Federal Law Journal (December -2024), Volume-3, Issue-2 *pp 69-104*
p- ISSN: 2959-3670 | e-ISSN: 2959-3727

Enforcement of Arbitration Agreement: A Comparative Analysis of Pakistani and English Legal Regimes

Syed Jawad Muzaffar[1]

Abstract

Arbitration has long been used in the subcontinent through informal systems like "Panchayat" and "Jirga," which resolved disputes by mutual agreement. Even under British rule, arbitration continued to thrive, and today, it remains a popular, efficient, and less formal dispute resolution method globally, particularly in commercial matters. In Pakistan, domestic arbitration is governed by the Arbitration Act 1940, while foreign arbitration is regulated by the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act 2011. Challenges arise when parties seek court intervention, questioning the validity and enforcement of arbitration agreements. Pakistan's arbitration regime faces hurdles due to its interventionist approach, lack of clear laws, and unorganized jurisprudence. Studying the more advanced UK arbitration system offers insights to improve Pakistan's regime. Reforms, including consistent laws, institutional support, and better legal training, are essential to make Pakistan a more arbitration-friendly country, fostering trust in international commercial agreements.

Key Words: Arbitration, Agreement, Award, English, Enforcement, Arbitrability

[1] Currently serving as Civil Servant (Pakistan Administrative Service)
Email: jawadbinmuzaffar@gmail.com

Introduction

The system of arbitration is not new for the subcontinent, where the resolution of disputes has taken place through mutual agreement of the parties known as "Panchayat" or "Jirga" system. It was so successful that even after the arrival of British rule, this system continued to thrive. Bombay High court in 1927 referred to this system as the natural way of deciding conflicts in Sub-Continent.[2]

Arbitration is a dispute resolution mechanism that is less formal, more economical, and quicker than the courts. Its private and consensual nature makes it more popular among businesses across the globe and now even states have recognized it through their local laws and international regulations. Importantly, the agreement is based on the consent; therefore, it is argued that the involvement of national laws should be limited, and more focus should be given to party autonomy. Although, courts play a pivotal role in the enforcement of arbitral awards, thus question always exists what the existence and validity of arbitration agreement are if one party knocks the court's door.

Every country's approach toward domestic and foreign arbitration is different. In Pakistan, the domestic arbitration enforcement is governed by "The Arbitration Act 1940" whereas foreign arbitration enforcement is ruled by "Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act 2011". When a party seeks court jurisdiction, first it is decided whether the agreement at hand is domestic or foreign and accordingly law is applied. Section 34 of "The Arbitration Act 1940" provides grounds to court to decide whether to rule in favour of arbitration or courts proceedings

[2] International Arbitration In The Context Of Globalization: A Pakistani Perspective' by Mr. Justice Mian Saqib Nisar, Judge Lahore High Court, Lahore, afterwards Chief Justice of Pakistan. https://pakistalegalservices.wordpress.com/2012/06/09/international-arbitration-in-the-context-of-globalization-a-pakistani-perspective/

be suspended. The grounds are whether the party who is interested in arbitration has fulfilled all legal formalities before filing application under section 34. Is the party willing to go for arbitration? Whether the substantive dispute lies within the scope of the arbitration agreement? Subsequently, it depends on the court how it will interpret the grounds and based upon jurisprudence give its verdict.

For the domestic arbitration cases, the courts, according to Section 34 of the 1940 Act, may reject any application for anti-suit Injunction only when sufficient grounds are available against arbitration agreement. How would it be decided whether the agreement is invalid for being performed? Moreover, to assess the validity of arbitration, what principles of contractual interpretation are being used by the court? Therefore, if the arbitration agreement is valid, the court will grant a stay. Nonetheless, if no substantial grounds are presented, then the court will decide the matter on its own.

Whichever law that deals with foreign arbitration agreement is recognized as an international arbitration law for that country. For example, arbitration happening in London will be considered as foreign arbitration for Pakistan. In this aspect, section 4 of 2011 Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act 2011, will be applicable in Pakistan. Here, unlike domestic law, the court has a binding to implement arbitration agreement unless the agreement is found *"null and void, inoperative or incapable of being performed"*. It is worth mentioning that the above quoted section is like Article II of New York Convention 1958 and Pakistan being a signatory state will convene recognition and enforcement of foreign arbitral awards according to it.

Courts take into consideration that if the seat defined in the Arbitration Agreement is Pakistan, then it will be a domestic

arbitration case, for which the implementation will be carried out under Section 34 of 1940 Act. On the contrary, if one party is Pakistani and the other is French and the seat of Arbitration is London, then the party will not submit an application under section 34 of Arbitration Act 1940 (since it is not a domestic matter anymore), rather court will be requested to refer the dispute to arbitration under section 4 of 2011 Act because now the case pertains to foreign arbitration act.

The contention for regimes like Pakistan is the enforcement of arbitration agreements since many lacunas are present in the system of handling it. Therefore, to find remedies, better legal regimes such as the United Kingdom (UK) can be studied that will provide us with better options of addressing the issues at hand. Moreover, it will also be researched, are these solutions viable for Pakistani regime or it requires some tailoring?

Moreover, other scenarios will also be explored in which the arbitration agreement will be discussed as a cornerstone of the arbitration process. The fact that the person who has not signed the arbitration agreement is not considered as a party to it; neither is he bound by arbitration agreement nor he falls within the jurisdiction of the arbitrator as per the Article II (2) of New York Convention 1958. The flip side is if someone has given consent of arbitration according to the main contract or anything related to it, then it is considered that arbitration has become binding on him. That means if he goes to court, he shall be sent back to arbitration by the courts keeping in view the arbitration agreement and international arbitration laws. Nonetheless, it is not that simple. Therefore, let us ponder on the excuses one party who has moved to the court against arbitration can make:

Firstly, the party can plead to the court that the arbitration agreement has never been concluded. Thus, this is a ground of non-existence. The party may explain further that the person who signed the

arbitration agreement had no capacity of doing so, therefore, it never came into existence.

Secondly, the party can base its arguments on the question of the invalidity of an arbitration agreement. It can be said that since the person who concluded it was under duress or he was compelled to do so through unfair means i.e. through bribery, corruption, fraud or misinterpretation; therefore, arbitration agreement stands invalid.

Thirdly, the question of non-arbitrability can arise in which matter cannot be decided in arbitration.

Moving further, we will also discuss who is the competent authority deciding the above-mentioned scenarios. Either the arbitral tribunal will decide and then its decision will be reviewed by a court, or the courts will first decide and then send it to the tribunal to proceed. This will be discussed by reviewing the principle of Competence-Competence and theory of Separability.

Therefore, when these matters come to courts, they analyze the existence, validity and arbitrability of the arbitration agreement and if the agreement is found null and void, inoperative or incapable of being performed then courts use different methods for contractual interpretation, thus paving way for the outcome. These questions are addressed differently for domestic and foreign arbitrations. The response of the Pakistani regime to such scenarios will be discussed in detail.

It is observed that problem arises at a nascent stage as Pakistan's regime is very interventionist and not arbitration-friendly. We will propose schemes and solutions by studying the pertinent issues and finding viable solutions through exploring the English regime since both are common law countries. Our focus of research is to make Pakistan an effective, efficient and above all a pro-arbitration regime.

