Kluwer Arbitration Blog

“Appropriate Legality” and Arbitration Reform in Pakistan

Feisal Naqvi (Bhandari Naqvi Riaz) · Wednesday, August 28th, 2024

“Small is Beautiful”, a collection of essays by the economist E. F. Schumacher, was published first in 1973, more than 50 years ago. Schumacher’s basic thesis was that the latest, shiniest or most complex technology was not necessarily the best option for developing countries. Instead, he argued in favor of a practical, more “people-centric” approach, later dubbed “appropriate technology”.

Like technological developments, laws must also be evaluated in a context-sensitive manner. Just like the latest technology may not be appropriate for developing countries, so too the latest legal innovation. There are no “best practices” when it comes to legal reforms, only “appropriate practices”. Hence the term “appropriate legality”.

“Appropriate legality” in practice

To illustrate how an “appropriate legality” approach can operate in actual practice, this post analyses Pakistan’s draft Arbitration Act, 2024 (“Draft Act”). The Draft Act was prepared by the Law and Justice Commission of Pakistan and is currently pending parliamentary approval in Pakistan.

The Draft Act is based on the UNCITRAL Model Law (“Model Law”) and draws on regional implementations of the Model Law. While the salient features of the Draft Act have been discussed in another post, this post focuses on the material differences between the Draft Act and the Model Law and, more pertinently, the basis for those differences.

Scope of the Draft Act

One foundational divergence between the Draft Act and the Model Law lies in the scope of the Draft Act. The Model Law applies to both foreign-seated arbitrations as well as to domestically-seated international arbitrations. By comparison, the Draft Act does not apply to foreign-seated arbitrations (with certain exceptions, including in relation to interim measures and court assistance in taking evidence).

The reason for this divergence is that Pakistan already has a law implementing the New York

Convention that deals exclusively with foreign-seated arbitrations: the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("2011 Act"). While the 2011 Act is far from perfect, recent judgments by Pakistan's superior judiciary have now interpreted it in a "pro-enforcement" manner. Any change to the 2011 Act would inevitably cause those judgments to be reconsidered. Given that it took the better part of two decades for "pro-arbitration" jurisprudence to emerge, it makes sense for flaws in the 2011 Act to be addressed through separate amendments, rather than trying to come up with an omnibus arbitration regime.

"Bright line" rules

This same emphasis on practicality can be seen in the Draft Act's definition of "international commercial arbitration". The Model Law definition includes both bright line rules (such as nationality) and more discretionary standards (such as the place where a substantial part of the obligations of the commercial relationship is to be performed). These discretionary standards have been omitted from the Draft Act.

This "bright line" approach was driven by the fact that Pakistan's courts are already overwhelmed with litigation. The delays endemic to the system are such that final relief is often irrelevant by the time it arrives. Hence, any provision which permits a discretionary debate at an interim stage (no matter the amount of available precedent) is likely to be abused by parties wishing to avoid arbitration.

The potential rigors of this bright line approach are also ameliorated by a provision which allows parties to stipulate that their arbitration proceedings will be treated as an international commercial arbitration (subject to a pecuniary minimum). This pecuniary minimum is not only to ensure that the High Courts do not get swamped with disputes but so that less sophisticated users do not get forced into international arbitration through contracts of adhesion.

Interlocutory challenges and judicial intervention

This same desire to minimize interactions with the judiciary also explains why the Draft Act does not permit appeals if an arbitrator rejects a challenge to their appointment. Instead, all such decisions can only be appealed as part of a challenge to the final award. If the Draft Act permitted appeals in the manner contemplated by the Model Law, any party could easily delay arbitrations by appealing challenges to the curial court.

A different innovation in the Draft Act is to introduce the concept of the "seat of the arbitration" in the context of domestic arbitration. This avoids the confusion between "seat" and "venue" created by the phrase "place of arbitration" used in the Model Law and also allows parties to determine the curial court in advance. This provision not only protects party autonomy, but also addresses the current problem whereby curial jurisdiction is exercised by the court which first handles any matter regarding the dispute, even if the arbitration proceedings themselves are to take place in a different city. This geographic dislocation causes is not only practically problematic but is occasionally abused by litigants who deliberately initiate proceedings before less sophisticated judges in rural areas so as to avoid more sophisticated judges in the major cities.

