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Pakistan's Dilemma with Foreign Arbitrations

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The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 1958 was adopted by Pakistan on 14 July 2005 through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005. This was re-promulgated in the years 2006, 2007, 2009 and 2010 until it was finally enacted in 2011 ("2011 Act").

The purpose of the 2011 Act was to adopt the Convention by recognising and enforcing: (i) foreign arbitration agreements (under Sections 3 and 4 of the 2011 Act); and (ii) foreign arbitral awards (under Sections 6 and 7 of the 2011 Act). In doing so, the 2011 Act limited the judicial discretion of the Pakistan Courts (by using the word "shall") and repealed the Arbitration (Protocol and Convention) Act, 1937 ("1937 Act").

With the enactment of the 2011 Act, international award creditors filed applications for recognition and enforcement of the foreign awards on the basis that the new law was clearer and had lessor scope of judicial intervention. The 2011 Act, being a special law, was to be strictly construed with the effect that the Courts under Sections 6 and 7 of the 2011 Act "*shall*" not refuse an application for recognition and enforcement of the foreign award unless it was contrary to the grounds enumerated in Article V of the Convention. However, in practice, the Pakistan Courts could not adapt to the radical change in law (since the 1937 Act) and, consequently, the recognition and enforcement of foreign awards was delayed (making such awards redundant) or inconsistent judgments were passed contrary to the established principles of arbitration.

The judgment of the Lahore High Court titled Taisei Corporation versus A.M. Construction Company (Private) Limited, PLD 2012 Lahore 455, is a first example in which the Court, while interpreting Section 14 of the Arbitration Act, 1940 ("1940 Act") and Sections 6 and 7 of the 2011 Act, held that the powers of the Court to recognise and enforce a foreign award under the 2011 Act are limited and thus, the general remedy to seek recognition and enforcement under Section 14 of the 1940 Act would remain available. This appears to be incorrect as the 1940 Act applies to domestic awards and not foreign awards.

Another interesting interpretation is the judgment of Abdullah versus CNAN Group Spa, PLD 2014 Sindh 349, which held that an award debtor could not seek to nullify a foreign award through a civil suit filed against such award on the grounds mentioned in Article V of the Convention. The Court held that the grounds mentioned in Article V could only be taken by the award debtor in defence to any proceedings initiated by the award creditor for recognition and enforcement of the foreign award.

A unique perspective was seen in the judgment of Rossmere International Limited versus Sea Lion International Shipping Inc., PLD 2017 Baluchistan 29, in which the Quetta High Court recognised a foreign award but rejected its enforceability on the basis that the award debtor did not have any assets or bank accounts in the territorial jurisdiction of the Court. It also created an interesting procedural deviation by holding that: (i) in the case of assets and person (i.e. of the award debtor), a civil suit (which could result in a re-trial) for recognition and enforcement is to be filed by the award creditor in the court of territorial jurisdiction where such assets / person are present; and (ii) in the case of a money award, an application for recognition and enforcement is to be filed by the award creditor in the court of territorial jurisdiction where the bank accounts of the award debtor are maintained.

This procedural issue has led Pakistan Courts astray in the previous century and also defeated the purpose of international arbitrations. The 2011 Act aimed to address it but it does not also specify any procedure for the Courts to recognise and enforce foreign awards. Moreover, the Federal Government has also not framed any rules under Section 9 of the 2011 Act which outlines a procedure for recognition and enforcement of foreign awards. Pakistan Courts have thus remained inconsistent with respect to the procedure for recognition and enforcement of the foreign awards and are unable to decide *inter alia* : (i) whether an award creditor is required to file a civil suit (which could result in a re-trial) or an application (summary procedure) for recognition and enforcement of the foreign awards; and (ii) the parameters of the Court's discretion and powers in recognising and enforcing foreign awards.

In this context, two cases pending before the Lahore High Court are of particular interest. In these cases, the award creditors have filed applications under the 2011 Act for recognition and enforcement of foreign awards passed by the International Cotton Association. In the first case, namely Louis Dreyfus SA Commodities versus Acro Textile Limited, Civil Original No.649 of 2012, I am representing the award creditor (Louis Dreyfus) before the Lahore High Court. The matter is in adjudication since the year 2012 with over forty (40) hearings in which I and my counter-part have addressed the Court on the above questions but the respective judges have not passed any judgment in the matter – which has thus suffered inordinate delay.

The second case is Jess Smith and Sons Cotton LLC versus D.S. Industries, Civil Original No.628 of 2014, in which the Lahore High Court has passed an Order dated 12 December 2017 which held that the interpretation of Articles IV and V of the NY Convention (to make any factual inquiry in terms thereof) "*usually involve investigation into the disputed questions but it is not in every case*

that the Court would be under obligation to frame issues, record evidence of the parties and follow the procedure prescribed for decision of the suit. In my view, the matter has been left to the satisfaction of the Court which has to regulate its proceedings and keeping in view the nature of the allegations in the pleadings, may adopt such mode for its disposal, as in consonance with justice, the circumstances of the case may require. It is thus within the competence of this Court to frame formal issues and record evidence if the facts of a particular case so demand. So far as the case on hands is concerned, inter alia, the questions whether the e-mails/ letters available on record constitute contract containing arbitration; whether Pakistan AXA International was duly authorized to act as an agent of the plaintiff; and, whether the arbitration proceedings were conducted in accordance with the rules of the International Cotton Association Limited, in my view, are the questions which cannot be decided without framing issues and allowing the parties to adduce evidence in support of their respective claims…In view of above, office is directed to fix this case on 12 .01.2018 for framing of issues." (emphasis added). In other words, the Lahore High Court is likely to adjudicate the matter as a court of appeal[1)] – a concept that has been domestically and internationally denounced by the superior courts. It is unfortunate to see that the Court appears to have travelled beyond its jurisdiction in adopting the code of civil procedure and decided to frame issues and conduct evidence. In my view, the Court should have simply evaluated the foreign award in terms of the grounds mentioned in Article V of the NY Convention and accepted or rejected the award without venturing into further inquiry. This case is likely to settle an unwanted precedent which must be criticised for defeating the purpose of the 2011 Act and the NY Convention.

In the author's opinion, the answer to Pakistan's problem in recognising and enforcing foreign awards lies in an article authored in the year 2004 by the present Chief Justice of Pakistan namely Justice Mian Saqib Nisar titled International Arbitration in the context of Globalization: A Pakistani Perspective which stated that "T*he enforcement of foreign awards has also been much simplified and the legal framework strengthened in favour of the award…The Convention, and hence the Ordinance, can be said to have a "pro- enforcement" bias and a strong case can be made out that the grounds under Article V are to be applied restrictively and construed narrowly*" (emphasis added). This simple, yet important, guideline has the capacity to remove major inconsistencies in interpreting the 2011 Act and improve the quality of precedents of the Pakistan Courts at par with its international counterparts.

References

?1 Deriving appellate powers from Section 107 of the Civil Procedure Code, 1908 including framing additional issues and conducting evidence.

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