Although writers have worked on this topic; however, no comprehensive research has yet been carried out as we come across the articles written in Pakistan's perspective. Most of the litigation in Pakistan tackles whether to go for arbitration or not and very few instances are available in which arbitral awards are presented before the courts for enforcement. Although, studies are conducted on the topic of stay proceedings; however, referral of the matter to the arbitration agreement is not covered properly. Therefore, deep analysis is required covering all aspects; thus, the questions raised in our research will add value to the arbitration especially to the regimes who are nascent in the arbitration world. Our main research question is:

Countries like Pakistan are faced with the issue that parties avoid arbitration and invoke the court's jurisdiction at the nascent stage. Moreover, lack of research and knowledge about the topic make the lawyers and the judges confused. It is often seen that they remain disarrayed regarding the question of enforcement of the arbitration agreement. Thus, either they do not have a clue about it, or they do not know how to implement it. In addition to this, there is a devoid of relevant laws, statutes and even judgments on the topic. In other words, jurisprudence on the matter is highly unorganized. Our focus would remain on how English courts handled several issues regarding enforcement of arbitration agreements in comparison with Pakistan's arbitration regime. Thus, our research will encompass what factors will lead the regime to encourage parties towards arbitration if an arbitration agreement is present, along with providing grounds for enforcement of arbitral awards effectively and efficiently.

How the Enforcement of the Arbitration Agreement is Performed

The Legal Regime in Pakistan Governing the Enforcement of Arbitration Agreement

Since the inception of Pakistan in 1947, arbitration was governed under the Act of 1940 for the domestic arbitration cases while Act of 1937 was used for the foreign awards. The section 34 of 1940 Act suggested that unless there was an application with a strong reason for not proceeding with the arbitration agreement, and for that, the party satisfied the court by providing sufficient evidence, then the courts might stay the court proceedings and gave orders for the commencement of arbitration process. Moreover, regarding foreign arbitral awards, section 3 of the 1937 Act illustrated that just the presence of the arbitration agreement in a contract did not always allow the parties to opt for arbitration. Hence, they need to have relevant submissions that would equip the parties to invoke section 3 of the 1937 Act and parties could go for arbitration proceedings. Otherwise, courts might intervene and stay the arbitration proceedings. Furthermore, it was implied that courts are competent to decide the fate of the cases, either by granting a stay or declining it.[3] The intent of Arbitration (Protocol and Convention) Act, 1937 was to provide protection to the foreign arbitration agreements and to ensure enforcement of arbitral awards. Unfortunately, it remained a tool in the hands of courts to intervene in the process of arbitration and to show their discretion that resulted in undermining the standardization of arbitration regime.[4]

[3] Ikram Ullah, 'The Pakistani legal regime on stay of court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

[4] Hassan Raza, 'Foreign Arbitration Laws – An Appellate Adventure of Pakistani Courts', *https://courtingthelaw.com/2018/03/03/commentary/foreign-arbitration-laws-an-appellate-adventure-of-pakistani-courts/.*

These laws demonstrated the interventionist approach of courts towards arbitration and were considered as a hindrance in the smooth flow of the arbitration regime. For example, in *Messrs Yangtze (London) Limited v. Messrs Barlas Brothers (Karachi)*[5], the Supreme Court of Pakistan declined to enforce a London Court International Arbitration(LCIA) award because such award was not a foreign award as there was no announcement of the government acknowledging England as a party to the Convention on the Execution of Foreign Arbitral Awards. Similarly, in the verdict of *Continental Grains Co. v. Naz Brothers*[6], the Sind High Court in Pakistan denied enforcing an award announced in Geneva on the points that the United States of America (USA) was not a party to the 1937 Convention.

Municipal laws of Pakistan have recently incorporated the New York Convention by legislating "Arbitration Agreement and Foreign Awards Act". Besides, the International Centre for Settlement of Investment Disputes (ICSID) Convention has also been included in the municipal law of Pakistan by the investment Disputes Act. Further, concerning the procedures and standards for enforcing an award in Pakistan regime, a domestic award is enforced keeping in view the 1940 Act. Hence, according to section 14 of the 1940 Act, if the validity of an award is not questionable or any challenge has been unsuccessful and there is no verdict of the court to alter, remit or dismiss the award, then the court under section 17 of the 1940 Act, may declare an order as per the award and issue a decree. Ideally, this decree is similarly executed under the CPC as to a decree pronounced in a suit. Moreover, time taken to execute the decree and the expense of the procedure depends upon the subject matter and scope of the award. Furthermore, according to

[5]*Messrs Yangtze (London) Limited v. Messrs Barlas Brothers (Karachi),PLD (1961) Supreme Court 573 as cited by* Hassan Raza, 'Foreign Arbitration Laws – An Appellate Adventure of Pakistani Courts'.

[6]*Continental Grains Co. v. Naz Brothers,CLC (1982) Sind High Court 301 as cited by* Hassan Raza, Foreign Arbitration Laws – An Appellate Adventure of Pakistani Courts.

section 6 of Arbitration Agreement and Foreign Awards Act, the award is accepted and enforced by the court under Article V of the New York Convention in the same manner as a verdict of a court in the civil suit unless the court has some reservations. Moreover, the ICSID award shall be enforced through the International Investment Disputes Act. The award will then be registered in court after fulfilling all the provisions as described in the International Investment Dispute Act. The decision it imposes would be treated the same as the verdict of the court in a civil suit.[7]

How the Pakistani Courts Dealt with Ambiguous Arbitration Agreements

Cases discussed here give us an idea of how Pakistan's courts handled arbitration agreements having ambiguous clauses. In *Jugo Textile Impex v. Shams Textile Mills Ltd*[8], an award was announced in petitioner's favour in England. However, when the same was forwarded to Pakistan's court for enforcement, it was contended by the respondent that the arbitration clause present in the commercial contract was ambiguous, thus invalid. Since the clause was invalid; hence, it was requested that the arbitration award should be declared void and the authority of arbitrator decreeing the award should be brought into question. The wordings mentioned in the clause were, *"Any dispute or difference will be referred to the Federation of Pakistan Chamber of Commerce and Industry, Karachi (Pakistan) or Manchester Chamber of Commerce, Manchester."*

The court was of the view that the clause at hand could be interpreted in two ways. If we consider Federation of Chamber of Commerce of Pakistan as Tribunal A, and the other as Tribunal B, then one

[7] Karyl Nairn QC & Patrick Heneghan, Mujtaba Jamal & Maria Farooq | MJLA Legal, Arbitration World International Series (5th edn, Thomson Reuters Publishing 2015) 736.

[8] *Jugo Textile Impex v. Shams Textile Mills Ltd*, (1986) CLC 879 as cited by Ikram Ullah, 'The Interpretation of Arbitration Agreements by Pakistani Courts'.

possibility could be that first reference is made to Tribunal A followed by another reference to Tribunal B. Secondly, the parties could be provided with the choice to go for any of the Tribunals mentioned. The petitioner opted for the second option with the arguments that the clause had provided the option of going to any of the tribunals. However, the court asserted that the clause was invalid because it did not provide circumstances that could elaborate which tribunal could be chosen. Furthermore, petitioner presented the idea of the election while opting for the tribunal and in that case, the choice of tribunal after the election could be taken as valid. Nevertheless, the court negated this idea as well by commenting that the arbitration agreement was void of any such ideas that allow the parties to select their tribunal in case of disagreement. Moreover, according to the court, the standing of an arbitration agreement became skeptical when one subject matter was authorized to be tried by two different tribunals at the same time. In addition to the uncertainty regarding handing over the case to any of the tribunals, there was also the ambiguity that who would be the arbitrator if the procedure took place in Manchester Chamber of Commerce. Hence, the award was set aside by the court considering the vagueness, invalidity, and uncertainty of the agreement.

