



Dispute Resolution Guide **2015**

Featuring contributions from

Al Busaidy Mansoor Jamal & Co
Arias Fábrega & Fábrega
ASAR - Al Ruwayeh & Partners
Big Ben Chambers
Covington & Burling
FJ & G de Saram
Freshfields Bruckhaus Deringer
Gün + Partners
Hermawan Juniarto
Hui Zhong
Khan & Associates
Prager Dreifuss
Shardul Amarchand Mangaldas
Tsvetkova Bebov Komarevski
Udo Udoma & Belo-Osagie
Yoon & Yang
Zamfirescu Racoti & Partners

I FLR
INTERNATIONAL FINANCIAL LAW REVIEW

Managing international dispute resolution

Mansoor Hassan Khan of **Khan & Associates** examines how Pakistani courts have dealt with international dispute resolution

Pakistani law differentiates between domestic arbitration and arbitration conducted outside Pakistan and their resulting awards. Each is governed and enforced under a separate law.

Domestic arbitration and domestic arbitral awards

The Arbitration Act 1940 (Arbitration Act) governs and regulates arbitration proceedings conducted in Pakistan and the enforcement of domestic arbitral awards.

The parties are free to adopt procedures of their choice for the conduct of arbitration proceedings. The court, however, plays a pivotal role in the conduct of a domestic arbitration from the appointment to the removal of an arbitrator. The court, on the application of the arbitrator, summons the parties and witnesses to appear before the arbitrator. If the parties or witnesses fail to appear before the arbitrator and produce evidence, the arbitrator may make an award on the basis of the evidence before him or her. The court may order the preservation, interim custody or sale of any goods or property that form part of the subject matter of the arbitration.

The grant of exclusive jurisdiction to the High Court reflects Pakistan's commitment to the regime established under the New York Convention

The award given by an arbitrator is final and cannot be appealed on a point of law. However, appeals are permissible where there has been a procedural irregularity. The court may, on request of either party, modify or correct an award on a matter that is not part of the referral to arbitration, or where the award is imperfect in form or contains an obvious error or mistake. After the expiration of the time allowed for either party to apply for the arbitral award to be set aside, the court will proceed to pronounce judgment and issue a decree on the basis of the award.

Where a party to an arbitration agreement governed by the Arbitration Act commences legal proceedings against another party to such arbitration agreement in respect of any matter agreed to be referred to arbitration, the Arbitration Act entitles such other party to apply to the judicial authority before which the proceedings are pending to stay the legal proceedings. This can be done at any time before the filing of a written statement or before taking any other steps in the legal proceedings. The judicial authority, however, has discretion and is not bound to order a stay of legal proceedings in every case.

The New York Convention

Pakistan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Pakistan signed

the New York Convention on December 30 1958 and ratified it much later on July 14 2005. Although the New York Convention was being implemented in Pakistan from 2005 through ad hoc presidential decrees (ordinances), on 15 July 2011 a permanent legislation was enacted by the parliament of Pakistan: the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (NYC Act). A high court has exclusive jurisdiction to deal with all matters related to the NYC Act. A high court is the second highest court of the country and the grant of exclusive jurisdiction to such court reflects Pakistan's commitment to the regime established under the New York Convention.

The NYC Act applies to arbitration agreements made at any time, and to foreign arbitral awards made on or after July 14 2005. It obliges a local court seized of a matter covered by an arbitration agreement to stay the judicial proceedings pending before it upon an application filed by one of the parties and to direct the parties to refer the matter to arbitration. This will not apply if the local court finds the arbitration agreement null and void, inoperative or incapable of being performed.

Section 6 of the NYC Act obliges a local high court, upon an application filed by a party in whose favour a foreign arbitral award is issued, to recognise and enforce the foreign arbitral award in the same manner as a judgment or an order of a court in Pakistan. A foreign arbitral award that is enforceable under the NYC Act is treated as binding for all purposes on persons between whom it was made. The court is entitled to refuse recognition and enforcement of a foreign arbitral award only on grounds stated in section 7 of the NYC Act, which are the same as those laid down in article 5 of the New York Convention. After a foreign arbitral award is recognised by the court, it may be executed in the manner laid down in the Code of Civil Procedure 1908 (Code).

