Kluwer Arbitration Blog

# International Arbitration: Is Pakistan Finding New Avenues?

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Recently, the Center for International Investment & Commercial Arbitration inaugurated its Young Arbitration Group in Pakistan in a conference which attracted foreign panelists who efficaciously explained the theory and practice of international arbitration, highlighting the room for improvement in Pakistan. This has been summarized in a prior post on the Blog, which also explained that the conference was a success and foreign participants also had an opportunity to acquaint themselves with the Pakistani arbitration environment, which is the focus of this post. In particular, this post will discuss case laws and analyse how the Pakistani courts are playing their part in rectifying the negative image of arbitration in Pakistan.

Pakistan faces considerable criticism when it comes to (i) enforcement of contracts involving foreign parties; (ii) enforcement of foreign arbitration agreements; and (iii) enforcement of foreign awards. For the first category, the Reko Diq dispute[1)] and the Rental Power Plants' dispute[2)] are notable examples. For the latter, a list of Pakistani precedents is open to criticism for disregarding the settled principles for enforcement of foreign arbitration agreements and awards, which will be discussed below in the context of recent pro-arbitration judgments, such as in the cases of Travel Automation (2006), Lakhra Power Generation (2014), Louis Dreyfus (2018) and Orient Power (2019).

**Enforcement of Contracts Involving Foreign Parties**

Traditionally, a Pakistani party would seek to override the contractual terms to the detriment of a foreign party by challenging the contract before the local courts on various grounds including breach of law and public policy. However, in *Lakhra Power Generation versus Karadeniz Power-ship Kaya Bey*[3)] the High Court held that even though the Supreme Court had declared the main contract to be void, the arbitration agreement had survived due to 'doctrine of separability', which could be enforced under the New York Convention, 1958 ("Convention") by the foreign party once it had exhausted the remedies before the ICSID Tribunal.

Likewise, in *Louis Dreyfus Commodities versus Acro Textile Mills* (PLD 2018 Lahore 597), the High Court refused to accept the award debtor's challenge to the arbitration agreement, and the award, on the basis that Articles II and IV of the Convention cannot be intertwined with any grounds under Article V to enhance the grounds of challenge to the award. The Court also declared the agreements to be valid under Article V(1)(a) after: (i) confirming ownership of the award

debtor's email address which was used to negotiate the agreements and appoint an arbitrator; and (ii) drawing in-court comparison of the award debtor's signature to resolve the question of execution of agreements.

**Enforcement of Foreign Arbitration Agreements**

Foreign arbitration agreements have also been disregarded in Pakistan for reasons including forum non-convenience and preference to domestic special law[4]. But in *Travel Automation versus Abacus International* (2006 CLD 497) enforcement of arbitration agreements was confined to Article II of the Convention and detached from local arbitration agreements under Section 34 of the Arbitration Act, 1940 because after the adoption of the Convention, judicial discretions were extinguished and confined to Article II of the Convention. This position has been upheld by the Pakistan Courts in later judgments[5].

At the court of first instance in Pakistan, the author is aware of two matters[6] (and has represented a client in one) in which the court has summarily rejected suits filed by domestic parties based on lack of proper jurisdiction, as the main contracts included arbitration agreements requiring international arbitration, the result of which would be enforced under the Convention.

**Enforcement of Foreign Arbitral Awards**

Originally, Pakistan recognized the Convention on the Execution of Foreign Arbitral Awards ("CEFAA") through the Arbitration (Protocol and Convention) Act, 1937 ("1937 Act") which was interpreted by local courts to create discretion for interference with foreign awards. For example, in the judgment of *Yangtze versus Barlas Brothers* (PLD 1960 Supreme Court 573), the Supreme Court declined enforcement of an award passed by the London Court of Arbitration because Pakistan had not recognized the United Kingdom as party to CEFAA. The judgment of *Continental Grains Co. versus Naz Brothers* (1982 CLC 301) followed suit. A further in-depth analysis of this issue can be found in the author's previous post on the Blog, including the misuse of discretion in *Taisei Corporation versus A.M. Construction* (PLD 2012 Lahore 455) ("Taisei Corporation I") which applied the mechanism for enforcement of domestic arbitral awards to foreign awards in disputes where the foreign award was made pursuant to an arbitration agreement that incorporated Pakistan law as the curial law and thus opening foreign awards to objections beyond Article V of the Convention.

