

LAW OF ARBITRATION IN PAKISTAN

The Statute

The law of arbitration in Pakistan is contained in the Arbitration Act, 1940 (a pre-partition enactment, which still continues in force). Its main features are summarized as under:

The Act provides for three classes of arbitration:–

- (a) arbitration without court intervention (Chapter II, sections 3-19);
- (b) arbitration where no suit is pending, (but through court) (Chapter III, section 20) and
- (c) arbitration in suits (through court) (Chapter IV, sections 21-25).

The Act also contains further provisions, common to all the three types of arbitration (Chapter V, sections 26-38).

Arbitration agreement

Whatever be the class of arbitrations there must be an arbitration agreement. As defined in the Arbitration Act, 1940, it means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not [section 2 (2)].

Arbitrators

The number of arbitrators can be one, two, three or even more. In the case of an even number of arbitrators, an umpire is to be appointed according to the procedure given in the Act [First Schedule. Where the arbitration agreement does not specify the number, the arbitration shall be by a sole arbitrator (First Schedule).

An arbitrator may be named in the arbitration agreement or may be left to be appointed by a designated authority (First Schedule).

Where the arbitration agreement is silent about the mode of appointment of arbitrators and the parties cannot agree about the choice of the arbitrator, the Act gives power to the court to make the appointment, after following the prescribed procedure (sections 8-10).

An arbitrator who does not diligently conduct the proceedings, or who is guilty of misconduct, can be removed by the court after due inquiry (section 11).

Death of a party does not terminate the arbitration proceedings, if the cause of action survives (section 6).

The arbitrator has got certain statutory powers, including the power to administer oaths to witnesses, power to “state a case” for the opinion of the court etc.

Court intervention

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 (section 20).
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 (section 30). But various stages of the process are not dealt with in the Act.

In practice, arbitration is conducted on the basis of (i) the pleadings (statement of claim and statement of defense), whereupon (ii) issues may be framed (if necessary), followed by (iii) affidavits, (iv) oral evidence, and (v) arguments.

The award

The award must be pronounced within the time limits laid down in the arbitration agreement or (failing such agreement), within 4 months of the commencement of hearing. However, the time limit can be extended by the court in certain circumstances (section 28, and First Schedule).

The award has to be in writing and signed by the arbitrator. If there are more than one arbitrator, the majority view prevails. The Act itself does not provide that the arbitrator shall give reasons for the award. When the award is a non-speaking award, the scope for interference by the court with the award becomes somewhat limited.

Court control over the award

An award cannot be enforced, by itself. Judgment of the court has to be obtained in terms of the award (section 17).

In the scheme of the Arbitration Act, 1940, the court may:–

- (a) pass judgment in terms of the award (section 17), or
- (b) modify or correct the award (section 15), or
- (c) remit the award (on any matter referred to arbitration), for re-consideration by the arbitrator or umpire (section 16), or
- (d) set aside the award (section 30).

In short, the court may (i) totally accept the award, or (ii) totally reject it, or (iii) adopt the intermediate course of modifying it or remitting it.

Modifying the award

Modification of award by court

The Court may, by order, modify or correct an award:–

- (a) where it appears to the court that a part of the award is upon a matter not referred to arbitration and can be separated from the other and does not affect the decision on the matter referred, or
- (b) where the award is imperfect in form, or contains an obvious error which can be amended without affecting such decision, or
- (c) where an award contains a clerical mistake or an error arising from an accidental slip or omission (section 15).

Remitting the award

The court may remit the award (or any matter referred to arbitration):–

- (a) here the award has left undetermined certain matters or where it determines matters which are not referred to arbitration, and which cannot be separated from the rest or
- (b) where the award is so indefinite, as to be incapable of execution or
- (c) where an objection to the legality of the award is apparent on the face of it (section 16).

Setting aside the award

The court can set aside the award, only on one or more of the following grounds, namely:–

- (a) that the arbitrator or umpire has misconducted himself or the proceedings;
- (b) that the award has been made after issue, by the court, of an order superseding the arbitration; or
- (c) that an award has been improperly procured or is otherwise invalid (section 30).

