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Pakistan's Draft Arbitration Bill 2024: Change After 84 Years?

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In April 2023, the Chief Justice of Pakistan directed the formation of an Arbitration Law Review Committee ("ALRC") to carry out a review of arbitration laws in Pakistan and propose reforms. The ALRC, which was formed under the aegis of the Law and Justice Commission of Pakistan, was also directed to prepare legislation that would bring Pakistan's domestic arbitration regime in line with international standards, and specifically, the UNCITRAL Model Law ("Model Law"). The ALRC is headed by Mr. Justice Syed Mansoor Ali Shah, currently the senior puisne judge of the Supreme Court of Pakistan.

The Draft Arbitration Bill ("Bill") and its revised versions were published last year as well as earlier this year for public consultation, including direct feedback from international and local stakeholders. Members of the ALRC also reached out directly to domestic and international experts to get their feedback. As a consequence of these efforts, the ALRC finalised its draft of the Bill and on 2 May 2024, presented the Bill to the Federal Minister for Law and Justice and recommended for the Government to consider the Bill for its enactment through Parliament. This post discusses the essential features of this Bill.

Inspiration

The Bill is inspired by the Model Law and seeks to replace the Arbitration Act, 1940 ("1940 Act"). The 1940 Act is a relic of colonial times which leaves open the door to judicial intervention at many levels such that local litigants do not see arbitration as having any major advantages compared to litigation in domestic courts.

Pakistani courts have recently given a series of pro-enforcement judgments. However, these judgments arose in the context of enforcement of foreign arbitral awards under a 2011 statute implementing the New York Convention ("2011 Act"). The aim behind the Bill is to reform domestically seated arbitration and to bring a similar "pro-enforcement" ethos to local arbitration.

The Bill is based on the Model Law and is also inspired heavily by the Indian Arbitration and Conciliation Act, 1996 ("Indian Act") given the shared legal history between India and Pakistan. Other than the Indian Act, the Bill borrows from the laws of other common law jurisdictions such as the United Kingdom, Singapore and Malaysia.

The Scope of the Arbitration Bill

Under Pakistan's Constitution, the federal legislature has competence to legislate on international arbitration and the provincial legislatures have competence to legislate on domestic arbitration. To avoid future conflicts between federal and provincial laws on arbitration and achieve greater consistency, the ALRC has drafted the Bill as covering both international and domestic arbitration across all of Pakistan. This will, in turn, require the provincial legislatures to pass resolutions delegating their legislative and executive powers regarding domestic arbitration to the federation as provided by Articles 144 and 147 of Pakistan's Constitution.

While the Bill primarily applies to arbitrations seated within Pakistan, it also contains provisions supporting foreign arbitrations, including provisions relating to court ordered interim measures (section 10) and court assistance in taking evidence (section 29). The Bill does not affect the 2011 Act which will continue to apply to foreign awards and arbitration agreements.

Distinguishing between International and Domestic Arbitration

The Bill distinguishes between international commercial arbitration and non-international commercial arbitration (i.e. domestic arbitration). This approach recognises differences in the level of sophistication and bargaining power of commercial parties in Pakistan. The Bill allows a greater degree of party autonomy and less opportunities for court intervention in relation to international commercial arbitrations, while retaining a certain degree of supervision and scrutiny by the courts in purely domestic arbitrations.

The Bill defines international commercial arbitration differently than the Model Law. This is done with a view to create bright-line rules and minimise debates about when a particular arbitration will be considered an international one. Where one of the parties to the arbitration agreement is permanently resident or incorporated outside Pakistan; or whose central management and control is outside Pakistan; or is a foreign government, the arbitration will be treated as an international commercial arbitration.

The Bill also allows parties to "opt in" to the international commercial arbitration regime by way of agreement. This agreement is also implied where the parties have: (i) chosen to apply the rules of arbitration of a foreign arbitral institution (e.g. SIAC, LCIA or ICC) to the arbitration; or (ii) agreed to apply foreign law as the governing law of the contract. The Bill recognises that in these situations, the parties are likely to have intended for their arbitration to have an international character with international standards applying. In this way, the Bill permits Pakistani parties to opt in to international commercial arbitration by express or implied agreement.

Pro-Arbitration Policy

The Bill promotes the resolution of disputes through arbitration by lessening opportunities for parties to challenge the arbitral process.

Where one of the parties has already instituted legal proceedings in court, the Bill requires courts to stay the proceedings where it finds *prima facie* that an arbitration agreement exists (section 9).

The courts are not expected to carry out a full review of the validity of an arbitration agreement and are encouraged to defer the question to the arbitrator or at a later stage at the time of annulment of the ensuing award by the court. This is complemented by express recognition of the competence-competence principle. The Bill provides for the arbitral tribunal's competence to rule on its own jurisdiction even where the existence or validity of the arbitration agreement is in question (section 18).

