

# Pakistan

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## 1. EXECUTIVE SUMMARY

### 1.1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration related proceedings in your jurisdiction?

The principal legislation governing arbitration in Pakistan is the Arbitration Act 1940 (the '1940 Act'), which provides a balance between the efficiency, flexibility and informality of arbitration proceedings and the authenticity, protection and support of the court. It is a simple piece of legislation which gives parties freedom to mutually agree upon the modalities of arbitration. In the absence of a comprehensive arbitration agreement, however, the 1940 Act does not provide precise guidance to the parties leaving many gaps which the court may have to fill.

The courts in Pakistan invariably uphold arbitration agreements and usually stay legal proceedings in favour of arbitration proceedings provided the issues in dispute do not involve determination of criminality or matters of public policy. The resolution of disputes relating to private rights through arbitration is encouraged by the courts and the legal system of Pakistan.

The enactment of legislation in 2011 to give effect to the New York Convention and the ICSID Convention reflects the commitment by Pakistan to develop the arbitration regime in Pakistan in accordance with international developments and expectations.

### 1.1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive towards arbitration and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number.

The arbitration regime of Pakistan may be ranked as 3+.

## 2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

### 2.1.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in arbitration in your jurisdiction?

Generally, the legal framework of commercial arbitration in Pakistan covers: (a) local arbitrations (Pakistani law as the governing law of the arbitration with the venue of arbitration in Pakistan); (b) international arbitrations (a foreign law as the governing law of the arbitration with the venue of arbitration outside Pakistan but the subject matter of arbitration having a nexus with Pakistan); and (c) investment treaty arbitrations (arising out of bilateral investment treaties signed by Pakistan).

Essentially, local arbitrations are governed by the 1940 Act which covers the proceedings and awards relating thereto.

International arbitrations are usually held under foreign arbitration laws, and the awards made pursuant to the said arbitrations may then be enforced in Pakistan. The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (the 'Arbitration Agreement and Foreign Awards Act') incorporates the New York Convention into the municipal laws of Pakistan thereby facilitating the enforcement of foreign arbitral awards in Pakistan. Previously, foreign awards were executed in Pakistan under the Arbitration (Protocol and Convention) Act 1937 which the Arbitration Agreement and Foreign Awards Act has repealed except for foreign arbitral awards made before 14 July 2005 or foreign arbitral awards made in a state which is neither a party to the New York Convention nor notified by the government of Pakistan for the purposes of the new Act.

Arbitrations arising from investment treaty arbitrations are covered by the ICSID Convention and are regulated by the Arbitration (International Investment Disputes) Act 2011 (the 'Investment Disputes Arbitration Act') which specifically provides that the provisions of the 1940 Act shall not apply to proceedings pursuant to the ICSID Convention (section 7).

### **2.1.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?**

Generally, the decisions of the courts to uphold an arbitration agreement which envisages arbitration at a foreign venue or where the courts have refused to stay proceedings brought before the domestic court, despite the presence of an arbitration clause in the agreement envisaging arbitration at a foreign venue have been the subject matter of academic debate. However, the courts have consistently taken the view that except for matters involving questions of criminality (including allegations of violations of mandatory laws, corruption and fraud) or public policy, the arbitration agreement will be upheld. Therefore, it is advisable that international businesses ensure full legal and regulatory compliance as part of their due diligence process, especially when entering into contracts with public entities, so that any inadvertent omission may not frustrate the arbitration agreement if and when a dispute or difference between the parties arises.

### **2.1.3 Principal laws and institutions**

#### **2.1.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?**

The principal statute of law governing domestic arbitration in Pakistan is the 1940 Act. This pre-partition enactment is based on the early English Arbitration Act and is not modelled on the UNCITRAL Model Laws. The 1940 Act, however, seeks to provide a complete code for conducting arbitration in Pakistan though often must be supplemented with case law for clearer understanding. According to section 41(a) of the 1940 Act, the provisions of the Code of Civil Procedure 1908 (the 'CPC') shall apply to all proceedings before the court and to all appeals under the 1940 Act.

International arbitration in Pakistan will now fall within the realm of the Arbitration Agreement and Foreign Awards Act which has permanently implemented the New York Convention within Pakistan.

The arbitration disputes arising out of the investment treaties covered by the ICSID Convention are regulated by the Investment Disputes Arbitration Act.

**2.1.3.2 What are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?**

Domestic arbitration is conducted under the administration and oversight of the courts in Pakistan, and international arbitrations, in the absence of intervention by the Pakistani courts on the grounds of criminality or public policy, are conducted in accordance with the arbitration regime agreed by the parties.