How the English Courts Handled Ambiguous Arbitration Agreements

The situation on the ground concerning the interpretation of laws is however quite different if we compare it with other arbitration-friendly regimes such as the United Kingdom. Thus, we could discuss different scenarios in which improvements in the legal regime of arbitration could be brought in Pakistan. Most Courts in more arbitration-friendly jurisdictions will interpret ambiguously drafted i.e. defective arbitration clause in a manner that will give effect to the general intention of the parties to go to arbitration. In

Paul Smith Ltd v. H&S International Holdings Ltd. (1991)[9], there were following two arbitration clauses that were considered as a pathological or defective clause:

"Clause 13: If any dispute arises between the parties the dispute shall be adjudicated under the rules of Arbitration of the ICC.

Clause 14: The Courts of England shall have exclusive jurisdiction over this agreement to which jurisdiction the parties hereby submit"

Hence, the court was faced with a clause requiring disputes to be settled through arbitration, which also provided for the exclusive jurisdiction of the court. English court was hesitant to reject a dispute resolution clause for ambiguity and intended to support agreements to arbitrate. Thus, the court construed the clause as an agreement to arbitrate with the stipulation for the English court to maintain a regulatory role. The court proceedings stayed, and continuance of ICC arbitration proceedings was held.

In *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP*[10], the Supreme Court of England stayed the proceedings in support of arbitration, even though the appellant had no intention to commence arbitration (holding, in the process, that an arbitration agreement contained a negative right to induce the other party not to resolve the dispute other than through arbitration).

From these cases, we get an idea that how much arbitration-friendly the English regime is that even when there was any ambiguity in the

[9]*Paul Smith Ltd v. H&S International Holding Inc* [1991] 2 Lloyd's Rep 127 as cited by Harris Bor, SJ Berwin, 'Dispute Resolution Clauses' (2008) the Hedge Fund Journal.

[10]*Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP as cited by Nelson Goh,* 'When a "may" is (almost) a "must" in an arbitration agreement' (2016) Thomas Reuters, http://arbitrationblog.practicallaw.com/when-a-may-is-almost-a-must-in-an-arbitration-agreement/.

arbitration clause, the courts instead of using its discretion compelled the parties to go with their beforehand arbitration arrangement. These are some decent examples from which the Pakistani regime could learn so that it could be incorporated in Pakistan's legal arena.

Stay of Court Proceedings

Decisions Taken By the Pakistani Courts under Old Laws

In the pre-2011 Act regime, stay for court proceedings in favour of arbitration process required the parties to satisfy courts on several fronts. It was assumed that the jurisdiction of courts did not get expelled during the arbitration process. Thus, the courts possessed the liberty to either announce anti-suit injunction or to overrule the arbitration process by announcing their decisions over the subject matter of any case. Moreover, the act allowed the courts to exercise their powers vehemently. Another aspect faced by the parties was ground of, *forum non conveniens*. It meant that if one party found foreign arbitration proceedings inconvenient, then courts could reject the application of stay. Nevertheless, such type of intervention was certainly against the consent of the parties that was primarily shown in the agreement. Several factors could become grounds of inconvenience for the courts such as the presence of evidence, witnesses, and the subject matter of the dispute in Pakistan. Besides, the limitations of foreign exchange, the residence of the plaintiff and defendant in Pakistan and the difficulty of engaging a counsel for foreign arbitration also became the reasons for a declining stay of court proceedings.

For instance, there was a Paris seated arbitration clause to be governed under the rules of the International Chamber of Commerce (ICC)[11]. Two subcontracts were created in an arbitration agreement

[11]*Island Textile Mills Ltd v. V/O Techno export* [1986] SCMR. 463. See also *Uzin Export and Import Enterprises for Foreign Trade v M. Iftikhar and Co*

in consonance with the provisions of the main contract. The sub-contract one was considered fine and stay was granted in favour of it; nevertheless, the court also pointed out that regardless of the agreement being governed under ICC, the jurisdiction of courts in this matter could not be ruled out. It further suggested that the arbitration taking place in Paris seemed inconvenient for one of the parties because of the expenses involved in it. Therefore, arbitrarily, it ordered for changing of venue from Paris to Karachi. Furthermore, looking at the second subcontract, another court appraised the inconvenience issue and granted stay considering the expenses involved in the process. Though, it did not agree to the idea of changing venue as did by the court in case of first sub-contract. Regrettably, both courts were undermining the arbitration process besides overlooking the mutual consent of the parties opting for the arbitration process.

Earlier, it was believed that settling of the question of existence and validity of the arbitration agreement was the purview of the courts.[12] The authority to determine these facts could not be bestowed upon the arbitrators alone.[13]Courts further clarified that any subject matter pursued by an arbitrator was carried out in consonance with the arbitration agreement, whereas, more complex questions of existence and validity rested with the courts. According to the courts, if the arbitration proceeding was initiated and the award was announced, and afterwards, this award was being challenged in the court of law on any reason and then turned down on the grounds of non-existence and invalidity, then, the whole exercise would be a futile exercise wasting time and expenses of the parties. Therefore, it was argued that the courts should decide the appropriateness of the subject matter at early stages of the proceedings of any dispute

Ltd [1989] SCMR 225; *Lithuanian Airlines v Bhoja Airlines (Pvt) Ltd* [2004] C.L.C. 544.

[12]*Province of West Pakistan v. Fakir Spinning Mills Ltd*. [1962] PLD (W.P.) Karachi 386.

[13]*WAPDA v. Abdur Razzaq* [1977] P LD Lahore 5.

that was to be forwarded to arbitrators; despite, arbitration is the preferred choice of the parties according to the contract. These powers were derived by courts under section 33 of the 1940 Act which stated that:

> Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:
>
> Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for the discovery and particulars as it may do in a suit.

Although, the Act of 1940 tackled the domestic arbitration regime in general; nonetheless, the courts used it in foreign cases as well when the questions of non-existence and invalidity of any contract arose.[14] Further, according to the law in the discussion, when an award was announced by an arbitrator in line with the arbitration agreement, the courts used to clarify whether the arbitration agreement was existent and valid. Only then the enforcement of the award was permitted.[15]

In *Asian Mutual Insurance case*[16], the Sindh High Court elaborated that section 33 of the 1940 Act allowed the court to determine

[14]*Pakistan Chrome Mines Ltd v. Phibro Asia Ltd* [1976] SCMR 93 as cited by Ikram Ullah, 'The Pakistani legal regime on stay of court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

[15]*Hakimuddin Harmusji & Sons v. Ghafoor Textile Mills* [1978] PLD Karachi 152 as cited by Ikram Ullah, 'The Pakistani legal regime on stay of court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

[16]*Asian Mutual Insurance Co Ltd v. Pakistan Insurance Corp* [1982] PLD Karachi 778 as cited by Ikram Ullah, 'The Pakistani legal regime on stay of

validity, existence, or effect of the arbitration agreement when an application is filed. Accordingly, the court had the compulsion to resolve the matter and would not restrain the matter under section 34. Nevertheless, only when the court was satisfied that the subject matter at hand was valid, existent, and effective, only then section 34 could be invoked and stay of court proceedings could be granted. Thus, the tendency of the court towards interference was further justified by the presence of this provision i.e. the court had to entertain the application under section 33 before giving a stay order.

