Kluwer Arbitration Blog

Arbitration Revolution: Decoding Pakistan's Draft Bill on Arbitration Act 2024

Muhammad Faisal Hayat · Wednesday, June 5th, 2024

For decades, Pakistan's arbitration framework has faced criticism for its inconsistency and inefficiency, contributing to the country's staggering backlog of over 2.26 million cases in the courts. This backlog includes cases affected by an ineffective arbitration regime that encourages arbitral matters to be taken to courts as a result of their extensive interventionist powers pursuant to the Arbitration Act 1940 of Pakistan ("Existing Act"). In response to calls for legal reform in Pakistan, the Arbitration Law Review Committee, acting under the auspices of the Law & Justice Commission of Pakistan, has finalized the Draft Bill for the Arbitration Act 2024 ("Draft Law"), following nearly a six-month period of consultation with stakeholders, experts and practitioners. When passed, the Draft Law would repeal and replace the outdated Existing Act.

The Draft Law is based on the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006 ("UNCITRAL Model Law"). Whilst the UNCITRAL Model Law addresses both domestic and international arbitrations, the Draft Law encompasses arbitrations seated in Pakistan, irrespective of the parties' nationalities or the arbitration institutions administering the proceedings. This is because arbitrations seated outside of Pakistan are already covered by the Arbitration Agreements and Foreign Arbitral Awards Act 2011 ("Act 2011"), which implements the New York Convention 1958 ("NYC"). A prior KAB post provided in-depth analysis of the essential features of the Draft Law. This post presents a comparative analysis between the Existing Act and the Draft Law to demonstrate the ways that the latest innovations would support modernization of Pakistan's arbitration regime.

A Comparative Analysis

Arbitral Authority and Efficiency

The Existing Act limits an arbitral tribunal's authority to grant interim measures which are primarily available only through court intervention (Sec. 16). In a significant departure, the Draft Law aims to provide arbitral tribunals and parties with greater control, which is consistent with the UNCITRAL Model Law. The Draft Law reflects a shift towards greater party autonomy and limited judicial intervention. It expressly incorporates the principle of *kompetenz-kompetenz*, allowing arbitral tribunals to rule on their own jurisdiction (Sec. 18). In addition to courts' power to grant interim measures (Sec. 10) and assistance in taking evidence (Sec. 29), the Draft Law

expressly enables arbitral tribunals to grant interim measures (Sec. 19). However, special care should be taken in deciding which forum to approach for such measures. The appropriate forum under the Draft Law is the arbitral tribunal, but if it is unable to provide the needed relief, parties may then approach the court for the same (Sec. 10). This scheme places the arbitral tribunal at the forefront in granting interim orders, with the court serving as a backstop when the arbitral tribunal cannot provide the necessary relief. As the arbitral tribunal is a private body lacking enforcement power, the Draft Law ensures the enforceability of its interim orders through the court process. These changes are indeed positive because they increase the independence and cost-efficiency of the arbitration process.

Respecting Party Autonomy

The Existing Act limits party autonomy, particularly in the selection of arbitrators and procedural rules (Sec. 6). The Draft Law recognizes a greater degree of party autonomy granting parties more control over the arbitration process to best suit their needs. Parties can freely choose the seat of arbitration, appointment of arbitrators, and freedom in the selection of specific rules governing the proceedings (Sec. 12 and 13). This change allows the parties to tailor the process for maximum fairness and efficiency according to their own needs.

Limited Judicial Intervention

The Existing Act allows various forms of judicial intervention during and after arbitral proceedings. This includes frequent interventions on interim measures and broader grounds for setting aside the arbitral awards (Sec. 9 and 10). This weakens the finality of arbitration and discourages its adoption.

The Draft Law strictly prohibits the court from interfering in the arbitral process unless it is specifically provided for by this proposed legislation (Sec. 6). Courts are generally required to stay judicial proceedings and refer all matters to arbitration unless they find the arbitration agreement prima facie null and void, or incapable of being performed (Sec. 9). Moreover, to prevent disruptions during arbitral proceedings the opportunities to appeal are also restricted. This promotes the finality of arbitral awards as courts have limited intervention. This deviation from the Existing Act will allow the smooth arbitration process without the intervention of courts.