**2.1.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?**

Arbitration under the 1940 Act is conducted under the judicial oversight and supervision of the 'civil courts'. Under section 2(c) of the 1940 Act a civil court is taken to mean a civil court having jurisdiction to decide the question forming the subject matter of the reference if the same had been the subject matter of a suit.

The 1940 Act has further specified in section 40 that a Small Cause Court shall have no jurisdiction over any arbitration proceedings.

The court having exclusive jurisdiction to adjudicate and settle matters related to the Arbitration Agreement and Foreign Awards Act and for the recognition and enforcement of a foreign arbitral award is the High Court and such other superior court in Pakistan as may be notified by the federal government.

The court having jurisdiction for the recognition or enforcement of an award rendered pursuant to the ICSID Convention under the Investment Disputes Arbitration Act is the High Court.

### **3. ARBITRATING IN YOUR JURISDICTION – KEY FEATURES**

#### **3.1 The appointment of an arbitral tribunal**

##### **3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators?**

The 1940 Act does not place any express restrictions on the right of parties to appoint an arbitrator or umpire of their choice. The parties may name the arbitrator or umpire in the arbitration agreement or define therein the procedure for his or her appointment. If the arbitration agreement is silent about the number of arbitrators, pursuant to section 3 read together with the First Schedule, the arbitration shall be referred to a sole arbitrator. If there is an even number of arbitrators, the arbitrators are required to appoint an umpire. Section 8 of the 1940 Act empowers a court to appoint an arbitrator or umpire if the parties fail to do so by consensus.

It is not necessary for an arbitrator to be a member of the local Bar.

### **3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?**

The 1940 Act expressly provides for situations in which the parties have not agreed upon the number and mode of appointment of the arbitrator or umpire in the arbitration agreement or, having agreed upon them, are unable to reach a consensus. For example, as stated at 3.1.1 (above) where the arbitration agreement is silent on the number of arbitrators, pursuant to section 3 read together with the First Schedule of the 1940 Act, a sole arbitrator shall be appointed.

In addition, section 4 of the 1940 Act enables parties to designate a third party in the arbitration agreement to appoint the arbitrator(s).

Under section 8 of the 1940 Act, where, *inter alia*, the arbitration agreement provides that the arbitration shall be conducted by one or more arbitrator(s) to be appointed by consent of the parties and all the parties do not concur in the appointment, reference may be made to the court (subject to the conditions contained in the section) for appointment of the arbitrator(s). Furthermore, section 20(4) of the 1940 Act permits the court to appoint an arbitrator where the parties have declared in an agreement to refer their dispute to arbitration and that agreement has been filed in court and, *inter alia*, the parties cannot agree upon the appointment of an arbitrator.

### **3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?**

In the absence of agreement between the parties, the 1940 Act empowers a court to appoint the arbitrator or umpire.

### **3.1.4 Are there requirements (including disclosure) for 'impartiality' and/or 'independence', and do such requirements differ as between domestic and international arbitrations?**

The 1940 Act does not expressly prescribe the qualifications or duties of an arbitrator or umpire. However, in accordance with the spirit of the 1940 Act, it is essential for an arbitrator or umpire to be fair, independent and impartial. The court has held that even an employee of a party, once appointed as an arbitrator, must act in his or her own independent capacity and not rely on the knowledge that he or she acquired as an employee of one of the parties when prescribing the award.

### **3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?**

Section 11 of the 1940 Act empowers a court to remove an arbitrator or umpire on the application of a party to arbitration if the arbitrator fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. Furthermore, the court is also empowered to remove an arbitrator or umpire where he or she has either conducted himself or herself or the proceedings in a manner resulting in the miscarriage of justice. Section 5 provides that the authority of an appointed arbitrator or umpire shall not be revocable except with the

leave of the court unless a contrary intention is expressed in the arbitration agreement.

### **3.1.6 What role do national courts have in any such challenges?**

The courts generally consider applications for removal of arbitrators or umpires made under section 11 of the 1940 Act on the basis of the facts of each

case. The courts will grant an application for removal if persuaded that the acts/omission complained of constitute misconduct on the part of the arbitrator or umpire and resulted in a miscarriage of justice (*Abdul Hamid Butt v Government of West Pakistan* (1975) PLD Lahore 1427; *Adamjee Insurance Company Limited v RB Industries Limited* (1981) CLC [Karachi] 923).

### **3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?**

There is no express provision in the 1940 Act which protects an arbitrator or umpire from personal liability for any wrongful acts committed by him or her. However, in the event of any misconduct, the usual practice is simply to challenge the award or seek removal of the arbitrator or umpire.