This appears to have been modified. First, as explained above in the context of enforcement of contracts, the judgment of *Louis Dreyfus* enforced the foreign arbitral award under the Convention. The Court correctly settled the jurisprudence of the Convention with the help of foreign judicial precedents, and also candidly adopted the UNCITRAL Secretariat Guide on the Convention, both of which conclude that the award creditor has to show prima facie existence of an arbitration agreement on the basis of which the foreign award has been made and the onus is on the award debtor to raise and prove objections under Article V of the Convention. A similar 'pro-enforcement bias' was offered in the judgment of *Dhanya Agro-Industrial versus Quetta Textile Mills* (2019 CLD 160).

Another aspect that must be highlighted is the development of a strong opinion against challenging foreign awards in the same manner as domestic awards, such as in the case of *Taisei Corporation I*. In *Orient Power Company versus SNGPL* (2019 CLD 1082), where the High Court rejected the interpretation offered in the *Taisei Corporation I* and held that an arbitral award passed in another contracting state would be a foreign award under the Convention irrespective of the fact that the governing law of the arbitration agreement is Pakistan law. The Court also rightly held that *Taisei Corporation I* erroneously relied on an earlier judgment of the Supreme Court in *Hitachi Limited and another versus Rupali Polyester and others* (1998 SCMR 1618), which had been passed under the 1937 Act and CEFAA, both of which are inapplicable (the 1937 Act was repealed with effect from 2005) after the Convention was adopted by Pakistan. Similarly, in another judgment titled *Taisei Corporation versus A.M. Construction* (2018 CLD 2058) (referred to as Taisei Corporation II)**,** the High Court did not subscribe to the earlier interpretation in *Taisei Corporation I.*

**Conclusion**

On balance, while there is a need for improvement in Pakistan to align with international standards, in the author's opinion, it appears that commercial judges in Pakistan have discovered a direction to develop the jurisprudence of international arbitration. The three important pillars for any foreign investor, *i.e*. (i) respectability of the terms of the contracts, (ii) recognition and (iii) enforcement of foreign arbitration agreements, and of awards, appear to be set into motion by aligning judicial precedents with correct interpretation of laws and appreciating international trends in an attempt to reposes trust by the foreign investors in Pakistan. The legal fraternity will increasingly be required to display high quality commercial aptitude and, where judges are involved, they must further ensure their independence in legal analysis. Simultaneously, Pakistan also needs more commercial judges to timely and effectively adjudicate matters involving international parties. In the coming years, the author hopes the international parties would be more receptive to doing business in Pakistan, which in turn, should develop the scope for effective international dispute resolution in Pakistan.

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References

?1 The Supreme Court of Pakistan in its judgment of *Maulana Abdul Haq Baloch versus Government of Balochistan* (PLD 2013 Supreme Court 641) declared the Chagai Hills Exploration Joint Venture Agreement dated 23-7-1993 (and all its addendums, ancillary agreements, novation agreements and any licenses issued) involving international investors to have been executed contrary to Pakistan's local law and therefore set aside as illegal and void.

?2 The Supreme Court in its judgment (2012 SCMR 773) set aside the Implementation Agreements (and all other connected agreements) involving international investors as they were held to be executed in violation of law and on grounds of corruption.

?3 2014 CLD 337; a case that stems from the Rental Power Plant's dispute.

?4 Akbar Cotton Mills versus Ves/Ojuanojo Objedinensije Tech (1984 CLC 1605 (SB) and 1987 MLD 600 (DB)); Transcomerz Ag versus Kohinoor Trading (1988 CLC 1652); and Pakistan Insurance Corporation versus KotAddu Power (2002 MLD 829).

?5 Far Eastern Impex versus Quest International Nederland (2006 CLD 153); Cummins Sales and Service versus Cummins Middle East (2013 CLD 291 (SB) and 2015 CLD 1655(DB)); Abid Associated versus AREVA (2015 MLD 1646).

?6 Olympus International versus Vinci Construction Grands Projects (Suit No. 318/14); and Capital Strategies Group versus Thyssenkrupp Elevators AG (Suit No. 78/2017).

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