Strengthens Arbitrator Qualifications and Disclosures

The Existing Act does not prescribe any qualifications and disclosure requirements for arbitrators. This increases the risk of award annulment at the enforcement stage. Moreover, it permits an even number of arbitrators, which may result in a scenario in which each party would appoint partisan representative who would ultimately require an umpire to break stalemates in decision-making.

The Draft Law presents significant changes to the regulation of arbitrators and the composition of arbitral tribunals.

First, it establishes qualifications and conflict disclosure requirements for arbitrators (Sec. 14). It also provides a proper procedure for challenging the appointments to ensure the formation of an unbiased tribunal (Sec. 15). The impartiality of arbitrators is essential, and failure to adhere to these requirements could result in the award being set aside. The Draft Law draws inspiration from the IBA Guidelines on Conflicts of Interest. This ensures that arbitrators must disclose any potential conflicts before the commencement of arbitration proceedings to avoid the risk of award annulment.

Second, the Draft Law requires parties to compose an arbitral tribunal with an odd number of arbitrators. In cases where the parties did not specify the number of arbitrators in the arbitration agreement, a sole arbitrator will be appointed unless parties express a different intention (Sec. 12). Furthermore, except for cases with explicit clauses for party-appointed arbitrators, appointments will be made by the relevant high court or its designated institution (Sec. 13).

Therefore, the proposed changes in the Draft law aim for fair and efficient arbitration proceedings. However, challenges might emerge as involving the high court in appointments could make the process more complex and potentially cause delays.

Pro-enforcement Approach

Significantly, the incorporation of NYC into Pakistan's domestic legal system has strengthened the legal framework surrounding the enforcement and recognition of arbitral awards. As could be seen in the recent Supreme Court Taisei Judgment on 28 February 2024, which upheld the pro-enforcement approach under Act 2011.

Similarly, the Draft Law adopts a pro-enforcement approach by providing limited grounds for setting aside or nullifying an arbitral award. In many enforcement proceedings, the award debtor frequently invokes public policy as a basis for challenging the award. This practice stems from the broad interpretation of public policy. However, the Draft Law aims to restrict the scope of public policy to prevent parties from abusing this ground and to oppose the enforcement of arbitral awards (Sec. 39).

Unlike the Existing Act, where civil courts decide on the application to set aside an arbitration agreement or arbitral award (Sec. 31), the Draft Law assigns challenges to domestic awards to the District Court and those for international arbitration to the relevant High Court. This change could help in better resource allocation within the judicial system, as high courts are generally considered to have more expertise in international law and complex legal matters.

Conclusion and the Way Forward

Pakistan's Draft Law marks a significant step in developing an effective, modern, and user-friendly system for the resolution of disputes through arbitration. By aligning with the UNCITRAL Model Law, the proposed legislation expanded powers of arbitral tribunals, greater degree of party autonomy, qualified arbitrators, limited judicial intervention, and simplified enforcement process are all positive steps in this direction. This shift can streamline arbitration, create a more attractive environment for both domestic and international businesses, and ease court burdens.

This development aligns with the growing momentum of ADR in the legal landscape of Pakistan. Recent advancements include the courts' pro-enforcement approach towards arbitration and the establishment of court-annexed mediation centers. Additionally, Pakistan's intention to become a signatory of the UN Convention on International Settlement Agreements resulting from Mediation (Singapore Mediation Convention) further strengthens the favorable environment for dispute resolution in Pakistan.

As a next step, the Arbitration Law Review Committee has handed over the Draft Law to the Ministry of Law. It is expected to be presented before Majlis-e-Shoora (Parliament) soon. After its passing by the Parliament, the Draft Law will be presented to the President of Pakistan for his assent. Following such assent, the Draft Law will be notified in the official gazette as an Act of Parliament.

However, the successful implementation of the Draft Law will require concerted efforts. The government would need to take certain necessary steps, such as strengthening the ADR infrastructure, providing comprehensive training for professionals, and raising awareness among stakeholders. The judiciary would in turn need to play a crucial role in ensuring that courts are not misused to undermine the arbitral process.

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