Whilst giving an award, arbitrators must conform to the ordinary rules of natural justice and not be partial towards any of the parties to the agreement or exhibit unfairness in their decision-making (*Muhammad Farooq Shah v Shakirullah* (2006) SCMR 1657; *Messrs Qamar Din Ahmad & Co v Pakistan* (1971) PLD Lahore 38).

## **3.2 Confidentiality of arbitration proceedings**

### **3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?**

There is no express provision in the 1940 Act which declares the arbitration proceedings as confidential. Therefore, it would be reasonable to state that arbitration proceedings conducted under the 1940 Act are not confidential. Under section 14(2) of the 1940 Act, at the request of any party to the arbitration agreement or any person claiming under such party, or if so directed by the court, the arbitrators or umpire are required to file the award (or a signed copy of it) in court together with any depositions and documents which may have been taken and proved before them. Having been filed at court, the award along with the depositions and documents may then become accessible to third parties or the general public.

### **3.2.2 To what matters does any duty of confidentiality extend (eg does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?**

Since arbitration proceedings conducted under the 1940 Act are not confidential, the parties may consider agreeing between themselves, and seek specific directions from the court, that the proceedings are confidential as against third parties or the general public. Furthermore, parties may also

consider procuring that the persons representing them in the arbitration, as well as the arbitrator or umpire, enter into confidentiality agreements to maintain confidentiality.

### **3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?**

There is no express provision in the 1940 Act in this regard. The extent to which the documents or evidence disclosed in arbitration proceedings can be used in other proceedings would depend upon the nature of the proceedings and may also depend upon the nature of the document/information to be used.

### **3.2.4 When is confidentiality not available or lost?**

Confidentiality of the arbitration proceedings would be compromised at the time of the filing of the award, together with all depositions and any documents which were produced before the arbitrator or umpire, in the court. The aforementioned filings are necessary so that the court may pass a judgment according to the award, which judgment shall be followed by a decree.

## **3.3 Role of (and interference by) the national courts and/or other authorities**

### **3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?**

The courts would usually stay a court action in favour of arbitration under section 34 of the 1940 Act. Section 34 of the 1940 Act states that on the application of a party to the arbitration agreement (before filing a written statement or taking any other steps in the proceedings), the judicial authority may stay proceedings against that party if it is satisfied that there is no sufficient reason as to why the matter may not be referred to arbitration and the court proceedings concern a matter within the scope of the arbitration agreement. The applicant, however, must be ready and willing to do all things necessary for the proper conduct of the arbitration in order for a stay to be granted.

Section 32 of the 1940 Act provides that notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than under the 1940 Act.

Section 4 of the Arbitration Agreement and Foreign Awards Act empowers a party to an arbitration agreement, against whom legal proceedings have been brought in respect of a matter covered by an arbitration agreement, to apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter. On receiving such application, the court is bound to stay the instant legal proceedings and direct the parties to proceed with arbitration, unless it finds that such agreement is null and void, inoperative or incapable of being performed.

### **3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?**

The general approach of the courts is to uphold a valid arbitration agreement and direct parties to resolve their disputes in accordance with the provisions of the agreement. However, a grant of stay under section 34 of the 1940 Act has been refused where the court has found that enforcement of an arbitration clause would be unconscionable or would amount to forcing a party to honour an agreement different than the one originally contemplated by the parties. Furthermore, matters involving questions of criminality or public policy cannot be referred to arbitration (*Eckhardt and Company, Marine GmbH v Muhammad Hanif* (1993) PLD SC 42; *The HUB Power Company Limited v Pakistan WAPDA* (2000) PLD SC 841).

### **3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?**

Where there is a breach of an arbitration agreement governed by the 1940 Act, the courts generally stay the court proceedings upon the filing of an application under section 34 of the 1940 Act and uphold the arbitration agreement so that the parties abide by the terms of their agreement.

The courts generally take the view that if parties, by virtue of agreeing to an arbitration clause, expressly choose a forum other than a court of law for the settlement of their dispute, then neither party should normally be allowed to avoid that forum. They discourage parties from deliberately deviating from a valid arbitration agreement and often term such practice an abuse of the process of the court. The courts have also followed the principle that a plaintiff who sues on an arbitrable claim unconditionally, without having initiated arbitration of the claim or demanding specific performance of the arbitration agreement, creates in the defendant a right of election so the defendant may insist upon arbitration or not, as it chooses (*Societe Generale De Surveillance SA v Pakistan* (2002) SCMR 1694; *Conticotton SA Co. v Farooq Corporation* (1999) CLC [Karachi] 1018).

### **3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?**

The National Judicial Policy 2009 postulates the judicial policy for all the courts, tribunals and quasi-judicial institutions of Pakistan. Paragraph D(II) (18)(d) of the policy stipulates that the courts should make use of section 89(A) of the CPC which empowers the court, where it considers necessary, to adopt with the consent of the parties, alternate dispute resolution mechanisms to resolve disputes through, *inter alia*, arbitration.