The Situation in Pakistan after Enactment of New Laws

Pakistan adopted the New York Convention into its laws on 14th of July 2005 through ratification of "Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005" which was finally legislated as 2011 Act. The purpose of promulgating this act was to minimize courts intervention in the Arbitration process. The sections 3 and 4 of this Act dealt with foreign agreements; while, section 6 and 7 coped with foreign arbitral awards. The 2011 Act, being a special law, was believed to be more arbitration-friendly in a way that application for recognition and enforcement would be supported as envisaged in Article V of the New York Convention. Regrettably, again the spirit was practically not followed by the courts, and most of the time, the enforcement of awards got delayed particularly due to lack of steadiness in the courts' verdicts that were antagonistic to the International standards of arbitration.[17]

court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

[17]Hassan Raza, 'Pakistan's Dilemma with Foreign Arbitrations' (2018) Kluwer Arbitration Blog.

In *Abdullah v. CNAN Group Spa*, PLD 2014 Sindh 349[18], it was held that an award debtor could not be pursued to quash a foreign award through a civil suit challenged against such award on the factors cited in the New York Convention. The Court was of the view that as per Article V of the Convention, only award debtor could invoke such provisions while responding to any trial initiated by the award creditor for the recognition and enforcement of the foreign award.

Another distinctive scenario was experienced in the verdict of *Rossmere International Limited v. Sea Lion International Shipping Inc.*, PLD 2017 Baluchistan 29[19]. An award was recognized by the Quetta High Court; however, it overruled the enforceability of the award because the defeated party did not have any assets or bank accounts in the territorial jurisdiction of the court. The court interestingly suggested that the triumph party could again file a case of asset recovery in the court of the territorial jurisdiction where such assets were available. Furthermore, for the recovery of the amount, the court advised the party to file a case where the bank accounts of the award debtor were retained.

Nonetheless, the interventionist policy of courts continued even after the legislation of 2011 Act. In a recent case of *Lakhra Power Generation Company Ltd.* (LPGCL)[20], the main contract had an arbitration clause according to which arbitration was to be governed by LCIA using Pakistani Laws and London as its seat. Supreme Court of Pakistan on grounds of misappropriation and illegality, ordered to cancel the main contract and LPGCL to be given reimbursement. The verdict made the arbitration agreement null and

[18]*Abdullah v. CNAN Group Spa*, PLD 2014 Sindh 349 as cited by Hassan Raza, 'Pakistan's Dilemma with Foreign Arbitrations' (2018) Kluwer Arbitration Blog.

[19]*Rossmere International Limited v. Sea Lion International Shipping Inc.*, PLD 2017 Baluchistan 29 as cited by Hassan Raza, 'Pakistan's Dilemma with Foreign Arbitrations' (2018) Kluwer Arbitration Blog.

[20]*Lakhra Power Generation Co Ltd (LPGCL) v. Karadeniz Powership Kaya Bey* [2014] CLD 337.

void and unfeasible to be performed based on the allegations of fraud and perjury. In the meantime, the other party Karkey (a Turkish company), commenced ICSID proceedings according to an arbitration clause in Bilateral Investment Treaty (BIT) between Pakistan and Turkey that took place in 1995. Moreover, in Sindh High Court, the suit for recovery of the amount was then filed by LPGCL. The company pleaded for an anti-suit injunction under section 4 of 2011 Act because the arbitration agreement possessed an arbitration clause to be governed under LCIA rules. Nonetheless, the court dismissed its plea by suggesting that the presence of two arbitration bodies i.e. LCIA and ICSID were creating substantial overlapping. The court was further of the view that if a stay were granted in favour of LCIA arbitration as per the clause, the court then had a reservation that Karkey could go to ICSID further restraining the proceedings of LCIA. Besides, the companies' right in the BIT had also been transgressed. Thus, the court believed the agreement was inoperable if it were to be executed. The court indicated that even in the provisions of the New York Convention, the term incapable of being performed was mentioned when the contract was irreparable, and the court suggested that the case at hand was irremediable.

The decision was discouragement in the sphere of international arbitration. If there were overlapping between the subject matters, it would be the arbitration tribunals to decide which one was to be opted rather than local courts deciding the fate of the agreements. In this case, the local courts had undermined the arbitration process by infringing the parties' mandate as it should be their choice to either opt for treaty-based claims or go with contractual claims. As it was decided beforehand that the parties wanted to go for arbitration; thus, according to Article 26 of the ICSID Convention, the court had violated the provisions by intruding into the fact that parallel proceedings on the grounds of treaty and contract claim before ICSID tribunal and any other arbitration forum were acceptable and the decision of the court acted as a *suo moto* verdict. Furthermore, it

is a proven law that an application presented under an incorrect provision of law would not stand invalid if the plea were legitimate. Therefore, in this case, if the plea under the 2011 Act stands inoperable in case of LCIA arbitration clause, the same application of restraint based on the ICSID Convention could have been granted to the party.

In *Taisei Corporation v. A.M. Construction (Pvt.) Limited case*[21], the Lahore High Court held that despite promulgation of 2011 Arbitration Act, remedies available under Arbitration Act, 1940 which are not directly eclipsed by the former Act are intact. For instance, if a party wanted to challenge the validity and effectiveness of the arbitration agreement, it required the aid of 1940 Act rather than the 2011 Act which was devoid of such remedial provisions. Nonetheless, it could be observed that the court was encouraging an interventionist approach which the framers attempted to minimize in 2011 Act.

Today, the courts after the enactment of 2011 Act are making "null and void, incapable of being performed" the basis for rescinding the agreements. Though this inoperative term is not even described in the New York Convention, the concept is to stop intervention of the courts in the arbitration agreements that are based on the mutual consensus of the parties. Therefore, the agreement should only be considered inoperative once the parties involved in the contract mutually deem it so. Besides, conditions in the contract such as specific arbitrators chosen by the parties before going for arbitration, and then non-availability of those arbitrators, could be equivalent to a repeal of the arbitration agreement by the court.[22]Surprisingly, in

[21]*Taisei Corp v. A.M. Construction Co (Pvt) Ltd* [2012] PLD 2012 Lahore 455.