The ICSID Convention

Pakistan is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (Washington Convention). Pakistan signed the Washington Convention on July 6 1965 and ratified it on September 15 1966. On April 28 2011, a permanent legislation to implement the Washington Convention in Pakistan: the Arbitration (International Investment Disputes) Act 2011 (AIID Act) was enacted by the parliament of Pakistan.

Section 3 of the AIID Act entitles a person seeking recognition or enforcement of an arbitral award issued by the International Centre for Settlement of Investment Disputes (ICSID) to have the arbitral award registered in a local high court subject to proof of any matters that may be prescribed and to other provisions of the AIID Act.

An arbitral award registered under section 3 of the AIID Act is treated, with regard to the pecuniary obligations it imposes, as a judgment of a local high court and is to be executed by the high court in the manner laid down for execution of its judgments. However, enforcement of an award against the government may be refused by the court on the same grounds on which a court judgment may not be enforceable against the government.

The AIID Act bars local courts from applying the provisions of the Arbitration Act to proceedings initiated under the Washington Convention. The AIID Act empowers the Federal Government to lay down the procedure for the registration of arbitral awards issued under the Washington Convention by making rules. The Federal Government is also empowered under the law to prescribe, by rules, the matters to be proved at the time of the filing an application for registration of such arbitral awards and the manner of proof of these matters. So far, no rules have been issued by the Federal Government in this regard.

Other foreign arbitral awards

Certain foreign arbitral awards issued under an arbitration agreement covered by the Protocol on Arbitration Clauses 1923 and to which the Convention on the Execution of Foreign Arbitral Awards 1927 applies may be enforced in Pakistan in accordance with the provisions of the Arbitration (Protocol and Convention) Act, 1937.

Enforcement of foreign judgments

In the context of the enforcement of foreign judgments, Pakistani law only allows the enforcement of judgments issued by particular courts of certain specified countries. Once a foreign judgment has passed this test, the local court would then analyse whether or not the foreign judgment is a violation of any principles of Pakistani law. A foreign judgment will not be enforceable in Pakistan where: (a) it has not been pronounced by a court of competent jurisdiction; (b) it has not been given on the merits of the case; (c) it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Pakistan in cases in which such law is applicable; (d) the proceedings in which the judgment was obtained are opposed to natural justice; (e) it has been obtained by fraud; or, (f) it sustains a claim founded on a breach of any law in force in Pakistan.

Local courts are extremely reluctant to enforce foreign arbitral awards in Pakistan

The Code allows enforcement of decrees passed by courts in the United Kingdom and other reciprocating territories. Where a certified copy of a decree of any of the superior courts of the UK or any reciprocating territory is filed in a district court in Pakistan, the decree may be executed in Pakistan as if it had been passed by the district court. Reciprocating territories include the UK and other countries or territories the Federal Government may announce from time to time by notification in the Official Gazette. A superior court with reference to any such territory means such court as may be specified in the said notification.

Not all decrees and judgments from the UK or a reciprocating territory handed down by a designated superior court are enforceable in Pakistan. The only decrees which are enforceable are those where a sum of money is payable, not a sum payable in respect of taxes, fines or other penalties.

The Government of Pakistan seems to have only nominated Fiji, Singapore and certain parts of New Zealand and Australia as reciprocating territories under the Code. It is, however, possible to file a suit in Pakistan on the basis of a foreign judgment treating it as a cause of action even though the judgment may not be from one of the reciprocating territories.