Misconduct of the arbitrator (Setting aside the award)

One of the principal grounds for setting aside the award under the Act of 1940 is the ground of misconduct. Section 30 of the Act expresses it in rather cryptic terms by phrasing it in this manner "the arbitrator has misconducted himself or the proceedings". No exhaustive definition of "misconduct" in this context can be given because misconduct is as large as life itself.

Because of the endless variety of situations in life, treatment of the subject in an exhaustive manner is likely to degenerate into a mere catalogue of instances. It will be more useful if selected instances of misconduct are collected and are classified under a few convenient groups. In arranging the cases under such group, one should bear in mind the fact that misconduct may arise from the arbitrator's conduct of the case, the arbitrator's relations with the parties, the arbitrator's mode of arriving at the decision (in regard to the materials relied on by the arbitrator or the tests applied), and the arbitrator's mode of formulating his award.

Specific heads of misconduct

Here are some specific heads of misconduct which recur frequently in practice:—
proceeding ex parte, without justification (and analogous acts);
private inquiries by the arbitrator;
absence of the arbitrator;
delegation by the arbitrator, or the arbitrator associating strangers with the arbitration;
use of wrong criteria by the arbitrator;
use of wrong material (by the arbitrator);
irregularities in the award.

Proceeding ex parte and analogous acts

It is misconduct for an arbitrator:—
to hear only one party in the absence of the other; or
to fail to give notice of hearing; or
to amend the issues behind the back of the parties, thereby causing prejudice.

But it is not misconduct on his part to amend the issue at the time of writing an award, if no prejudice is caused to the parties.

Competent court

The court competent to exercise various powers under the Arbitration Act, 1940, is the civil court, which would be competent to entertain a civil suit, if a suit were to be filed on the cause of action which forms the basis of the arbitration.

Private inquiries

An arbitrator must decide on the evidence on record, and not on material obtained otherwise. It is misconduct on his part:—

(i) to import his personal knowledge into the decision;
to hold a private conference with a party;
to hold a private meeting behind the back of the party;
to make a private inquiry behind the back of the party;
to listen to confidential information, adverse to a party, even if the arbitration agreement gives him full latitude, (though the position may be different, if the parties had the

opportunity of checking and contradicting the information so proposed to be utilized); to communicate with one party, behind the back of the other party.

Absence of arbitrators

Where there are more than one arbitrator, they must all act together. The award is bad, if one arbitrator is absent. The position may be different if what was done during the absence of one arbitrator is done all over again by all the arbitrators, or if the act performed in the absence of one arbitrator is only ministerial, such as looking into an account book.

Joint deliberations

All arbitrators must deliberate jointly. However, the parties may waive the irregularity. Delegation by arbitrator, or associating strangers with the arbitration. An arbitrator cannot delegate his functions to another person. It follows, that if the award is given by a person to whom the arbitrator delegates his functions, the award is a nullity. There is, however, an exception to this rule, where the delegation is:—

- (i) with the consent of all the parties, or
- (ii) a purely ministerial act.

An arbitrator cannot associate a third person with the decision-making process. Here again, there is no misconduct, if there was consent of all the parties, to such a course being adopted.

Use of wrong criterion by arbitrator

Sometimes, an arbitrator, while not guilty of procedural lapses (as in the above categories of misconduct), employs a wrong criterion for coming to a conclusion. The award may then be set aside on that ground. Examples are:

- (i) assessment of damages for breach of contract, on the basis of rates prevailing in the black market (instead of the controlled rates);
- (ii) ignoring very material documents, at a stage when the evidence has not yet been closed.