Specific relief and real property disputes

One notable aspect of the Draft Act is that it expressly grants arbitral tribunals the power to grant specific performance, including in relation to real property. By comparison, neither the Model Law nor India's implementation of it contain any express provision as to what remedies may be granted by a tribunal. The English Arbitration Act, 1996 does contain an express provision regarding the remedies available to the tribunal (see S. 48) but it also excludes contracts relating to land.

The arbitrability of contracts pertaining to land is of great significance in Pakistan because, as per informal estimates, at least 60% of civil litigation of Pakistan involves disputes pertaining to real property. To the extent that such disputes (or any significant portion of them) can be speedily resolved, arbitration can be a true game-changer for Pakistan.

Different standards of review

The Draft Act also differs from the Model Law in allowing courts to set aside purely domestic awards (but not international commercial awards) for errors apparent on the face of the record. This additional ground reflects the realities of Pakistan's legal landscape.

To elaborate, arguing that judicial interference with arbitral awards is unwarranted is like arguing that legislative interference with contracts is unwarranted. In each case, the underlying presumption is that the document in question has emerged from the agreement of two fully empowered independent and equal parties (and that therefore parties should suffer the consequences of their actions). But just like inequality of bargaining power informs the legal analysis of contracts, hence so too must it inform the legal review of awards. Within the context of international commercial arbitration, it is reasonable for a Pakistani court to presume that the parties operated on an equal footing. Within the context of domestic arbitration, that assumption is more problematic.

At a practical level, the argument is simpler. Pakistani courts have a history of interventionism. Any attempt to shift overnight from the current situation to international best practices would likely backfire. Hence, the Draft Act adopts a pragmatic position in relation to domestic awards while also trying to ringfence international awards from judicial intervention. Once the concept of non-interference becomes established as the norm in relation to international awards, it can be extended to domestic awards. But to insist on complete non-interference in relation to domestic awards is neither desirable nor doable at this stage.

Arbitral institutions and Pakistani courts

The role of the courts in Pakistan was also taken into account in relation to arbitral institutions. More specifically, the issue was how such institutions were to be established in Pakistan. The dominant arbitral institutions in the world – such as International Chamber of Commerce, London Court of International Arbitration ("LCIA"), Hong Kong International Arbitration Centre – have purely private origins. However, those institutions developed over many years, even decades. And

Pakistan does not have the luxury of waiting for the local equivalent of, say, the LCIA to emerge. On the other hand, while many countries (see, *e.g.*, Singapore) have helped set up flagship arbitral institutions, local stakeholders had deep misgivings about the capacity of the Pakistani state to establish and maintain an arbitral institution.

The solution adopted in the Draft Act is to provide a minimal version of a court-annexed arbitral centre similar to the Delhi International Arbitration Center, whose governance is controlled by the senior-most judges of the Delhi High Court. Thus, the regulations appended to the Draft Act provide that every High Court shall create an arbitration council which shall be responsible for the empanelment and nomination of arbitrators. If so desired, the relevant High Court can expand the role of the relevant arbitration council into a fully-fledged arbitral institution. But if the High Court is not so inclined, or does not see the need, then the role of the relevant arbitration council will remain restricted to empanelment and nomination.

One final aspect worth considering of the Draft Act is in relation to confidentiality. It is easy enough to mandate confidentiality for the arbitration process. However, the difficulty lies in trying to ensure that those proceedings remain confidential if challenged in court. Pakistani law treats all documents filed in court as public documents and while there are existing processes for keeping individual documents confidential during court proceedings, extending that process to arbitration awards and records generally is currently impracticable. Hence, the compromise solution adopted in the Draft Act is to impose an obligation on all parties to keep the arbitration proceedings confidential (using language taken from the LCIA Rules) but to provide an exception for the enforcement of legal rights or to enforce or challenge an award.

Deng Xiao Ping once described his approach towards reform as “crossing the river by feeling the stones”. That same humility must inform a legislature’s approach to arbitration reform. There are no “best practices” applicable to all countries and all societies. As the Realists taught us, law is a means to social ends. If a law achieves those ends, it is a good law. What matters is the end result, not the doctrinal purity of the approach adopted.

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