

# Kluwer Arbitration Blog

## At the Dawn of a New Arbitration Era, the Old Law Shines Bright: A Landmark Judgment by the Lahore High Court in *Waqas Yaqub v. Adeel Yaqub Case*

Rana Rizwan Hussain (Hussain and Associates) · Thursday, July 25th, 2024

While Pakistan is heading towards promulgating a [new arbitration law](#), developments continue to take place under [the extant Arbitration Act, 1940](#) (“the Act”). Section 34 is one of the most availed provisions of the Act, which provides for the stay of court proceedings where an arbitration agreement exists between the parties. This provision can be invoked subject to two conditions: the applicant should have not filed a written statement; and the applicant should have not taken any steps in the proceedings of the case. The expression “before filing a written statement” is clear and uncontroversial. However, what amounts to “taking any other steps in the proceedings” has been interpreted differently by the Superior Courts. A combined study of all those judgments makes it somewhat difficult for the subordinate authorities to clearly distinguish between the circumstances in which the proceedings should be stayed and where the court should accept jurisdiction.

In the *Waqas Yaqub case*, Mr. Justice Jawad Hassan of the Lahore High Court has explained the concept of taking a “step in the proceedings” in a manner which draws a clear distinction between both the situations, i.e., where the trial court should refer the matter to arbitration and where it should assume jurisdiction. The judgment starts with the following extract from Lord Denning’s judgment in the *Eagle Star case* [1978] 1 Lloyd’s Rep 357:

“In order to deprive a defendant of his recourse to arbitration a **“step in the proceedings”** must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.”

### **Brief Facts of the Case**

Succinctly, the parties had entered into a partnership deed with an arbitration clause. After the dispute arose, one of the parties filed a suit before the Civil Court at Rawalpindi. The defendant appeared before the Court and submitted his memo of appearance. Thereafter, a date was calendared for filing of power of attorney as well as the written statement by the defendant. On that next date, the counsel for the defendant submitted his power of attorney and the case was calendared for the next date, for filing of the written statement. An important aspect of both the foregoing proceedings was that they were conducted by the Court Reader in exercise of his

delegated authority. Subsequently, the case was adjourned (this time by the judge), with a specific warning to the defendant to file the written statement by the following hearing date which had also been calendared. Meanwhile, the defendant filed an application under Section 34 of the Act, seeking to stay the court proceedings in favour of arbitration. The said application was dismissed by the judge on the ground that the applicant had already taken steps in the proceedings, by availing adjournments on account of filing a written statement, and he therefore could not invoke the arbitration clause at a belated stage. An appeal against the dismissal order was brought before the High Court.

### **Findings of the High Court**

The challenge faced by the High Court was to decide the fate of the application under Section 34 of the Act by distinguishing between the case law that leant on both sides. The High Court first perused the order sheet of the Civil Court and found that the defendant had never filed a written statement, but his application under Section 34 had been delayed by three consecutive adjournments. The primary question therefore was whether the defendant's failure to raise a Section 34 objection in the circumstances deprived him of his right to have the dispute arbitrated.

In light of the case law that had been presented by the parties, the High Court first considered the language of Section 34 and found that the same envisaged "the unequivocal intention of the defendant to proceed with the suit" and to abdicate his right to arbitration. The High Court held that the "unequivocal intention" of the party relying on Section 34 should be examined in the specific circumstances of each case, without prescribing a mechanical test to be applied across the board. The High Court also followed the position of the Supreme Court in *PIA v Pak Saaf* PLD [1981] SC 553, which was followed in *Pakistan Stone v. M. Yousaf* [2018] CLC 877 by the Islamabad High Court.

Notably, the High Court set out the test for "stepping into proceedings" in the following manner:

- “(i) Whether the party sought an adjournment for filing written statement;
- (ii) whether the moved application, the contents whereof as well as all the surrounding circumstances that led the party to make the application, display an unequivocal intention to proceed with the suit, and to give up the right to have the matter disposed of by arbitration;
- (iii) An application of such nature, therefore, should prima facie be construed as a step in the proceedings within the meaning of section 34.”