Errors of law

Questions of difficulty arise, when the arbitrator's decision is challenged, for an erroneous conclusion reached by the arbitrator on matters of law. the position appears to be a bit complex and cannot be stated with absolute certainty. However, broadly speaking, one can state the law on the subject in the form of the following propositions:—

- (a) where a question of law has been specifically referred to the arbitrator for his decision, then his ruling on that question, if bona fide and if not suffering from any other defect, is not open to challenge, merely because it is erroneous;

(b) if a question of law has not been specifically referred to the arbitrator, his ruling on the point of law (if material to the result) may render the award void.

First as to situation (a) above. Where an arbitrator is called upon to decide the effect of the agreement, he has to really to decide a question of law, (i.e., in interpreting the agreement), and hence his decision on the point is not open to challenge.

In situation (b) above, the award of the arbitrator can be set aside on the ground of an error of law on the face of the award. However, for this purpose, the court cannot look into a document not referred to, in the award.

Generally, the question of error of law can arise only if reasons are given in the award. However, if the very relief granted by the award is illegal, the position is different. Thus, an arbitrator cannot grant specific performance of a contract of service. Nor can a contract for the sale of movable property be enforced specifically, save in exceptional cases.

Decision to be according to Legal Rights

An arbitrator must decide according to legal rights, and not according to his own notions of fairness. There may, of course, be special situations where a different intention of the parties may be inferred and upheld judicially.

Basis of interference by court

The logical basis on which the jurisdiction of the court to interfere for apparent error can be justified, needs first to be explained. The general principle is that an arbitrator is a final judge both of fact and of law. So far as questions of fact are concerned, this jurisdiction has been limited to decisions pronounced after serious procedural lapses, which reveal breach of natural justice or other technical misconduct. So far as errors of law are concerned, the jurisdiction of the court, (though not conferred in so many words by section 30), seems to have been based on the assumption that if the parties have not specifically referred a question for the decision of the arbitrator, then it is implied that the general power of the court to determine legal questions between the parties remains unimpaired. In theory, the jurisdiction can also be supported on the ground that the ultimate arbiters of questions of law should be the courts, so that uniformity is maintained.

Reasoned and unreasoned awards

Where the award is an unreasoned one, the court cannot interfere on the ground of an error therein. If the arbitrator chooses to give reasons, then the award can be set aside on the ground of error of law, although, in general, the reasonableness of the reasons themselves cannot be challenged.

Interpretation of contracts

The same principle is also followed, regarding questions of interpretation of contract as determined in the award. Court can interfere only if the award is a speaking award. It is only if the line of interpretation is set out in the award that the court can interfere.

Breach of natural justice

Of course, the arbitrator would be guilty of misconduct, if there is a breach of natural justice. Thus, it is well established that the arbitrator cannot depend on personal knowledge or arrive at a conclusion behind the back of the parties.

But where the arbitrator decides a question of fact on the basis of the evidence and on the basis of answers given by the parties in response to queries from the arbitrator, the award cannot be said to be based on personal knowledge and cannot be set aside on that ground.

Arbitrator's award may be set aside, if it awards charges for extra work, escalation charges and damages claimed by the construction contractor without any supporting material.

The preceding Arbitration Act of 1940 that governs domestic arbitration in Pakistan has several deficiencies. Under the Act, the parties are relatively free to adopt procedures of their choice with little oversight. With no national arbitral institutions, there are no arbitral rules, except for some formulated by courts within the framework of the Act.

There are flaws in Arbitration Act 1940, namely: No interim power in the arbitrator, too many grounds for judicial intervention at all stages (pre-arbitral, during arbitration & post award), as a result it defeats the whole object of speedy and cost effective dispute resolution. A new Arbitration Act should be passed to implement the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) into Pakistan. This will constitute a further step forward in the efforts of the Government of Pakistan to build a framework for investor-friendly Dispute Resolution.

Pakistan Enacts a Statute to Implement the ICSID Convention

The Islamic Republic of Pakistan is not foreign to defending investment claims. In order to restore investors' confidence in its country, the Pakistani government has enacted on April 28, 2011 a law to secure foreign investment. The International Investment Disputes Act (the "Act") has been qualified by the Pakistani president, Mr. Asif Ali Zardari, as "a giant leap forward" to create confidence amongst foreign investors.