[22] For a detailed description as to when an arbitration agreement becomes "null and void", "inoperative" or "incapable of being performed", see M. Pryles, "The Kaplan Lecture 2009: When is an Arbitration Agreement Waived?" (2010) 27(2) Journal of International Arbitration 105 as cited by Ikram Ullah,

the 2011 Act, there is no definition of the word arbitration agreement; despite, it comprises Article II of the New York Convention that discusses recognition and enforcement of arbitration agreement. The intention of legislating 2011 Act was to fully incorporate the New York Convention in Pakistani arbitration laws since Pakistan is a signatory to it. Nevertheless, to address an arbitration case, courts bring together the provision of the New York Convention with the provisions of Arbitration Act, 1940.[23]

How the Pakistani Courts Responded to Cases Involving Public Policy Issue

According to the Arbitration Act 1940, if an award did not lay down sufficient details, then it would be termed as a non-speaking award[24]**,** which would normally be considered against the doctrines of natural justice. Therefore, to fulfill the requirements, it was forwarded by the courts to the arbitrator within a stipulated time frame. Consequently, in the *Nun Fung Textile case*[25], the enforcement of a foreign award was challenged because according to the Sindh High Court, it was not a speaking award and was considered against the principles of public policy as no detailed reasoning was provided as per the prevailing law.[26]

'The Pakistani legal regime on stay of court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

[23]Ijaz Ali, 'Challenges in the Way to Enforcement of Foreign Arbitral Award in Pakistan' (2014) http://prr.hec.gov.pk/jspui/bitstream/123456789/6961/1/Ijaz_Ali_Law_2015_Univ_of_Karachi_09.05.2016.pdf.

[24] *Messrs Tribal Friends Co. v. Province of Balochistan*, 2002 SCMR 1903 as cited by Ijaz Ali, 'Challenges in the Way to Enforcement of Foreign Arbitral Award in Pakistan' (2014).

[25] *Nan Fung Textile Ltd v. Sadiq Traders Ltd*, PLD 1982 Karachi 619 as cited by Ijaz Ali, 'Challenges in the Way to Enforcement of Foreign Arbitral Award in Pakistan' (2014).

[26] *Supra* n 22.

How the Pakistani Courts Reacted To Change of Designated Position of an Arbitrator

This could also be correlated to the situation where a position is designated to an arbitrator and that post gets abolished. In one instance, Secretary Civil Supplies Department, Government of Punjab was nominated for an arbitrator. After some time, the post ceased to exist. Thus, according to the Pakistani court, the clause was void as it was unclear from the agreement whether the parties wanted to appoint the Secretary as an arbitrator acting at the time of the termination of the contract, at the time the disagreement surfaced or at the time of actual reference.[27]

Similarly, in *Taj Muhammad Khan case*[28] **,** the parties in their agreement showed their consent that disputes would be brought before Chairman of the Forest Department, Khyber Pakhtunkhwa government for arbitration. In the aftermath of the enactment of Forest Development Corporation Ordinance 1980, the structure of the corporation amended the nomenclature of the Chairman post. Thus, the court held that the arbitration agreement was inoperative, and stay could not be granted because the arbitrator's designated post did not exist.

In another example, it was agreed by the parties to hand over the dispute to the "Chief Accountant" of the State Bank of Pakistan. Though, in the event of a dispute, one party contended that since the post of Chief Accountant had been obliterated due to the change in the policies of the State Bank; therefore, arbitration clause had become infructuous. This time, the court did not go with this idea

[27] Province of Punjab [1986] CLC 2800 as cited by Ikram Ullah, 'The Pakistani legal regime on stay of court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

[28] Taj Muhammad Khan v NWFP Forest Development Corp [1984] PLD Peshawar 64 as cited by Ikram Ullah, 'The Pakistani legal regime on stay of court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

that changing nomenclature would undermine the beforehand agreement of the arbitration. Therefore, it suggested that mere change of name of the post should not affect the agreement thus, stay was granted.[29]

Furthermore, the dilemma of suit v. application has made Pakistani courts feel insecure as a suit is considered as a retrial while application as a summary procedure. Even though it was anticipated that the 2011 Act would tackle the matter of the foreign arbitral award; however, it could not standardize the procedure for recognition and enforcement of the award. Hence, keeping the controversy alive which could vanquish the purpose of the law. Several applications were filed in courts under the 2011 Act for the recognition and enforcement of foreign arbitral awards. Nonetheless, primary concern had been to determine whether the said application would be taken as a suit or an application.[30]

Stay of Court Proceedings In Favour of Arbitration – English Perspective

The stance of English courts has generally remained positive towards anti-suit injunctions. In *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v. Containerships Denizcilik Nakliyat Ve Ticaret AS ("Yusuf Cepnioglu") [2016]* EWCA Civ 386[31], the petitioner had attained an anti-suit injunction restraining a vessel's charterers from pursuing Turkish proceedings against it. According to the Turkish legislation, the third parties had a right of action against an insurer. In the arbitration clause, the charterers were not mentioned as parties. The claim was subject to the London

[29]*Macdonald Layton Costain Ltd Karachi v State Bank of Pakistan* [1980] PLD Karachi 87.

[30]*Supra* n 3.

31 Practical Law Arbitration, 'Practical Law Arbitration: Top 10 English cases in 2016 (2016), Thomson Reuters Practical Lawhttps://uk.practicallaw.thomsonreuters.com/w-004-7272?transitionType=Default&contextData=(sc.Default).

arbitration clause and choice of English Law in the insurance contract. The English Court of Appeal upheld the restraining orders and stated that the anti-suit injunction was sought to prevent a contractual right. It concluded that the stay order should be granted by the courts unless there was a valid reason not to do so.

Referring to an Emergency Arbitrator Instead of Urgent Interim Court Relief

In *Gerald Metals S.A. v. Timis & Ors* [2016] EWHC 2327[32], the recent phenomenon of the emergency arbitrator which is a provision in major institutional rules was referred. Thus, courts invoked section 44 of the English Arbitration Act (EAA) 1996, which gives powers to the court to decide on the scope of arbitral proceedings. The court recognized the intention of LCIA rules providing for an emergency arbitrator i.e. to limit the need to invoke the assistance of the court in cases of urgency. Thus, the court would only act when arbitral tribunal would be unable to act effectively within the stipulated time frame. Subsequently, the party's autonomy would be strengthened, and the English court seeks to assist the arbitral process by securing the full effect of a beforehand agreement of appointing an emergency arbitrator instead of urgent interim relief. To conclude, the commercial court stated that the emergency arbitrator provisions contained in the LCIA Arbitration Rules effectively removed the court's power to grant urgent relief in support of arbitration under section 44 of the English Arbitration Act 1996.

[32]Angeline Welsh, 'What we learned in 2016 about the English courts' approach to arbitration' (2017) The Laws of Nations https://lawofnationsblog.com/2017/01/24/learnt-2016-english-courts-approach-arbitration/.

Post-Award; A Non-Interventionist Approach of the English Courts

In *National Iranian Oil Company v. Crescent Petroleum Company International Ltd and another [2016] EWHC 1900 (Comm)*[33], the English court dismissed a challenge to an award under sections 67 and 68 of the EAA 1996 because English law governs separability of an arbitration agreement, even though the governing law of the main contract was Iranian. The case confirmed that a choice of foreign law as the underlying law of the contract would not displace the application of the doctrine of separability under English law.

Who Should Decide the Validity of an Arbitration Agreement?

According to the New York Convention, the validity of an arbitration agreement could be evaluated in two ways. Firstly, as court appraise the validity given Article II of the Convention when an application is filed. Hence, if any shortcoming is found, the process comes to a halt. Secondly, under Article V (1) (a) of the Convention, the court may turn down to recognize and enforce an award on grounds that the contract is not acceptable either under the law which the parties have subjected to or the domestic law of the state where the award was rendered.