In respect of arbitrability, the Bill seeks to move away from prevalent jurisprudence in Pakistan. Pursuant to case law under the 1940 Act, a matter is not capable of determination by arbitration where statute law confers jurisdiction in respect of that matter on a special court or other judicial authority. The Bill makes clear that such conferment of special jurisdiction does not, in and of itself, render the matter non-arbitrable. The test proposed is that arbitrating a matter should be against public policy for it to be non-arbitrable. Accordingly, this should encourage and permit arbitration of *in personam* matters pertaining to financial disputes between banks and customers, certain company disputes, intellectual property matters and other disputes which are currently resolved by courts or tribunals specially conferred with statutory jurisdiction.

Appointments and Challenges of Arbitrators

The Bill brings in important changes relating to the appointment of arbitrators. Unlike the 1940 Act, the Bill does not permit an even number of arbitrators. Instead, unless the parties agree to a three-member tribunal (or larger), the default is to have a sole arbitrator (section 12).

Under the Bill, arbitrator appointments by the courts may also be made by persons or institutions designated by the each of the High Courts in Pakistan (section 13). Importantly, decisions regarding appointments are not regarded as an exercise of judicial power and are not appealable under the Bill. Further, the Model Regulations appended to the Bill (Schedule 2) create an Arbitration Council for each High Court (i.e., for each Province and the Federal Territory) which will be in charge of appointment of arbitrators and make procedural rules for the conduct of arbitrations where the parties have not chosen any.

The Bill requires disclosure from arbitrators in respect of their impartiality and independence and, in this regard, the Bill provides guidelines on conflict of interests based on the IBA Guidelines on Conflict of Interest (Schedule 1). Unlike the Model Law, the Bill does not allow interlocutory appeals against unsuccessful challenges of arbitrators but permits such challenges to be made as part of a challenge to the final award (section 15).

Interim Measures to Preserve Parties' Rights

The Bill provides for interim measures ordered by the court (section 10) and the arbitral tribunal (section 19). Court-ordered interim measures cannot be obtained where the arbitral tribunal has already been constituted unless the tribunal cannot provide adequate relief. The Bill also requires parties that have obtained court ordered interim measures before commencement of the arbitration to commence arbitral proceedings within 90 days of the order of the court and allows the arbitral tribunal to pass orders superseding the court's order. This is provided to avoid parties taking undue advantage of court-ordered interim measures.

In respect of interim measures ordered by the arbitral tribunal, the Bill provides for *ex parte* requests to the arbitral tribunal where the risk of prior disclosure to the responding party will frustrate the measure being sought (section 19). Tribunal orders of interim measures are also made enforceable through the process of the court.

Annulment and Enforcement of Arbitral Awards

The provisions in the Bill relating to the setting aside of awards replicate the Model Law, except that it seeks to expressly limit the meaning of public policy to prevent frivolous challenges to arbitral awards (section 39). This effort is similar to the approach in the Indian Act but with some modifications further restricting the scope of the public policy challenge. The Bill limits public policy challenges to instances of fraud and corruption in the making of the award; material breaches of natural justice; and conflicts with fundamental norms of morality and justice. The Bill also expressly provides that any determination of a public policy challenge should not entail a review on the merits of the dispute.

The Bill also departs from the Model Law in certain respects. The Bill permits the court to set aside awards arising from purely domestic arbitration, where the court finds that the award is "vitiated by patent illegality appearing on the face of the award". The Bill is based on the premise that additional court scrutiny is advisable in matters of dispute between purely domestic parties in Pakistan. However, the Bill makes clear that the ground of patent illegality should not entail allegations of an erroneous application of the law by a tribunal or require reappreciation of evidence by the court.

The Bill does not make any distinction between domestic and international arbitral awards for the purpose of enforcement of the award. The Bill does away with the requirement under the 1940 Act to have an award made "rule of the court" i.e. judgment being entered in terms of the award. Instead, the Bill makes an award automatically enforceable unless it is either set aside or its enforcement is temporarily suspended during setting aside proceedings. The Bill further specifies that in the absence of exceptional circumstances, a party challenging an award will be required to deposit the liability amount.

Conclusion

The Bill has now been handed over to the Federal Law Minister who has stated that the government would place the draft legislation in Parliament for enactment. While any bill is subject to multiple readings in both houses of Parliament and scrutiny by committees, stakeholders have commended the Bill and considered it unlikely for law makers to recommend many changes. One is hopeful that the Bill will be enacted later this year. If enacted, the Bill will be a radical overhaul of arbitration law in Pakistan. It will create a solid foundation to an arbitration friendly environment and assure local and international parties of the effectiveness of arbitration in Pakistan.

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