The Act is Pakistan's answer to the Supreme Court of Pakistan's 2002 decision in the SGS v. Pakistan proceedings that the ICSID Convention, although ratified by Pakistan, having not been incorporated into the laws of Pakistan by implementing legislation, the domestic courts had no power to enforce the provisions of the Convention while ignoring the existing national statutes relating to arbitration. This case saw parallel arbitration proceedings in Pakistan and before ICSID, and the Supreme Court upheld the lower courts' decision not to stay the arbitration

proceedings under the Pakistani Arbitration Act following the commencement of the ICSID arbitration.

However, the *SGS v. Pakistan* case had highlighted the need for national legislation in order to give full force and effect to the ICSID Convention. The enactment of this legislation, however, was not exempt of obstacles. The legislation was first promulgated by presidential ordinance in November 2006, but lapsed. Under the Constitution of Pakistan, presidential ordinances have a limited life of four months unless earlier repealed or enacted into a statute. A new presidential ordinance was promulgated in March 2007 followed by another in July 2007, but the state of emergency was thereafter declared in Pakistan, which gave it permanent life. The permanent life however was cut short by a judgment of the Supreme Court which declared the emergency as illegal. This resulted in promulgation of another presidential ordinance in November 2009 followed by another in April 2010. The current Act is the result of a government sponsored bill introduced in Parliament in 2010.

The purpose of the Act is to implement the International Convention on the Settlement of Investment Disputes between States and Nationals of other States, with an aim to bringing transparency in the settlement of investment disputes. The Act attaches the ICSID Convention as a schedule.

Under the ICSID Convention, awards are insulated from review by national courts at the recognition and enforcement stage, but no such guarantees are offered when specific assets are targeted in execution of the award. Article 54(1) of the ICSID Convention provides that each contracting state shall “recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”. Article 54(3) of the ICSID Convention provides that the execution of the award is governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought, and Article 55 emphasizes that “nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any State from execution”.

The Act leaves a great discretion to the Pakistan courts for the enforcement of ICSID awards. Article 4 provides that an award registered in Pakistan must “be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court” and, if the award “relates to pecuniary obligations”, “proceedings may be taken on the award” and “the High Court shall have the same control over the execution of the award, as if the award had been a judgment of the High Court”. High Courts in Pakistan are generally courts of appeal, which are to be found in each province. The purpose of giving jurisdiction to a High Court is to ensure the quality of judicial expertise. With respect to its binding effect on the government itself, the Act provides that the principles set forth in Article 4 bind the government but “not so as to make an award enforceable against the Government in a manner in which a judgment would not be enforceable against the Government”. Moreover, the Act provides that these principles do not apply if the government is not a party to the award (Article 5).

In effect, therefore, the Act does not provide for a foolproof execution of ICSID awards in Pakistan. Execution of awards is subject to the review of the High Court and, if the award has

been rendered against the Government, it can only be enforced if it were enforceable in the same circumstances if it were a judgment. In practice, the High Court will have the power to attach and sell assets, as long as such assets are not related to defense and national security. High Court decisions can be appealed. However, in execution matters, the grounds of appeal are very limited.

The Act, however, removes a lacuna and one can hope that it will render the enforcement of ICSID awards in Pakistan easier. It has also the advantage of providing an effective reference for the execution of awards in Pakistan. In contrast, in many a state, the execution of ICSID awards is left to the civil procedure provisions applicable to the execution of judgments, which can lead to confusion and unsatisfactory decisions.

In addition to this Act, Pakistan is also preparing the enactment of two statutes relating to international arbitration. First, a law to enforce the New York 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.

A NEW LEGISLATION PROPOSED

The Arbitration Bill, 2009 (the Bill) was introduced into the Pakistan National Assembly on 24 April 2009 (1). The preceding Arbitration Act of 1940 that governs domestic arbitration in Pakistan has several deficiencies. Under the Act, the parties are relatively free to adopt procedures of their choice with little oversight. With no national arbitral institutions, there are no arbitral rules, except for some formulated by courts within the framework of the Act.