As a general rule, the courts do not interfere in arbitration proceedings unless parties to the arbitration agreement approach the court to seek relief. The courts have stayed arbitration proceedings in respect of disputes arising out of commercial contracts entered into by public entities in which infringement of mandatory laws has been alleged on the ground that they

involve determination of criminality or issues of public policy. Other matters which have been held to fall outside the purview of arbitration include, *inter alia*, minority oppression proceedings under section 290 of the Companies Ordinance 1984 (*Pakistan Water and Power Development Authority v Kot Addu Power Company Limited* (2002) MLD [Lahore] 829); and proceedings for the winding up of a company (*Orix Leasing Pakistan Limited v Colony Thal Textile Mills Limited* (1997) PLD Lahore 443).

It is possible for delays to occur in arbitration proceedings because of the filing of applications with the court.

### **3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?**

The legal requirement for valid arbitrable proceedings include: (a) a valid arbitration agreement; (b) the appointment of arbitrator or umpire as per the arbitration agreement or the provisions of the 1940 Act; (c) the arbitrator or umpire conducting the arbitration proceedings in accordance with the principles of fairness, natural justice and the 1940 Act; (d) the arbitrator or umpire giving a reasoned award after consideration of the evidence produced by the parties to the arbitration proceedings; and (e) the filing of the award in the court.

## **3.4 Procedural flexibility and control**

### **3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?**

The 1940 Act stipulates the procedure governing the general framework of arbitration proceedings. Under section 3 of the 1940 Act, an arbitration agreement (unless a different intention is expressed therein) shall be deemed to include the provisions of the First Schedule of the 1940 Act, to the extent the same are applicable to the arbitration reference. The First Schedule generally provides rules and procedures for arbitration proceedings.

### **3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?**

In the 1940 Act, there are no express requirements in respect of the place or seat of arbitration. Normally the arbitration agreement stipulates the place or seat of arbitration. If the arbitration agreement is silent as to the seat of arbitration then the same is determined by the curial law of the arbitration. If the arbitration agreement is silent about the seat of arbitration and curial law, the proper law of the contract may become its curial law and determine the seat of arbitration when the arbitration clause is part of the main contract (*The HUB Power Company Limited v Pakistan WAPDA* (2000) PLD SC 841; and *Hitachi Limited v Rupali Polyester* (1998) SCMR 1618).

### **3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?**

The powers of the arbitrator or umpire are stipulated in section 13 of the 1940 Act, which states that an arbitrator or umpire (unless a different



intention is expressed in the arbitration agreement) shall have the power to: (a) administer oaths to the parties and witnesses appearing; (b) state a special case for the opinion of the court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the court; (c) make the award conditional or in the alternative; (d) correct in any award any clerical mistake or error arising from any accidental slip or omission; (e) administer such interrogatories to a party to the arbitration as the arbitrator or umpire deem necessary. Section 27 of the 1940 Act empowers the arbitrator or umpire to make an interim award.

The obligations of the arbitrator or umpire include: responsibility for conducting the arbitration proceedings honestly, fairly and in accordance with the principles of natural justice; giving sufficient notice to the parties; examination and recording of evidence; and stating reasons for the award in sufficient detail to enable the court to consider any question of law arising out of the award (section 26(A) of the 1940 Act).

#### **3.4.4 Evidence**

##### **3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?**

There is no fixed approach to the gathering and tendering of written evidence at the pleadings or hearing stages of the arbitration proceedings. Under the 1940 Act, the proceedings before the arbitrator or umpire are in the nature of proceedings before a domestic tribunal, and the arbitrator or umpire is not bound to strictly comply with procedural law, though the arbitrator or umpire must ensure that the requirements of natural justice and procedural fairness are duly met. In respect of the gathering of written evidence, paragraph 6 of the First Schedule of the 1940 Act stipulates, *inter alia*, that the parties to the arbitration and all persons claiming under them shall, subject to the provisions of any law for the time being in force, produce before the arbitrator or umpire all books, deeds, papers, accounts, writings and documents within their possession or power, respectively, which may be required or called for by the arbitrator or umpire.

##### **3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?**

Paragraph 6 of the First Schedule of the 1940 Act deals with the powers of the arbitrator or umpire in respect of disclosure, however, the paragraph shall only be implied in an arbitration agreement in the absence of an express provision to the contrary in the agreement (section 3 of the 1940 Act). The 1940 Act therefore enables parties to agree on rules pertaining to disclosure of evidence/information.

