Kluwer Arbitration Blog

Interim Relief under Pakistan's Proposed Arbitration Act: Promoting Judicial Non-Intervention?

Ammad Manzur (Advocate of the High Courts, Pakistan) and Rashid Ahmad (APM Terminals Maasvlakte II, Netherlands) · Saturday, December 7th, 2024

In an attempt to modernize Pakistan's legal regime on arbitration, the Law and Justice Commission of Pakistan assembled the Arbitration Law Review Committee (the **"ALRC"**), and tasked it to prepare a new legislation on the subject. After protracted deliberations by members of the ALRC, the draft Arbitration Act, 2024 (the **"Draft Act"**) has come into being, which seeks to align Pakistan's legal regime on arbitration with international best practices. This is a welcome reform as domestic-seated arbitrations in Pakistan are currently governed by the Arbitration Act, 1940, which pre-dates the New York Convention (the **"NYC"**) and does not offer the protections provided therein for parties to a Pakistan-seated arbitration with a foreign nexus.

The arbitration regime developed under the Draft Act is based on, among others, the principle of judicial non-intervention. Pursuant to this principle, the designated arbitral tribunal (the **"Tribunal"**) is to have a primary role in the arbitral process, while national courts assume a limited supervisory role. The principle has been provided in the Draft Act's preamble and also Section 6 thereof, which mandates that no court or judicial authority may intervene in matters governed by the Draft Act; except to the limited extent provided therein. One such matter governed by the Draft Act is that of interim relief in arbitral proceedings. In fact, compared to most of its provisions, the Draft Act's regime on interim relief is a complete code on the subject for both Pakistan and foreign-seated arbitrations. This is because while Section 3(1) of the Draft Act generally limits its scope to Pakistan-seated arbitrations, Section 3(2) extends the scope of application of the Draft Act's provisions relating to interim relief to foreign-seated arbitrations as well.

However, an examination of the Draft Act's regime on interim relief reveals that it actually opens the door to judicial intervention, in a manner not contemplated under the NYC. This post shall highlight certain provisions of the Draft Act which envisage a role for courts that militates against its policy objective of promoting judicial non-intervention in the arbitral process. To remedy this problem, a much-needed course correction prior to the proposed law's enactment by Parliament will be suggested.

The Curious Case of an Appeal – A Misplaced Indian Inspiration

Despite being a signatory to the NYC since 1958, Pakistan has not adopted the UNCITRAL Model Law (the **"ML"**) – which had been developed with the intention of ensuring a harmonized implementation of the NYC. To remedy this, one of the core objectives of the Draft Act is to adopt the ML and align Pakistan's arbitration legal regime therewith – which has been acknowledged in five of the Draft Act's seven pre-ambulatory clauses.

That said, members of the ALRC were also influenced by the arbitration laws of other jurisdictions while drafting the proposed law. As for the Draft Act's interim relief regime, the most influential source of inspiration has been the Indian Arbitration and Conciliation Act, 1996 (the **"IAA"**). This is obvious on a mere comparison of the relevant provisions of the two legislations which empower courts and Tribunals to order interim measures. Sections 10 and 19 of the Draft Act, stipulating the powers of courts and Tribunals to order interim measures, respectively, are nearly identical to the comparative provisions of the IAA – namely, Sections 9 and 17. Nevertheless, the powers of courts and Tribunals to order interim measures under the Draft Act can still be regarded as being aligned with Article 17(2) of the ML.

By contrast, the Draft Act's substantive treatment of Tribunal-ordered interim measures (hereafter, **"Tribunal-ordered Measures"**) is completely at odds with the ML, since the latter's express provisions on the status of such measures appear to have been disregarded. Under Article 17(H)(1), the ML provides for the recognition and enforcement mechanism of all Tribunal-ordered Measures; except for such measures which may be refused on the limited grounds given under Article 17(I) thereof. The refusal grounds provided in Article 17(I) have the following key features:

- They mirror the refusal grounds for awards provided under Article V of the NYC; and
- They do not simply serve as an indicative list for jurisdictions seeking to adopt the ML – but are "intended to limit the circumstances" in which Tribunal-ordered Measures may be challenged.