In its preamble the Bill aspires to implement the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) into Pakistan. The Bill, once promulgated into law, will constitute a further step forward in the efforts of the Government of Pakistan to build a framework for investor-friendly Dispute Resolution.

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. It is hoped that the Bill is passed through the National Assembly fairly quickly and that note is taken of the changes proposed in this paper. This author's concerns, in particular, arise from the problems faced in India in respect of the implementation of the Indian Act.

The Bill is intended to supersede and build on the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2007 (REAO) which implemented the United Nation's Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NY Convention) into Pakistani law (2). It is a holistic piece of legislation that covers the use of arbitration, conciliation and alternative dispute resolution within and outside Pakistan,

including re-promulgating a domestic law implementing the International Convention on the Settlement of Investment Disputes (ICSID) between States and Nationals of Other States (the Washington Convention) (3). The Bill also proposes to establish an arbitration and conciliation centre in Pakistan.

This paper will analyze the pros and cons of the Bill for international arbitration in Pakistan and also seek to highlight some of the challenges for international investors that it may pose.

The good news:

The Bill builds on the progress made in the REAO in providing for NY Convention-compliant provisions and reproduces the REAO in its Part III. Consequently, the REAO's pro-enforcement provisions regarding arbitration agreements and awards are preserved by the Bill.

The REAO's failure in laying out a criterion for when an award can be characterized as domestic or foreign has been addressed in the Bill. The Bill moves towards a territorial approach on this issue and implements nearly identical grounds for challenging both types of awards (4). Accordingly, awards rendered within Pakistan are seen as domestic awards capable of being enforced or set-aside (as appropriate) by a Pakistani court while awards rendered outside Pakistan and in a state that is party to the NY Convention are enforceable in accordance with the terms of the NY Convention. Awards rendered in countries that are parties to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (5) continue to be enforceable in Pakistan under the Arbitration (Protocol and Convention) Act 1937 (the APC Act).

It is important to note that, under the REAO, there was a residual risk that awards rendered in a NY Convention country that applied Pakistani substantive law might have been characterized as a domestic award and so be subject to the enforcement provisions of the Pakistan Arbitration Act 1940. This residual risk arose as a result of the reasoning of the Supreme Court of Pakistan in *Hitachi Ltd v Rupali Polyester*, (6) where the Supreme Court tacitly affirmed (while commenting that it seemed impractical) the theory of "concurrent jurisdiction" expounded by the Indian Supreme Court in *National Thermal Power Corporation v The Singer Company* (7). Both Singer and Hitachi were concerned with the interpretation of s.9(b) of the APC Act (the 'savings clause'⁸) which made the substantive law applicable to an award a determining factor (9).

Since both the REAO and the Bill specifically omit the savings clause, a strong argument can be made that the legislature has consciously altered the criteria of character determination away from the choice of substantive law and towards a more territorial approach. This argument has also been used in India where the Indian Arbitration Act 1996 replaced a similar savings clause contained in the Indian Foreign Awards (Recognition and Enforcement) Act 1961 (FARE) . Accordingly, it is likely that all awards rendered outside Pakistan will be recognised and enforced pursuant to, as applicable, the NY Convention or the Geneva Convention (10, 11).

International commercial arbitrations (12) 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. Such provisions and powers include, amongst other things, giving the parties the power to obtain interim measures before or during arbitral proceedings (13); the Chief Justice of Pakistan having powers to appoint arbitrators (14); supervisory powers of Pakistani courts over the appointment and challenge of arbitrators (15); giving arbitral tribunals the power to rule on their own jurisdiction (16); rules governing the conduct of arbitrations (17); court assistance in taking evidence (18); powers to arbitrators to decide *a case ex aequo et bono or as amiable compositeur* if authorized by the parties (19); and to apply the substantive law of any country chosen by the parties (20).