Interim relief for international arbitration proceedings

Unfortunately, the legal regime established in Pakistan under the New York and ICSID Conventions does not address the issue of interim relief. Section 41 of the Arbitration Act, which only deals with domestic arbitrations, grants powers to a civil court in matters such as preservation, interim custody, sale of any goods which are the subject matter of the reference,

interim injunction, and appointment of a receiver. One important issue is whether recourse may be made to the provisions of section 41 of the Arbitration Act for obtaining an injunction in aid of actual or intended arbitration proceedings before an ICSID or an ICC tribunal.

Section 47 of the Arbitration Act states that the provisions of the Arbitration Act apply to all arbitrations and to all proceedings thereunder apart from those otherwise provided for by any other law. Section 7 of the AIID Act states that the provisions of the Arbitration Act do not apply to proceedings pending under the Washington Convention. In view of this provision, it appears that a recourse may not be made to section 41 of the Arbitration Act for the grant of an interim injunction in aid of arbitration proceedings pending under the ICSID Convention.

In contrast, no provision under the NYC Act specifically ousts the applicability of the Arbitration Act to matters governed by the NYC Act. It appears that the provisions of the Arbitration Act may continue to apply as long as they are not in conflict with the NYC Act. This may include a recourse to section 41 of the Arbitration Act for the grant of an interim injunction in aid of the arbitration proceedings before an ICC or any other tribunal excluding an ICSID tribunal. One case from the Lahore High Court discussed below throws some light on this issue. Such application of the Arbitration Act to matters related to international arbitration proceedings would be unusual, as the Arbitration Act was not intended to deal with matters related to foreign arbitration agreements and foreign arbitration proceedings.

Role of local courts in international arbitration agreements

There is now enough case law in Pakistan under section 4 of the NYC Act to establish that a court has no discretion when it comes to the grant of a stay in legal proceedings brought by a party to an arbitration agreement against another party. The threshold for not granting such a stay under the domestic arbitration law is quite low; 'sufficient reason' is all that is required. The courts have now taken the view that under the NYC Act, no such discretion is available to the courts. This position has been followed in the Karachi High Court cases of: *Travel Automation v Abacus International* 2006; *Metropolitan Steel Corporation v Macsteel International* 2006; *Far Eastern Impex v Quest International Nederland* 2009; and *Cummins Sales and Service v Cummins Middle East* 2013.

The reality of enforcing foreign arbitral awards

Despite the fact that the procedure for the enforcement of foreign arbitral awards has been streamlined in the NYC Act, local courts are extremely reluctant to enforce foreign arbitral awards in Pakistan. The seriousness of this situation can be gauged from the fact that 10 years after the enforcement in Pakistan of the New York Convention, there is only one reported judgment of a Pakistani court (*FAL Oil Company v Pakistan State Oil Company* 2014) where a foreign arbitral award has been enforced in Pakistan.

There are instances in which local courts have applied very stringent requirements of the Civil Procedure Code in enforcement proceedings. For instance, the framing of issues and calling the parties to produce their oral and documentary evidence. One particular case brought before the Lahore High Court for the enforcement of a foreign arbitral award could not be decided in the 10 years in which the court had called for the production of oral and documentary evidence instead of adopting the summary procedures. Eventually, the foreign party seeking enforcement decided to withdraw its application. The Federal Government's failure to issue the required rules under section 9 of the NYC Act, which lay down the procedures to be applied by local courts for handling these matters, is further aggravating this situation. There also appear to be capacity issues among local courts, which frequently treat enforcement proceedings in the same manner as they treat ordinary civil proceedings instead of applying the summary procedures.

In a disturbing development, the Lahore High Court has held in *Taisei Corporation v AM Construction Company* 2012 that an arbitral award issued

in an ICC arbitration held in Singapore between Japanese and Pakistani corporations would be considered a domestic arbitral award, as the governing law of the arbitration agreement was Pakistani law. The court held that the enforcement of this award would be governed by the Arbitration Act. The High Court based this conclusion on a judgment of the Supreme Court, commonly known as the Rupali case (*Hitachi and another v Rupali Polyester* 1998).