On the other hand, the Draft Act provides an altogether different enforcement mechanism for Tribunal-ordered Measures to the ML. Under Section 19(3) of the Draft Act, such measures are subject to a full-fledged right of appeal contained in Section 42(2)(b) thereof, pursuant to which both the grant or refusal of an interim measure by a Tribunal may be contested before court. As with the provisions empowering Tribunals and courts to order interim measures, the ALRC once again borrowed this right to appeal from the IAA. Similar to Section 19(3) of the Draft Act, Section 17(2) of the IAA subjects Tribunal-ordered Measures to appeal under Section 37(2)(b) thereof, which is *pari materia* to Section 42(2)(b) of the Draft Act.

Given that Tribunal-ordered Measures are granted a similar status to final awards in terms of their recognition and enforcement under Articles 17(H) and (I) of the ML, leads one to wonder why the Draft Act, which seeks to implement the ML, subjects their enforcement to appeal. Especially, because approximately around the same time as the ALRC was preparing the Draft Act, its chairman, Mr. Justice Syed Mansoor Ali Shah, authored a pro-arbitration Supreme Court judgment on the subject in *Taisei Corporation v AM Construction*. In the said judgment, Justice Shah was at pains to point out that there is no right akin to an appeal against awards issued under the NYC. Ironically, however, under Section 42(2)(b) of the Draft Act, there is no restriction on a court to evaluate the merits of an interim award, giving it the same status of "a first appellate court" that Justice Shah was vehemently opposed to in *Taisei*.

Thus, as a result of the Draft Act's unique right to appeal Tribunal-ordered Measures, all

references to the principle of judicial non-intervention therein are likely to be reduced to mere exhortations.

Righting the Wrongs – Ensuring Judicial Non-Intervention

To ensure that the principle of judicial non-intervention is followed, it is crucial that the enforcement mechanism for Tribunal-ordered Measures under the Draft Act is reconsidered carefully.

Guidance can be gleaned from another arbitration legislation which the ALRC considered while preparing the Draft Act, namely, the Singapore International Arbitration Act, 1994 (the **"SAA"**). Section 12(6) of the SAA accords Tribunal-ordered Measures issued by Singapore-seated tribunals the same status as court-ordered interim measures. Additionally, Section 27(1) of the SAA grants Tribunal-ordered Measures issued by foreign-seated tribunals the same status as arbitral awards, which may only be refused recognition and enforcement under Section 31 thereof, on grounds similar to the NYC. In *PT Pukuafu Indah v Newmont Indonesia Ltd*, it was held that the enforcement mechanism under the SAA is premised on the policy of minimal curial (or judicial) intervention, which is identical to the principle enshrined in Section 6 of the Draft Act.

Further, the Draft Act, in the spirit of judicial non-intervention, has sought to give courts a subsidiary role to Tribunals in the context of interim relief. This is plain on a reading of Sub-Sections (2) and (3) of Section 10, which impose time limits on the ability of a party to approach the court and a general ouster on the court's jurisdiction where the Tribunal is in place. However, whether such a general ouster of jurisdiction alone – which may be overcome on a simple exercise of discretion by none other than the court itself – helps achieve the objective of judicial non-intervention remains doubtful. This is more so where, owing to the Pakistani courts' "history of interventionism" in arbitration, members of the ALRC have justified the exclusion of certain provisions of the ML that otherwise allow for court intervention.

Therefore, to instill meaningful court-subsidiarity, which goes hand in glove with judicial non-intervention, it is best to amend Section 10 of the Draft Act in a manner which conditions court involvement to specific criteria; instead of unbridled discretion. This could include matters such as urgency and the Tribunal's inability to act, despite emergency and expedited procedures, in a manner similar to Section 12-A of the SAA.

Conclusion

In order to ensure that Pakistan's arbitration regime is overhauled a manner which is in line with the Draft Act's broad policy objectives, the Parliament must thoroughly debate its provisions – especially those which conflict with the ML. As detailed above, a reckless departure from the ML's regime on enforcement of Tribunal-ordered Measures undermines the underlying objective of the proposed law to promote judicial non-intervention.

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.

This entry was posted on Saturday, December 7th, 2024 at 8:29 am and is filed under Arbitration, Interim measures, Pakistan
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.