To elaborate the discussion on the validity of an arbitration agreement, it is important to discuss two concepts in arbitration that are:

[33]*National Iranian Oil Company v. Crescent Petroleum Company International Ltd and another [2016] EWHC 1900 (Comm)* cited by Practical Law Arbitration, 'Practical Law Arbitration: Top 10 English cases in 2016 (2016), Thomson Reuters Practical Law

Competence-Competence[34] is a theory that empowers the tribunal to rule on its jurisdiction. It enables the tribunal to hear and evaluate claims concerning the authenticity and extent of the arbitration agreement. According to this doctrine, national courts should not intervene in the jurisdiction of arbitral tribunal until the tribunal has either recognized or rejected its jurisdiction. Nevertheless, tribunals recognition of its jurisdiction is not a limitation on the courts; hence, it might be challenged at the time of enforcement of the award or if the award is brought in the court.

Separability addresses the separate existence of arbitration agreement and the evaluation of its validity under the law applicable to it.

Pakistani Perspective in Deciding the Validity of an Arbitration Agreement

Let us take the example of a Pakistani case titled *Avari Hotel Ltd v. Hilton International Co.*[35]The Sindh High Court asserted that in the situation where legal validity of the agreement was in question on the grounds of fraud, the matters should not be handed over to the arbitrators without first being investigated in all aspects by the court. It would be a futile exercise to allow proceedings of the arbitration when there was an apprehension that later it would be challenged based on invalidity. The decision was given under Geneva Convention and not under the New York Convention; nonetheless, the verdict was in support of 'ex-facie standard' on the ground of validity of agreement at the stage of referring to arbitration.Another case that faced criticism was *SGS Societe Generale de Surveillance*

[34] Julian D M Lew, Lukas A Mistellis, Stefan M Kroll, 'Comparative International Commercial Arbitration' (2003) Kluwer Law International.

[35] *Avari Hotel Limited v. Hilton International Co.*, Karachi All Pakistan Legal Decisions 425 (1985) as cited by [35]Ijaz Ali, 'Challenges in the Way to Enforcement of Foreign Arbitral Award in Pakistan' (2014).

S.A. v.the Islamic Republic of Pakistan.[36] The case was filed by SGS against Government of Pakistan on the grounds of an alleged breach of contract. SGS initially filed a commercial claim in the Swiss Court considering the breach of BIT conditionality between Pakistan and Switzerland. The claim was failed and SGS final appeal was overruled by the Federal Tribunal as well. Before the decision of Tribunal, Pakistan filed an application under the 1940 Act in a trial court pursuing the transfer of the dispute to arbitration under the provisions of the contract. In the meanwhile, SGS initiated ICSID proceedings and in parallel filed an application before the trial court to stay the proceedings; however, it got dismissed. It then appealed before High Court that also got rejected. Finally, SGS moved to Supreme Court, but Pakistan in response appealed for a restraining order against the ICSID arbitration. SGS on the other hand applied to the ICSID tribunal requesting to stay the local arbitration proceedings commenced by Pakistan and obliging it to abandon its submission before the Supreme Court for a stay of the ICSID proceedings. Later, Supreme Court through an interim order gave restraining order for both the local and ICSID arbitration proceedings and asked the parties to refrain from following them until the Court decided the appeals. Thus, the Supreme Court gave its judgment in favour of Pakistan rejecting SGS's appeal; hence, ordering it to abstain from pursuing the case in ICSID arbitration as it was not part of the municipal laws of Pakistan. According to the court, no confidence could be placed on the same to defeat the express agreement between parties to arbitrate in Pakistan under the 1940 Act. On the other hand, the tribunal asked Pakistan not to engage in the contempt application against SGS before the Supreme Court for any transgressions it made against the court's orders. Also, it suggested a stay of the local arbitration until the decision regarding jurisdiction is provided by the tribunal. Hence, Pakistan renounced

[36]*SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan* as cited by Saad Mir, 'Court Intervention in Arbitration: Pakistan's Perspective'file:///C:/LLM/Sem%202/Thesis-dissertation/arbitration%20pakistan%20courts.html.

its contempt application. The tribunal finally gave its verdict for discontinuance of the proceedings. The decisions faced criticism at the international level and interventionist approach of the courts was criticised.

In *Port Qasim Authority, Karachi v. Al-Ghurair Group of Companies*[37]case, the contention was that the main contract did not take place on the due date. The court argued that the wordings of the clause i.e. "dispute in respect of or concerning anything herein contained" were empowering arbitrator to decide the existence and validity of the contract. Sindh High Court stated that normally arbitrator had no authority to rule on his jurisdiction unless explicitly described by the parties in the clause. Therefore, not making it a rule of law by authorizing arbitrator to address such questions.

In a recent famous case titled *Reko Diq*[38], the parties went for joint venture having an arbitration clause in the main contract in which the dispute was to be decided under ICSID Convention; however, if it did not assume jurisdiction then the case would be referred to ICC arbitration in London. Hence, when the ICSID proceedings were initiated, one of the parties invoked the jurisdiction of Supreme Court with the plea that the case could not be resolved through arbitration since the main contract was founded on criminality, deception, and misappropriation. Consequently, Supreme Court intervened and by undermining the theory of separability, declared the arbitration agreement as null and void and inoperable to be executed. Further quoting section 4 of the 2011 Act, it took the stance that under Article2 (3) of the New York Convention the courts could invoke their jurisdictions in the matter where the

[37]*Port Qasim Authority* PLD 1997 Karachi 636 as cited by Ikram Ullah, 'The Interpretation of Arbitration Agreements by Pakistani Courts' International Arbitration Law Review 80.

[38]*Maulana Abdul Haque Baloch v. Government of Balochistan* [2013] PLD SC 641 (Reko Diq case) as cited by Ikram Ullah, 'The Pakistani legal regime on stay of court proceedings in favour of arbitration', (2017) International Company and Commercial Law Review.

agreements are "null and void, inoperative or incapable of being performed". Regrettably, the matter which should be pronounced by the ICSID Convention was taken up by the local courts which effected the arbitration process.

English Courts Deciding the Validity of Arbitration Agreements

According to the *Fiona Trust case*[39], the court held that the arbitrators are competent to decide the matters of illegality in a contract unless it was specifically mentioned otherwise in the arbitration clause. According to EWCA in the Fiona Trust case (2006), para. 22-25

> An arbitration clause was a separate contract which survived the destruction or other termination of the main contract. An allegation of invalidity of a contract did not prevent the invalidity question being determined by arbitration to tribunal pursuant to the separate arbitration agreement. It was only if the arbitration agreement were itself directly impeached for some specific reason that the tribunal would be prevented from deciding the disputes that related to the main contact.

The Court of Appeal and the House of Lords described that parties had proposed to bring all disputes within the scope of the arbitration clause. This premise could only be contradicted by use of express words in the agreement. A lesson here for Pakistan's courts is that they should also embrace the same assumptions as in the case of Fiona trust to make the regime more pro-arbitration. Hence, the House of Lords reemphasized the assumptions that parties to a contract who have included an arbitration clause intend that all

[39] See *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All ER 891 (Comm) (English Ct. App.), aff'd, [2007] UKHL 40 (House of Lords);*Film Fin. Inc. v.. Royal Bank of Scotland* [2007] EWHC 195 (Comm) (English High Ct.); *Vee Networks Ltd v. Econet Wireless Int'l Ltd* [2005] 1 Lloyd's Rep. 192 (QB) (English High Ct.); §9.02[D] [1][d].

questions arising out of their relationship should be determined following their chosen procedure and the theory of separability should make their agreement effective to be performed.