It appears that the Lahore High Court, while writing this judgment, did not consider that the Rupali case was decided under the Arbitration (Protocol and Convention) Act 1937, which was repealed upon the enactment of the NYC Act. While section 9 of the Arbitration (Protocol and Convention) Act 1937, which expressly stated that an arbitral award made outside Pakistan under an arbitration agreement governed by Pakistani law would be deemed a domestic arbitral award, the NYC Act did not contain a similar provision. Therefore, the Rupali case was not good authority in respect of matters being adjudicated under the NYC Act.

The High Court further observed that there was no provision in the NYC Act similar to sections 14 (dealing with signing and filling of award by the arbitrator), 30 (dealing with grounds for setting aside the award) and 33 (dealing with arbitration agreement or award to be contested by application) of the Arbitration Act. The High Court held that since the NYC Act had not specifically repealed the Arbitration Act, the remedies available to a person under these provisions of the Arbitration Act were still intact.

The appeal against this decision was heard by the Supreme Court. However, the Court did not give any findings on the above issues. In the meantime, it is advisable that parties to cross-border transactions expressly agree on a foreign law to be the governing law of the arbitration agreement.

Separability

The Pakistani courts have generally accepted the principle of separability of the arbitration agreement. Courts in Pakistan have held that the frustration or repudiation of the matrix contract will not affect the validity of the arbitration agreement embedded in it. In the recent case of *Lakhra Power Generation v Karadeniz Powership Kaya Bay* 2014, the Karachi High Court further extended the scope of this doctrine. The highest court of Pakistan, the Supreme Court, had declared void ab initio certain contracts in which were embedded certain arbitration agreements. A matter came before the Karachi High Court in which the court was to decide on the effect of such declaration by the Supreme Court on the arbitration agreements embedded in the matrix contracts. The Karachi High Court observed that the 'Supreme Court was concerned with the main contracts and not with any arbitration clause[s] embedded therein...What was declared void ab initio and ordered to be rescinded were the main contracts... and not any arbitration agreements therein'.

Public interest litigation

In several cases, the superior courts of Pakistan have proactively exercised their constitutional power of judicial review, even in those matters covered by international arbitration agreements. The courts exercised these powers in the public interest generally to protect the public exchequer either suo moto or on the basis of petitions filed by third party pro bono publicos. It is sometime alleged that interested parties approach the local courts through fictitious pro bono publicos to enable the government and government-owned enterprises to wriggle out of their international arbitration agreements. Frequently, government and government-owned enterprises allege corruption and their own non-adherence to internal governmental procedures to convince a local court to declare void international contracts which they have entered into. In several cases, the Supreme Court of Pakistan has declared contracts which contained international arbitration agreements void ab initio.



Mansoor Hassan Khan

Partner, Khan & Associates

Islamabad, Pakistan

T: +92 300 844 1664

E: mkhan@khanassociates.com.pk

W: khanassociates.com.pk

About the author

Mansoor Hassan Khan is a partner at Khan & Associates, and his practice focuses on commercial law and dispute resolution. In his dispute resolution practice, he has acted for various international corporations, including: Toyota Motor Corporation; Motorola Solutions; General Electric; AT&T; Etisalat; Ithmaar Bank of Bahrain; Tethyan Copper Company; and, DP World. He has also appeared in arbitrations before ICC and ICSID tribunals.

Khan has obtained law degrees from Punjab University, University of London and Harvard Law School, and he previously worked for the New York office of King & Spalding. He has numerous citations as one of the leading lawyers in Pakistan from *Chambers Asia* as well as the *Legal 500*. He is licensed to appear before the Supreme Court of Pakistan.

KHAN & ASSOCIATES

Banking & Finance;
Corporate;
Domestic & International Dispute Resolution;
Foreign Investment;
Intellectual Property;
Mergers & Acquisitions;
Mining;
Oil and Gas;
Public Procurement;
Project Finance;
Taxation;
Telecommunication

SOLUTIONS FOR GLOBAL BUSINESSES

Pakistan
+92 42 3576-0107
www.khanassociates.com.pk