitution of Pakistan. The Objectives Resolution was passed in by the constituent assembly in March 1949. The Objectives Resolution, inter alia, states that the principles of Islamic common law are salutary rules for state policy, and that all the three organs of the state that is, the legislature, the executive, and the judiciary have to act in accordance with the provisions of the constitution.

While dispensing justice, various provisions of the constitution, the laws, the orders passed and actions taken thereunder have to be interpreted in accordance with the principles of Islamic

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27) Martin Lau (2006), *The Role of Islam in the Legal System of Pakistan*, p.44

23) Shahid Jamil (2010), *op. cit.* pp.104-105

common law. In short, foreign arbitral awards may be unenforceable on the following, amongst other, public policy grounds: where the award is against the Objectives Resolution; and/or Where enforcement would be against national interest, for instance where the court comes to a conclusion that the enforcement of the award would be detrimental to internal or external security of the country or the award tends to jeopardize the economic interests of the country.

The parties cannot exclude by agreement statutory rights of appeal and other recourses available. Any attempt to do so may render the arbitration agreement invalid.<sup>29)</sup> If the court which set aside the award is otherwise competent under the laws of Pakistan, Pakistani courts may not enforce such award. This issue has not been adjudicated upon.

## 2) Judicial bias and lack of judicial independence in Pakistan

The previous above discussed cases from other jurisdictions reveal that, generally the courts seize their jurisdiction on the petition of the party feeling aggrieved on certain act or omission of the defendant.

Before giving an analytical view about the judicial bias in Pakistani courts, there is a need to draw a clear distinction between the element of 'judicial bias' and 'lack of judicial independence'.<sup>30)</sup>

<Table 1> Distinction between lack of judicial independence and judicial bias

Judicial Bias	Lack of Judicial Independence
Judicial bias is an element which roots into the minds of the members of judiciary and has no further backing.	Judiciary lacks its independence when it is influenced or dominated by any other organ of the state.
Judicial bias hinders sharing of power with any alternative mode of dispute resolution.	Lack of independence works for protecting the interests of influencing authority.
Judicial bias directly targets arbitration system as a rival and obstructs its progress.	Lack of independence does not victimize arbitration system directly but arbitration may become an unwanted prey.
Proof of judicial bias establishes a jurisdiction as an unfriendly jurisdiction for arbitration.	Proof of lack of independent judiciary establishes the weak institutional growth of the country.

source: Rana Rizwan Hussain (2013)

29) Section 23 of the Contract Act, 1872

30) Rana Rizwan Hussain (2013), International Arbitration: Debate Of Judicial Bias In Pakistan, available at <https://ranarizwanhussain.wordpress.com/2013/04/10/international-arbitration-debate-of-judicial-bias-in-pakistan/>



The purpose of drawing distinction between both the elements is to draw attention to the fact that the effect of lack of judicial independence in the court decisions should not be mixed with the effect of judicial bias.

However, Pakistani courts were exercising excessive judicial activism to secure a protectionist bias against international commercial arbitration. Cases such as *Eckhardt* represent the suspicion with which the Pakistani legal community has viewed international commercial arbitration. The high fees involved, coupled with the general perception that foreign arbitrators invariably rule against Pakistani parties, fed into this suspicion of international commercial arbitration.<sup>31)</sup>

In the case of *SGS.v. Pakistan*, the Supreme Court of Pakistan granted orders restraining SGS from continuing arbitration pending at ICSID.<sup>32)</sup> Again in *Hubco v. WAPDA*, the same court entertained claims started in the courts of Pakistan, whilst ICC arbitration was ongoing in London. This demonstrates that without the support of courts, arbitration could not advance in Pakistan. Courts should be sensitized to the importance of arbitration with particular emphasis on foreign awards and their enforcement.

## V. Conclusion

Arbitration has indeed gained considerable popularity among the world mercantile community due to a variety of reasons. It is likely to become increasingly a preferred mode of dispute resolution with the further growth of trade and Pakistan's fuller integration into the world trading system.

A domestic award may be enforced under the 1940 Act in Pakistan. A foreign award within the scope of the NY Convention may be enforced under the Arbitration Agreement and Foreign Awards Act. A foreign arbitral award which is enforceable under the Arbitration Agreement and Foreign Awards Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.

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31) Shahid Irfan Jamil (2005), *International Commercial Arbitration in Pakistan, Navigating Between The New York Convention and The Draft Arbitration Act 2005*, ICC Arbitration Conference, November 23, 2005.

32) Samuel Marful-Sau (2009) *Can International Commercial Arbitration be effective without national courts? A perspective of courts involvement in International Commercial Arbitration*

As a private, autonomous and international dispute resolution mechanism arbitration has become independent from national laws in practice. The absence of confidentiality in the Arbitration Act produces multiple challenges to the whole process. This study suggests to include a confidentiality provision in the arbitration clause and make it enforceable to all parties concerned. Pakistan has adopted certain legislative measures to introduce modern arbitration system.

The significance of the study of commercial arbitration especially international commercial arbitration lies in the fact that, in the contemporary world of changing dimensions it has become a sophisticated mechanism for consensually dealing with international commercial disputes.

This study explains the relationship of old and new Pakistani arbitration laws and elaborates the changes brought about by the new enactments and gives an in depth and up to date analysis of Pakistani arbitration law dealing with arbitration agreements and awards. This paper analyses the realities of pakistani commercial arbitration practice, i.e. how arbitration is conducted, and the principles pertaining to the arbitration agreement, the formation, functions and role of the arbitration tribunal, and the effect and importance of the arbitration award. It provides an essential guide for scholars concerned with international trade law.

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## 국문초록

# 파키스탄의 상사중재제도에 관한 실무적 접근

원 성 권\*

상사중재는 문제를 해결하고 사업 파트너간 분쟁에 대한 해결책을 찾는 신속하고 효과적인 방법이다. 상사중재 발전을 위해 이론 뿐 만 아니라 실무차원에서 중재연구의 접근이 필요하다. 본 논문은 파키스탄 국내 중재법과 파키스탄에서 적용되는 국제상사중재제도에 대한 상황과 접근방법 등을 제시하였다. 파키스탄에서 새롭게 정비된 2009년 중재법은 국내중재, 국제상사중재, 외국 중재판정의 집행뿐 만 아니라 국제투자분쟁의 해결에 관한 법률을 통합하는 것을 목표로 한다. 더 나아가 2011년에 파키스탄 투자자의 신뢰를 회복하기 위해 외국인 투자자를 보호할 수 있는 법을 도입하기도 하였다.

본 논문은 파키스탄의 중재법의 과거부터 현재까지 진전된 관계를 설명하고 새로운 법령에 의해 적용된 변경사항을 설명하고 중재계약 및 판정을 다루는 파키스탄 중재 법률, 규칙 및 절차를 실무차원에서 포괄적으로 제시하였다. 잠재시장인 파키스탄관련 통상정보가 부재한 상황에서 한국무역학자들에게 파키스탄 상사중재제도에 관한 실무적 이해를 돕기 위하여 작성되었다.

주제어 : 파키스탄, 상사중재, 중재법, The Arbitration Bill 2009

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