This concept is also supported by Article 16 of the UNCITRAL Model Law which states that:

> A decision by the arbitral tribunal that the contract is null/void shall not entail ipso jure the invalidity of the arbitration clause.

Moreover, how a tribunal's jurisdiction is established in the cases related to bribery is also described by ICC Award No 1110(1963)[40]. According to it, the prevalent methodology is now that arbitrators will use the doctrine of separability to decide on the merit of the dispute either to refuse the argument that the contract is void for illegality, or announcing that the contract is inoperable under the applicable law or given the International public policy. This way the arbitrators will endorse their jurisdiction in the matters of public policy and criminal laws or other corruption cases.

To elucidate this concept in English arbitration regime, let us discuss *Westacre case*[41]. Westacre and Jugoimport entered into a consultancy agreement for the procurement of contract of military equipment to Kuwait. The dispute arose and the claim was filed before an ICC arbitral tribunal in Switzerland. The respondent relied on public policy and the illegality as a defence. However, the tribunal found no evidence of irregularity. Besides that, the award was confirmed by the Swiss courts. Further, the respondent tried to resist enforcement in the UK's court on the ground of public policy and illegality factors besides producing new evidence. Nevertheless, Court of Appeal in UK refrained to look into the matter of illegality

[40] See ICC Award No 1110(1963).

[41] *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd* [1999] QB 785 as cited by Redfern and Hunter, 'International Arbitration' 6th edition (©Kluwer Law International; Oxford University Press 2015) pp. 605 – 662.

because of the new evidence presented and stated that "if it is open to a party to seek to get an enforcing court to retry issues of fact which the arbitrators had before them, and which they had to and did determine, it would appear to present an open invitation to disappoint litigants to re-litigate their disputes by alleging perjury, and major inroad would be made into the finality of Convention awards."

In *Carpatsky Petroleum Corporation v. PJSC Ukrnafta* [2020] EWHC 769 (Comm)[42], the English High Court passed its verdict after deliberating the issue whether the disputing parties had come up with a valid arbitration agreement. In 2007, Carpatsky filed a claim for arbitration with the Stockholm Chamber of Commerce (SCC). Ukrnafta after two rounds of arbitration proceedings objected the tribunal's jurisdiction and pleaded that the arbitration agreement was invalid under Swedish law since it was concluded by a third-party which later merged into Carpatsky and then ceased to exist. The tribunal announced that it did have jurisdiction because by Ukrnafta participating in the arbitration without contesting jurisdiction initially, the parties had through conduct agreed to arbitrate. The award was announced in favour of Carpatsky; nonetheless, during enforcement of the award, Ukrainian Commercial Court in 2013 declared that the award could not be enforced on the issue that there had been no valid written arbitration agreement. Carpatsky applied to the English Commercial Court to enforce award upon which the court granted permission. However, Ukrnafta requested to overrule the decision because the arbitration agreement is invalid under Ukrainian law.

The English court after applying the *Sulamerica v. Enesa Engenharia* [2012] EWCA Civ 638 test, proclaimed that the applicable law of arbitration agreement was Swedish law and for

[42] *Carpatsky Petroleum Corporation v. PJSC Ukrnafta* [2020] EWHC 769 (Comm), https://www.judiciary.uk/wp-content/uploads/2020/03/Carpatsky-Petroleum-Corporation-v.-PJSC-Ukrnafta-Judgment.pdf.

applying the same, a valid agreement was established between Ukrnafta and Carpatsky. Furthermore, it stated that even if no such arbitration agreement had occurred, the parties' conduct, participation, and exchange of pleadings in the SCC arbitration had established an arbitration agreement in the event.

These decisions clearly illustrated the English courts' arbitration-friendly stance where their preparedness to consider and apply foreign law and willingness not to deviate unnecessarily from the decision of the tribunal is evident.

How Can the Question of Arbitrability be Addressed?

The issue of arbitrability in the legal regime of Pakistan

The arbitrability is still a question of debate in the legal regime of Pakistan. New York Convention under Article V(2)(a) envisaged that the enforcement of an arbitral award may be denied if the subject matter of the dispute is incapable of being resolved under the law of the state. Thus, party autonomy goes at the hind side when a subject matter has limitations levied by the national laws to be settled by arbitration. Hence, arbitrability provides the options which sort of issues could be dealt with arbitration and which could not. In Pakistan, there has not been that much jurisprudence about arbitrability; therefore, inconsistency is found related to this topic.

Several local and special laws present the provision of arbitrability in Pakistan. For instance, the Muslim Family Law Ordinance, 1961 sanctions the institution of an arbitration council. The concept has been derived from the Holy Quran where the institution of arbitration has been supported in disputes related to matrimony. ***In Abdul Malik v. Mst. Bibi[43]***, Quetta High Court held that matrimonial disputes could be submitted to arbitration. Similarly, in Shariah compliant arbitration, the mediation of Judge or Qazi is encouraged.

[43] *Abdul Malik v. Mst. Bibi Amina* PLD 1985 Quetta 85.

Moreover, under local laws such as the Punjab Local Government Act, 2013, the notion of neighbor-hood dispute resolution through arbitration is presented.[44]

The theory of arbitrability has not, at times, been favored by Pakistani courts. For instance, *Hub Power Company Ltd. (HUBCO) v. WAPDA*[45], in the Power Purchase Agreement (PPA) between the companies there was an arbitration clause that mentioned London as a seat and agreement to be governed under International Chamber of Commerce (ICC). WAPDA suspected that Schedule VI to the PPA was altered through conspiracy and dishonesty without taking it on board. Consequently, exaggerated tariff payments became due from WAPDA upon which it initiated civil proceedings in the local court. On the Contrary, HUBCO filed an application in Karachi's court pleading for suspension of the case from WAPDA and resorting to ICC arbitration as per their mutual agreement. The subject matter was taken up by the Supreme Court of Pakistan and stated that if the accusation of illegality got proved, then the contract would be deemed void. Moreover, since it was a matter of public policy; thus, further criminal proceedings would be initiated instead of referring the case to arbitration without any logical conclusion.

Question of Arbitrability and English Courts

In *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.*[46], a claim was filed by re-insurer for a pronouncement that reinsurance policies were void for illegality, and that the plaintiffs were not accountable under them. The allegation of criminality on defendants was that they were not

[44] Punjab Local Government Act, 2013.

[45] *The Hub Power Company Ltd. (HUBCO) v. Pakistan WAPDA and Federation of Pakistan* (2000) (Kluwer Law International)file:///C:/Users/44738/OneDrive/Note9/Download/Hub%20Power%20Company%20v%20Pakistan.pdf.