The primary difference in the requirements of disclosure between arbitration proceedings and proceedings in litigation is that an arbitrator or umpire is not bound by the rigors of procedural law, whereas, civil litigation in Pakistan is governed by the CPC which contains detailed provisions in respect of the disclosure of documents and prescribes the

manner in which documents may be relied upon in a plaint (Order VII of the CPC). The CPC also prescribes the rules for inspection of documents in possession of the other party (Order XI of the CPC) as well as rules for the production, impounding and return of documents (Order XIII of the CPC).

**3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?**

Paragraph 6 of the First Schedule of the 1940 Act stipulates, *inter alia*, that the parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrator or umpire on oath or affirmation in relation to the matters in difference and may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrator or umpire may require. Similarly, sections 13(a) and (e) of the 1940 Act, empower the arbitrator or umpire to administer oaths to the parties and witnesses and administer interrogatories to a party to the arbitration. With the exception of the afore-mentioned provisions, the 1940 Act does not prescribe any specific procedure regarding oral testimony or examination of the parties. However, as stated above, although the arbitrator or umpire is not required to adhere strictly to the technicalities of procedural law, they must comply with the general principles of natural justice and procedural fairness.

Cross-examination is less frequently used during arbitration proceedings.

**3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations or as between orders sought against parties and non-parties?**

In the absence of an express agreement between the parties, the arbitrator or umpire may seek the presence of a witness and/or production of evidence pursuant to paragraph 6 of the First Schedule of the 1940 Act (discussed above).

Under section 43(1) of the 1940 Act, the court may issue processes to parties and witnesses whom the arbitrator or umpire desire to examine. Under section 43(2) of the 1940 Act, persons: (a) failing to attend pursuant to issue of process by the court; (b) making any other default; (c) refusing to give their evidence; or (d) guilty of any contempt towards the arbitrator or umpire during the investigation of the reference; shall be subject to the disadvantages, penalties and punishments by order of the court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the court.

The 1940 Act only applies to domestic arbitration, so far as international arbitration is concerned, the powers of compulsion of the arbitrator or umpire and the powers (if any) to pass orders against non-parties would depend upon the law governing the arbitration proceedings.

#### **3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (ie bilateral or multilateral investment treaties)?**

The 1940 Act does not contain special provisions for appointment of arbitrators pursuant to international treaties.

#### **3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?**

The 1940 Act prescribes no special conditions or qualifications in respect of the representatives of parties in an arbitration proceeding.

### **3.5 The award**

#### **3.5.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?**

There is no express provision in the 1940 Act which deals with last minute requests for adjournment or ex parte proceedings. However, the courts have held that where a notice of the hearing issued by the arbitrator or umpire containing a peremptory direction with a threat of proceeding ex parte in case of default has been duly served on the other party, the arbitrator or umpire would be justified in proceeding ex parte if such party fails to appear before him or her (*Paracha Textile Mills Limited, Karachi v Nanikram Shamandas* (1977) PLD Karachi 37).

#### **3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, e.g. punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?**

In the absence of a different intention expressed by the parties in the arbitration agreement, section 13 of the 1940 Act expressly empowers the arbitrator or umpire to, *inter alia*, make the award conditional or correct any clerical mistakes or errors arising from it. The scope of the powers of the arbitrator or umpire may be defined in the arbitration agreement or the terms of reference defined by the court. Before an award may be enforced under the 1940 Act, it has to be filed in court under section 14. The court has exclusive jurisdiction to either modify or remit the award under sections 15 and 16, respectively. Therefore, any remedy fashioned by an arbitrator or umpire in the award will have to be accepted by the court before it can become rule of the court. The procedure for the enforcement of an award is discussed below at section 6.1.2.

#### **3.5.3 Must an award take any particular form or are there any other legal requirements, eg in writing, signed, dated, place stipulated, the need for reasons, method of delivery, etc?**

Section 14 of the 1940 Act provides that when the arbitrator or umpire has made an award, he or she shall sign it and notify the parties in writing of the making and signing of the award and of the amount of fees and charges payable in respect of the arbitration and award. It is mandatory for an award (or a signed copy of it), together with any depositions and documents, to be signed and

then filed with the court. Section 26A of the 1940 Act expressly requires that the reasons for the award must be provided in sufficient detail in the award in order to enable the court to consider any questions of law which may arise from it.

Paragraph 3 of the First Schedule requires that an award be given in writing within four months of the arbitrator or umpire entering on the reference or having been called upon to act by notice in writing. However, paragraph 3 would only apply if a different intention is not expressed in the arbitration agreement. The arbitrator or umpire may request that the court grant an extension of time under section 28 of the 1940 Act.