The bad news:

The Bill copies, without substantive change, the Indian Act. Accordingly, there is a danger that it will import the same problems that the international arbitration community has faced in India following a number of decisions of the Indian Supreme Court. The Indian courts have, as a result, been heavily criticized for their extra-territorial interpretation of the Indian Act.

Though Pakistani courts have shown a willingness to independently evaluate Indian precedents that are cited before them (21), Indian judgments, along with judgments from other common law countries, still have persuasive value in Pakistani proceedings. Accordingly, it would be useful if the legislators in Pakistan would review the consequences of some of the Indian cases and try to incorporate (into the Act when passed) potential solutions for dealing with the problems faced under the Indian Act.

If only:

Confusingly, Part II of the Pakistani Bill is a reproduction (with minor modifications) of Part I of the Indian Act. Both these Parts include provisions that apply to arbitrations taking place inside the respective country to which they apply (e.g. the domestic courts' powers to order interim measures, to appoint arbitrators, set aside, etc).

The principle problem with the Bill arises in Section 2(2) which is substantially identical to Section 2(2) of the Indian Act. Section 2(2) of the Bill states that:

"This Part and Part IV shall apply where the place of arbitration or conciliation is in Pakistan"

Section 2(2) of the Indian Act states that:

"This Part shall apply where the place of arbitration is in India"

In *Bhatia International v Bulk Trading S.A. and Another* (22) and, more recently, *Venture Global Engineering v Satyam Computer Services* (23), the Indian Supreme Court has interpreted the wording of Section 2(2) of the Indian Act to mean that Part I of the Indian Act would apply to all arbitrations whether conducted within or outside India.

The Indian Supreme Court's reasoning has been predicated largely on the fact that the word "only" is absent after the word "shall" in the Section. (24) In interpreting the consequences of this omission, the Indian Supreme Court reasoned in *Bhatia* that the Section mandatorily applied Part I of the Indian Act to arbitrations taking place within India, but did not prohibit Part I from applying to arbitrations taking place outside India. Recognizing that, as a general principle of Indian law, the jurisdiction of a court needs to be specifically excluded either by statute or by contract, the Indian Supreme Court reasoned that Part I would, therefore, apply to arbitrations conducted outside India unless the parties specifically agreed otherwise.

Consequently, the Indian Supreme Court in *Bhatia* allowed a party to obtain interim measures from an Indian court despite the arbitration taking place outside India and, more worryingly, in *Venture Global* it held that Indian courts can set aside foreign awards on the same grounds (e.g., patent illegality) as are applicable to domestic awards.

To avoid Pakistani courts reaching a similar conclusion, it would be sensible to insert the word "only" into section 2(2) of the Bill, after the word "shall".

Public policy:

Another problem arising out of the Indian Act comes from the reasoning of the Indian Supreme Court in *ONGC v Saw Pipes Ltd* (25) where an award rendered in India was not enforced on the grounds that it failed to correctly apply Indian substantive law. (26) The Indian Supreme Court predicated its decision on Section 34 of the Indian Act, which allows a court to refuse to enforce an award if such an award is contrary to the public policy of India. Section 34 of the Indian Act has been reproduced with slight modification as Section 34 of the Bill. Accordingly, the Pakistani courts could follow a similar line of reasoning in interpreting this phrase in the

Pakistani context:

Pakistani courts have, in the past, largely tried to give a restrictive construction to the term "public policy" (27). Accordingly, the Pakistani courts will hopefully not try to use the vagueness of the term so as 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. (29)

The Bill does attempt to clarify the construction of the term public policy as applicable to arbitrations taking place within Pakistan, in the Explanation to sub-Section 34(2) of the Bill where public policy is to include: "an arbitral award the making of which was induced or affected by fraud, misrepresentation or corruption and in violation of confidentiality." These are broader grounds than that provided in the Explanation to Section 34(2) of the Indian Act. It is suggested that the inclusion of misrepresentation and violation of confidentiality in the Explanation are capable of immense interpretation and should be deleted, or more precisely framed.