The High Court further added that the intention of a party to proceed with the suit should be examined in the light of contents of the adjournment application brought before the Civil Court along with the surrounding circumstances of the case.

### **Pro-Arbitration Approach**

The judgment demonstrates the High Court's pro-arbitration approach, which is a product of a broader pro-Alternative Dispute Resolution policy prevalent in the Pakistani legal system. In this

regard, paragraph 14 of the judgment underscores the High Court's views as follows:

“The course and mode of arbitration is globally recognized of the purpose of fair and efficient settlement of dispute arising in domestic and international commercial relations. The Courts are always required to support the arbitration proceedings and process to meet with object of the “Act” destined at for cost free, efficacious, effective and amicable resolution of disputes amongst parties.”

The pro-arbitration tilt of the Act is also evident from the text of the Act. The Chapter II ‘*Arbitration without Intervention of a Court*’ in its scheme obligates the competent court to provide every help to the parties to arbitrate their disputes. The Chapter III of the Act is titled as ‘*Arbitration with Intervention of a Court where there is no Suit pending*’ but the provisions contained in that Chapter reveal that the legislature through these stipulations has cast a strict duty on the competent court to drive the parties towards arbitration as initially agreed upon between them. Likewise, the Chapter IV of the Act ‘*Arbitration in Suits*’ obliges the court to assist the parties in arbitrating their dispute where they agree upon doing so in the course of a pending suit. The remaining Chapters also bear a pro-arbitration scheme with minimum court interference. Mr. Justice Mansoor Ali Shah while commenting upon the character of the Act has observed in *NHA v. Sambu Construction*, [2023] SCMR 1103 as under:

“the jurisdiction of the Court under the Act is supervisory in nature [...] Interference is only permissible if there exists any breach of duty or irregularity of action which is not consistent with general principles of equity and good conscience.”

Contrarily, there have been several judgments in the past at every level which allowed excessive court intervention in the arbitral process. (See, *Aslo Marines v. MT Magda*, PLD [1985] Kar 745; *Eckhardt v. M. Hanif*, PLD [1986] Kar 138; *M. Ilyas v. Ihsan Ilahi*, [2000] CLC 206) The need to have a new arbitration legislation has largely been due to an intervening approach of the courts in the past. However, the recent developments establish that the Act itself is not permissive towards court intervention, rather these are the court judgments which have been lenient about it.

### **Concluding Remarks**

The Act has widely been criticized for two major reasons: first, that it is outdated and does not embrace the principles of modern arbitration; and second, it allows a great deal of court intervention. According to the author's view, the first criticism is justified and must be overcome through a new legislation. The second criticism, however, is a myth which is debunked by various judgments of the Superior Courts, such as in the *Waqas Yaqub case*, which have implemented the real intentions behind the statutory provisions. In circumstances like those of *Waqas Yaqub case*, several other legal-minds would have leant in favour of court proceedings merely for the fact that the defendant's application under Section 34 was delayed by three consecutive adjournments. Such a decision would have been against the very spirit of the Act which encourages arbitration and gives only a supervisory jurisdiction to the court.

According to [Salmond](#), “the essence of law lies in its spirit not in the letter.” The spirit of the Act is evident from the statutory text and the same is to drive the parties towards arbitration as per their agreement. A harmony with the spirit of the law is important to be maintained by the courts. This is desirable not only for the existing law but also for the expected arbitration legislation. This

intervening approach which exists in the nook and corners of Pakistani judiciary gives a heads up to the Superior Courts to safeguard the new legislation from undesirable interpretations after its promulgation. Otherwise, the new law might well face the same destiny as the Act.

---

*To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).*

---

## 2024 Summits on Commercial Dispute Resolution in China

17 June – Madrid  
20 June – Geneva

Register Now →



This entry was posted on Thursday, July 25th, 2024 at 8:48 am and is filed under [Pakistan](#), [Stay of Proceedings](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.