The Supreme Court has ruled that the award would be incomplete if it did not address the matter for which arbitration was resorted to or if the award was given without viewing all relevant evidence (*Abdul Basit v Muhammad Idrees* (1984) SCMR 337; *Messrs Waheed Brothers (Pakistan) Limited v Messrs Izhar (Pvt.) Limited* (2002) SCMR 366).

Section 3 of the Stamp Act 1899 (the '1899 Act') prescribes the stamp duty payable on an award to be delivered by the arbitrator or umpire.

An award which has been arrived at without the intervention of the court must be registered (*Mst. Farida Malik v Dr Khalida Malik* (1998) SCMR 816).

Under section 17 of the 1940 Act, a court has the authority to set aside an award without filing of any objection if it finds that the award is patently illegal and, therefore, a nullity in law.

#### **3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?**

There is no express provision in the 1940 Act which allows an unsuccessful party to pay the costs of the dispute. The arbitrator or umpire, however, may cover the costs of arbitration in the award if so authorised by the arbitration agreement or the terms of the reference framed by the court. Section 38(3) of the 1940 Act provides that the court may make such order as it thinks fit in respect of the costs of arbitration when the award does not contain sufficient provision in relation thereto. Where the parties to the arbitration agreement have agreed to equally bear the costs of arbitration, the arbitrator or umpire may not award the costs to one of the parties (*Syed Altaf Hussain v Pakistan Steel Mills Corporation* (1985) CLC [Karachi] 914).

#### **3.5.5 What matters are included in the costs of the arbitration?**

The fee of the arbitrator(s) is likely to be included in the costs of arbitration. However, external counsel(s) do not fall within the scope of the costs of an arbitration because the parties are not bound to engage a lawyer. It is considered that if any party does engage external counsel for its own convenience or assistance, the other party should not be burdened with the cost of the same (*Messrs Ibrahim Fibres Limited v Hameed Masood (Private) Limited* (2006) YLR [Lahore] 1523).

### **3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?**

Arbitrators or umpires may refuse to file an award in court if their fees have not been paid and a court cannot compel them to do so. However, under section 38 of the 1940 Act, unless the arbitrator or umpire has fixed his or her fees in advance by a written agreement, a party on payment into court of the fees demanded by the arbitrator or umpire may compel him or her to file the award in court and to accept the fees as determined by the court.

### **3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?**

There is no requirement under the 1940 Act for the payment of taxes by either the foreign or the domestic arbitrator or umpire apart from the payment of a nominal stamp duty on the award under section 3 of the 1899 Act.

## **3.6 Arbitration agreements and jurisdiction**

### **3.6.1 Are there form and/or content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?**

Section 2(a) of the 1940 Act defines an arbitration agreement as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Furthermore, the courts are generally of the view that documents which manifest the intention of the parties to resort to arbitration may be read as an arbitration agreement; and that a written arbitration agreement need not necessarily be signed by the parties as long as its terms and conditions can be readily ascertained and have been freely agreed upon between the parties (*Mst. Shamim Akhtar v Najma Baqai* (1977) SCMR 409; *Messrs Tribal Friends Co. v Province of Balochistan* (2002) SCMR 1903).

Generally, an arbitration agreement may expressly state the law governing the arbitration agreement, the curial/procedural law of the arbitration and the proper law of the main contract. In the absence of any express choice by the parties, the proper law of the main contract by implication is treated as the law governing the arbitration agreement, when the arbitration clause is part of the main contract. The courts of Pakistan have acknowledged the choice of jurisdiction of courts for procedural matters by the parties to an international arbitration agreement, even by implication from the selection of venue of arbitration. Where the main contract is governed by Pakistani law and a proper law governing the arbitration agreement is not otherwise expressly selected, the 1940 Act would apply. Therefore, it is advisable to clearly mention in the arbitration agreement what law governs the arbitration proceedings and where they are to be seated.

### **3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?**

There is no express provision in the 1940 Act which deals with the severance

of an arbitration clause in an otherwise invalid agreement. However, the courts have allowed the arbitrator or umpire to determine the validity of a contract where express language in the arbitration agreement so authorises the arbitrator or umpire (*Port Qasim Authority v Al Ghurair Group of Companies* (1997) PLD Karachi 636).

**3.6.3 Can an arbitral tribunal determine its own jurisdiction ('competence-competence')? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?**

In the ordinary course of events the arbitrator or umpire does not have the power to rule upon questions of his or her own jurisdiction and the court must decide the same. However, the power of an arbitrator to adjudicate upon his or her jurisdiction has been recognised where the power was granted by statute (*Muhammad Aslam Siddiqui v Hasina Begum* (1986) MLD [Karachi] 735). Arguably, through an agreement, the parties may grant an arbitrator or umpire the power to rule upon questions of his or her own jurisdiction.