[46] *Harbour Assurance Co (UK) Ltd v. Kansa General International Insurance Co Ltd*: CA 7 Apr 1993 as cited by Ralph Gibson LJ, Hoffmann LJ in Gazette 07-Apr-1993, [1993] 1 QB 701, [1993] 1 Lloyd's Law Reports 455.

permitted to continue insurance or reinsurance business under the insurance companies Act. The defendants then applied for a stay and requested for referring the case to arbitration as per their agreement beforehand. The English Court of Appeal held that an arbitration clause in an insurance contract was a separate entity from the main contract. Further, it stated that invalidity of the main agreement did not deprive the arbitrator of his jurisdiction and he was competent to decide the question of illegality on the theory of competence-competence.

Pakistan's Losing Streak in the International Arbitration Cases in Recent Past[47]

It has been a setback for Pakistan that it recently lost two major arbitration cases involving $900 million compensation to local and international business firms. Unfortunately, Pakistan is still at the backseat of producing experts in arbitration. The most pivotal factor is that Pakistan is unable to develop a uniform law for the standardization of contracts and the choice of arbitral framework. In several cases, the government shows consent to the requirements of external investors in long-term deals: however, later deviate contractual enforcement through dealing with jurisdictions of the local legal system. Moreover, there is no incentive and reprimand mechanism for the preparation of contracts, selection of dispute settlement procedure in contracts and negotiation strategies where the governmental institutions abruptly agree on international arbitration without advice from the experts. Hence, intentionally abandoning their rights over sovereign immunity in the events of enforcement of awards; thus, surrendering the jurisdictions of domestic courts. Furthermore, the government has not yet been able to bring regulations in the agreements; despite, Pakistan being a signatory of numerous bilateral investment treaties. Moreover, the

[47] Khaleeq Kiani, 'Reasons why Pakistan loses International Arbitration' (2017) https://www.dawn.com/news/1370083.

confidentiality factor adds on to the worries as the agencies are unable to figure out vulnerabilities in the arbitration agreements.

Establishment of Center for International Investment and Commercial Arbitration, Lahore[48]

Lately, Pakistan has been involved in significant commercial and investment arbitral proceedings; however, conspicuous weaknesses in the system were blatant. There was a need for an institutional mechanism that could cater to international arbitration cases. Hence, a Lahore based Center for International Investment and Commercial Arbitration (CIICA) has been recently established. It is believed that such forums would impart requisite skill set to the concerned authorities so that international trade and investment agreements could be understood on merit. Institutions like CIICA will enhance the capacity of the government officials and the legal and business communities in Pakistan. It will improve the image of Pakistan in the international arena as a state that understands the bilateral and multilateral trade and investment agreements, giving confidence to the investors.

Conclusion and Recommendations

Through this research, an attempt has been made to find out the optimal resolution to the research question. We have selected the English regime for our research so that it could be realized that what steps it adopted that transformed it into an arbitration-friendly jurisdiction. Thus, those positive points could be incorporated into Pakistan's legal regime to strengthen its arbitration environment making it a pro-arbitration state.

[48] Rana Sajjad Ahmad, 'importance of international arbitration' (2015) https://tribune.com.pk/story/892149/importance-of-international-arbitration.

What has been learnt about the English Courts' Approach to Arbitration?

From the discussion, it has been learnt that English courts normally try to rule out any possibility of derailing the arbitration process. They were hesitant to reject a dispute resolution clause for ambiguity and intended to support agreements to arbitrate. Thus, putting aside their discretion and convincing the parties to go with their agreed arrangements. They were found upholding the restraining orders to preserve the contract right and not intervening in the process; unless, there was a valid reason to do so. They encouraged the emergency arbitrator provisions contained in several arbitration institutions' laws by effectively reducing courts authority to grant urgent relief that could act as an intervention. They highlighted that the choice of foreign law as the underlying law of the main contract would not displace the application of the theory of separability under the English law. Furthermore, they effectively applied theory of Separability and established that the arbitration clause is a separate entity from the main contract. Moreover, they emphasized that the parties to a contract who have included an arbitration clause intend that all questions arising out of their relationship should be determined following their chosen procedure; hence, strengthening the concept of party autonomy. Likewise, on the principle of Competence-Competence, the courts held that the issue of illegality of the main agreement could be taken up by arbitral tribunals since they are competent to decide the matters of public policy. Moving one step ahead, courts were of the view that even if there was skepticism about the existence of arbitration agreement in a contract, thus, the conduct, participation and exchange of pleadings would establish an arbitration agreement in any event. The points obtained from various courts' decisions gave us a good insight into the English arbitration regime that could be incorporated in Pakistan's legal system to make it more acceptable in the arbitration world.

Way Forward for Pakistan's Arbitration Regime

Pakistan requires drastic improvement in the arbitration regime to cope up with international standards. After comparing it with several scenarios of English arbitration's regime, it is significant that respectability of the provisions of arbitration agreements, recognition and enforcement of foreign arbitral awards are taken critically by the authorities.[49]Besides, the development of procedural laws of arbitration, arbitration institutions and availability of training institutes to learn arbitration as a subject are required.

Consistent procedural laws play a significant role in international arbitration. They allow a smooth flow of proceedings without any interruptions that benefit the parties in terms of saving their time and money. Pakistan's law does not give clear direction regarding the power of the tribunal deciding matters of Competence-Competence, interim relief, privacy, and confidentiality of proceedings. Thus, to avoid the intervention of local courts, such topics need to be addressed in the laws. This would make arbitration free from the control of national courts.

The authorities should invite International Institutions such as LCIA, ICC or ICSID to Pakistan so that they could play a role in promoting arbitration regime in the country. They could assist in establishing viable arbitration institution such as CIICA in Pakistan; besides, giving awareness to legal fraternity about the significance of arbitration in the international commercial dispute resolution front.

---

[49] Hassan Raza, 'International Arbitration: Is Pakistan Finding New Avenues? (2020)Kluwer Arbitration Bloghttp://arbitrationblog.kluwerarbitration.com/2020/01/31/international-arbitration-is-pakistan-finding-new-avenues/?doing_wp_cron=1597249242.7718830108642578125000.

Moreover, the Pakistani Courts should become more vibrant in dealing with complex arbitration situations. They should encourage the enforcement of arbitral awards in line with the international standards and overlooking petty issues that could be dealt with by the arbitrators. This will increase the confidence of investors in Pakistan's arbitration regime bringing a good name to the country. Moreover, experts should be taken on board while going for international arbitrations that could assist the government institutions in framings effective contracts and negotiation strategies; thus, preventing the state from heavy loses and disrepute in the International arena.

Last but not the least, it is welcoming that legal jurisprudence in Pakistan is moving positively towards the subject of dispute resolution. The institutions have shown positive intent to adopt the prevailing international standards of arbitration which is evident from the statements of many renowned judges. This shows that the future of arbitration is very bright for Pakistan and soon it will be among the leading pro-arbitration countries of the world.

A learned judge of the High Court, who later became the Chief Justice of Pakistan, rightly said that: "…if Pakistan is to attain some respectability in the commercial world, it is necessary that transnational commercial agreements must be honoured and the judicial process must not be used merely to delay the implementation of such agreements or judicial or quasi-judicial decisions passed in disputes arising from such agreement."[50]

[50] International Arbitration In The Context Of Globalization: A Pakistani Perspective' by Mr. Justice Mian Saqib Nisar, Judge Lahore High Court, Lahore.
https://pakistalegalservices.wordpress.com/2012/06/09/international-arbitration-in-the-context-of-globalization-a-pakistani-perspective/