Conclusion:

By clearly preventing the application of Part II of the Bill to arbitrations taking place outside of Pakistan, the Pakistani legislature is going to import the same problems faced by the international arbitral community in India. The application of Part I of the Indian Act to arbitrations taking place outside India has resulted not only in interim measures being ordered by Indian courts in respect of such arbitrations (30) but has also led to the Indian Supreme Court ruling that an award rendered outside India is capable of being set aside by Indian courts (31).

Additionally, the term "public policy" is a precarious and unpredictable term and the uncertainty that results from it is only further exacerbated by the definition that the Bill provides in its Explanation to Section 34(2).

These are problems that Pakistan should seek to avoid in introducing its new legislation on international commercial arbitration. It is hoped that these deficiencies in the Bill can be cured before the Bill becomes an Act of the Pakistan National Assembly.

1 A copy of the Bill is attached.

2 Task Force on National rules of procedure for recognition and enforcement of foreign arbitral awards pursuant to the New York Convention of 1958 which was Co-chaired by Geoffroy Lyonnet (France) and David P. Roney (Canada), In view of the 50th anniversary of the New York Convention in 2008, the Commission on Arbitration has created this task force.

The objectives of the task force are:

- to identify the countries to be covered by the work of the task force;
- to determine, for each country so identified, the national rules of procedure for recognition and enforcement of foreign arbitral awards, with reference to articles III and IV of the New York Convention;
- to compile all such national rules of procedure for recognition and enforcement of foreign arbitral awards on a country-by-country basis in one user-friendly document;
- to draft an introduction to and a summary of such compilation.

The Task Force is composed of over 150 registered members from 70 different countries.

3 Pakistan originally implemented the Washington Convention into its domestic law by promulgating the Arbitration (International Investment Disputes) Ordinance 2006. 4 In respect of foreign awards, section 50 of the Bill states that:

"The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the [NY] Convention."

In respect of domestic awards, section 34(2) of the Bill lays down the following grounds for set aside:

"(a) the party making the application furnishes proof that —

- (i) a party to the arbitration agreement was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or,

failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of Pakistan.

Explanation. — Without prejudice to the generality of expression public policy it also includes an arbitral award the making of which was induced or affected by fraud, misrepresentation or corruption and in violation of confidentiality."

5 92 League of Nations Treaty Ser. 2302

6 *Hitachi Ltd v Rupali Polyester (1998 SCMR 1618)*.

7 *National Thermal Power Corporation v The Singer Company, 80 AIR SC 998 (1993)*.

8 APC Act s.9(b) is a Savings clause that states: "Nothing in this Act shall.... (b) apply to any award made on an arbitration agreement governed by the law of Pakistan."

9 See these cases on Pakistan Law Site.

10 Compare the APC Act s.9(b) in fn. 8; s.9(b) of India's FARE was a savings clause identical to s. 9(b) of the Pakistan APC Act: "Nothing in this Act shall.... (b) apply to any award made on an arbitration agreement governed by the law of India."

11 In *Centrotrade Minerals and Metals Inc v. Hindustan Copper Ltd*, 2006(11) SCC 245, the Supreme Court of India held that an award from international commercial arbitration conducted in any NY Convention country would be a foreign award irrespective of the proper law governing the arbitration agreement. This case is also important as the Indian Supreme Court held that the phrase "or under the law of which that award was made" used in Article V (1)(e) of the NY Convention refers to the law of the country in which the arbitration had its seat rather than the country whose law governs the substantive contract. Additionally, *Vikramjit Sen J. in Bharti Televentures Ltd v DSS Enterprises Private Ltd CS (OS) No1769/2003* decided on August 17 2005, 2001 (3) RAJ 433 (Del) has stated in para [19] that "The deliberate decision not to incorporate s.9(b) of FARE assumes great significances, and leads inexorably to the

conclusion that the factum of Indian laws in the 1996 Arbitration regime, especially Part II thereof, venue/territoriality is all important.”