**3.6.4 Is arbitration mandated/prohibited for certain types of dispute?**

The 1940 Act does not mandate arbitration for any type of disputes. However, the Supreme Court has held in *Ali Muhammad v Bashir Ahmad through legal heirs* (1991) SCMR 1928, that the 1940 Act applies only to civil matters. In *The HUB Power Company Limited v Pakistan WAPDA* (2000) PLD SC 841, it was held that matters, which require findings about alleged criminality or involve issues relating to public policy, are not referable to arbitration. Other matters which have been held to fall outside the purview of arbitration include, *inter alia*, minority oppression proceedings under section 290 of the Companies Ordinance 1984 (*Pakistan Water and Power Development Authority v Kot Addu Power Company Limited* (2002) MLD [Lahore] 829); and proceedings for winding up of a company (*Orix Leasing Pakistan Limited v Colony Thal Textile Mills Limited* (1997) PLD Lahore 443).

**3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?**

According to section 37(1) of the 1940 Act, all the provisions of the Limitation Act 1908 (the '1908 Act') apply to arbitration as they apply to proceedings in the court. Article 181 of the 1908 Act stipulates that the limitation period for arbitration proceedings is three years from the date of accrual of the right. Section 37(3) stipulates that for the purposes of section 37 and the 1908 Act, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the parties so named or designed.

### **3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?**

Paragraphs 6 and 7 of the First Schedule of the 1940 Act make reference to the jurisdiction of an arbitrator or umpire as extending only to the parties and those claiming under them. An arbitrator or umpire may not assume jurisdiction over a third party as such a party is not bound by the award (*Awan Industries Limited v The Executive Engineer* (1992) SCMR 65).

## **3.7 Applicable law**

### **3.7.1 How is the substantive law governing the issues in dispute determined?**

The courts usually respect the choice of law by the parties. In the absence of an express choice made by the parties, the courts would either apply Pakistani law or settle the choice of law according to the principles of international private law (*MA Chowdhury v Messrs Mitsui OSK Lines Limited* (1970) PLD SC 373; *Light Industries (Pvt.) Limited, through Chief Executive v Messrs ZSK STICKMASCHINEN GmbH through Attorney* (2009) CLD [Karachi] 1340; *CGM (Compagnie General Maritime) v Hussain Akbar* (2002) CLD [Karachi] 1528; and *Masood Asif v United Bank Limited* (2001) CLC [Karachi] 479).

### **3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?**

The law applicable to arbitration proceedings is normally the law of the arbitration agreement, as agreed by the parties. The courts have held that where the law of the main contract is Pakistani law but the arbitration is taking place outside Pakistan, it is the law of the seat of the arbitration that governs the procedure and the proceedings of a foreign arbitration and Pakistani courts would not exercise any jurisdiction in this respect (*Hitachi Limited v Rupali Polyester* (1998) SCMR 1618).

## **4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS**

### **4.1.1 Can an arbitral tribunal order interim relief? What forms of interim relief are available and what are the legal tests for qualifying for such relief?**

An arbitrator or umpire may not grant interim relief. Under section 27 of the 1940 Act, the arbitrator or umpire may make an interim award. However, the interim award would be subject to the discretion of the court to become an order of the court for final enforcement.

### **4.1.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?**

Under the 1940 Act, interim relief may only be granted by the court.

### **4.1.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?**

Under the 1940 Act, the court has the powers to grant interim relief (section 41 read together with the Second Schedule). Some of the circumstances where the court will grant interim relief have been listed in the Second Schedule of the 1940 Act and include: interim custody or sale of goods

which are the subject matter of the reference; securing the amount in difference in the reference; detention, preservation or inspection of property or a thing which is the subject matter of the reference; interim injunction or appointment of a receiver; and the appointment of a guardian for a minor or a person of unsound mind for the purposes of the arbitration proceedings.

Section 18 of the 1940 Act empowers a court to pass such interim orders as it deems necessary any time after the filing of the award when satisfied that a 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, or that the prompt execution of the award is just and necessary.

#### **4.1.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?**

The courts have held that where the law of the main contract is Pakistani law but the arbitration is taking place outside Pakistan, it is the law of the seat of the arbitration that governs the procedure and the proceedings of a foreign arbitration, and Pakistani courts would not exercise any jurisdiction in this respect (*Hitachi Limited v Rupali Polyester* (1998) SCMR 1618).

## **5. CHALLENGING ARBITRATION AWARDS**

### **5.1.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?**

Under section 33 of the 1940 Act, any party to an arbitration agreement or any person claiming under him or her, desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, may apply to the court. The court shall then decide the question on affidavits provided that where the court deems it just and expedient, it may, *inter alia*, hear other evidence also and pass an order for discovery and particulars.