12 Section 2(1)(i) of the Bill 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;"

13 Section 9 of the Bill.

14 Section 11 of the Bill.

15 Sections 11 to 15 of the Bill.

16 Chapter IV of Part II of the Bill.

17 Chapter V of Part II of the Bill.

18 Section 27 of the Bill.

19 Section 28 of the Bill.

20 Section 28 of the Bill.

21 For a good example of this, see *Hitachi Ltd v Rupali Polyester* (1998 SCMR 1618) where the Pakistani Supreme Court refused to follow the Indian Supreme Court's theory of concurrent jurisdiction set out in *National Thermal Power Corporation v The Singer Company*.

22 *Bhatia International v Bulk Trading S.A. and Another* (2002) 4 SCC 105)

23 *Venture Global Engineering v Satyam Computer Services* (2008(1) ARBLR1 37 (SC))

24 *Bhatia International v Bulk Trading S.A. and Another*, at paragraphs [21] and [27] the Indian Supreme Court made reference to the fact that Article 1(2) of UNCITRAL Model Law, on which Section 2(2) of the Indian Act is based, uses the word "only" and that this word was specifically omitted by the Indian legislature in drafting that Section.

25 *ONGC v Saw Pipes Ltd* 2003 SOL Case No175.

26 In *ONGC v Saw Pipes Ltd* 2003 SOL Case No175, the arbitrators had determined that a claim for liquidated damages under Indian law required the proof of some loss contrary to Sections 73 and 74 of the Indian Contract Act. The Indian Supreme Court reasoned that since the arbitrators had failed to consider these sections, they had misapplied Indian substantive law. The court felt that the phrase public policy of India meant that an award could be set aside if it contained an illegality. This is a very wide interpretation of that phrase and has been criticised heavily in international commercial arbitration circles.

27 In *Manzoor Hussain v Wali Muhammad*, PLD 1965 SC 425, the Pakistan Supreme Court in deciding whether a contract was contrary to public policy under section 23 of the Pakistan Contract Act 1872 stated that this section has to be construed strictly and that the court should not invent new categories or heads of public policy. Cf. *Ali Muhammad v Bashir Ahmad*, 1991 SCMR 1928 where the Pakistan Supreme Court affirmed the setting aside of an arbitration award because that award purported to decide a criminal matter and the arbitrability of such a matter would be against public policy. Also see *The Hub Power Company Ltd v Wapda* (PLD 2000 Supreme Court 841), where the Supreme Court of Pakistan refused to enforce an arbitral agreement between Hubco (a subsidiary of Britain's National Power set up with World Bank support) and the Pakistani government on the grounds that the underlying agreement had been procured as a result of fraud and corruption. Also see *Grosvenor Casino Limited v Abdul Malik Badruddin* (PLD 1998 Karachi 104) where Bhagwandas J refused to execute a judgment of the United Kingdom High Court of Justice Queen's Bench Division on the grounds that the judgment decided a matter in respect of gambling debts and that such contracts for wagering were void under Pakistani law and were also repugnant to principles of Shariah; and as such were contrary to the public policy of Pakistan.

28 See *International Standard Electric Corp. v Bidas Sociedad Anonima Petrolera* 1990, 745 F. Supp. 172 (S.D.N.Y.) where the US District Court of the Southern District of New York held: "Finally we should observe that the core of petitioner's argument, that a generalized supervisory interest of a state in the application of its domestic substantive law (in most arbitrations the law of contract) in a foreign proceeding, is wholly out of step with the universal concept of arbitration in all nations. The whole point of arbitration is that the merits of the dispute will not be reviewed in the courts, wherever they be located. Indeed, this principle is so deeply imbedded in American, and specifically, federal jurisprudence, that no further elaboration of the case law is necessary. That this was the animating principle of the Convention, that the Courts should review arbitrations for procedural regularity but resist inquiry into the substantive merits of awards, is clear from the notes on this subject by the Secretary-General of the United Nations."