Under section 30 of the 1940 Act, the court may, *inter alia*, set aside an award on the grounds of misconduct by the arbitrator or umpire or on the grounds that an award has been improperly procured or is otherwise invalid.

Under section 17 of the 1940 Act, before making the award an order of the court and issuing a decree for its execution, the court must be satisfied that there is no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award. The courts have relied upon this provision to take *suo moto* notice even if the award has not been challenged before them (*Messers Awan Industries Limited v The Executive Engineer* (1992) SCMR 65; *Ascon Engineers (Pvt.) Ltd. v Province of Punjab* (2002) SCMR 1662).

A court hearing an objection to the award may not undertake reappraisal of evidence recorded by the arbitrator to discover the error or infirmity in the award. Any error or infirmity which may render the award invalid must appear on the face of the award and should be discoverable by reading the award itself (*M/s. Joint Venture KG/RIST through DP Geisler GM Bongard Strasse v Federation of Pakistan* (1996) PLD SC 108).



Under the Arbitration Agreement and Foreign Awards Act, the recognition and enforcement of a foreign arbitral award may only be refused in accordance with Article V of the New York Convention.

### **5.1.2 Can the parties exclude rights of appeal or challenge?**

The right to challenge an award has been granted by the legislature under the 1940 Act. Parties seeking to settle their dispute through arbitration cannot by virtue of a private contract exclude the right to challenge granted by statute. Further, the Supreme Court of Pakistan in *Ascon Engineers (Pvt.) Limited v Province of Punjab* (2002) SCMR 1662, has held that the court has suo moto powers to remit or set aside an award if the court finds that it is not fit to be maintained.

### **5.1.3 What are the provisions governing modification, clarification or correction of an award (if any)?**

Section 15 of the 1940 Act stipulates that the court may by order modify or correct an award: (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; (b) where the award is imperfect in form, or contains any obvious error which can be amended without effecting such decision; or (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Unless a different intention is expressed in the arbitration agreement, section 13(d) of the 1940 Act empowers the arbitrator or umpire to correct in an award any clerical mistake or error arising from any accidental slip or omission. Furthermore, under section 16(1)(b) of the 1940 Act, the court can remit an award or any matter referred to arbitration to the arbitrator or umpire for reconsideration upon such terms as it thinks fit including, *inter alia*, where the award is so indefinite as to be incapable of execution.

## **6. ENFORCEMENT**

### **6.1.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?**

The New York Convention has been incorporated into the municipal law of Pakistan through the Arbitration Agreement and Foreign Awards Act.

The ICSID Convention has also been incorporated into the municipal law of Pakistan by the International Investment Disputes Act.

### **6.1.2 What are the procedures and standards for enforcing an award in your jurisdiction?**

Where the validity of an award, pursuant to its filing under section 14 of the 1940 Act has not been challenged, or any challenge has been unsuccessful and the court does not deem that the award ought to be modified, remitted or set aside, the court under section 17 of the 1940 Act, may pronounce judgment according to the award, and issue a decree. The decree issued by the court may be executed under the CPC as a decree issued in a suit.

The execution proceedings of a decree may take a few months to several years depending upon the subject matter of the award. The expenses in relation to the execution of such a decree would also depend on the subject matter and scope of the award.

**6.1.3 Is there a difference between the rules for enforcement of ‘domestic’ awards and those for ‘non-domestic’ awards?**

A domestic award may be enforced under the 1940 Act.

A foreign award within the scope of the New York Convention may be enforced under the Arbitration Agreement and Foreign Awards Act. Section 6 of the Arbitration Agreement and Foreign Awards Act states that unless the court refuses to recognise and enforce an award in accordance with Article V of the New York Convention, the court shall recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan. 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. Section 5 of the Arbitration Agreement and Foreign Awards Act stipulates that the party seeking enforcement may supply to the court the duly authenticated foreign award or a certified copy of it, and the original arbitration agreement or a certified copy thereof. If the award or agreement is not made in Urdu or English, a translation of these documents in English or Urdu duly certified by an official or sworn translator or by a diplomatic or consular agent may also be supplied (section 5 of the Arbitration Agreement and Foreign Awards Act read with Article IV of the New York Convention).

An award made under the ICSID Convention may be enforced through the International Investment Disputes Act. The party seeking to enforce such an award may register the award in the court subject to proof of any matters that may be prescribed and to the other provisions of the Act (section 3). Once registered, the award, as respects the pecuniary obligations which it imposes, would be of the same force and effect for the purposes of execution as if it had been a judgment of the court given when the award was rendered pursuant to the ICSID Convention and entered on the date of registration under the Act (section 4).