

Reshaping Arbitration under the Changing Judicial Lens of Pakistan

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Abstract

Arbitration is considered as one of the best methods to settle the dispute through an informal way, outside the court. In Pakistan, although arbitration system is present yet there is no proper legislation to implement this system in the country as a substitute of litigation due to lack of proper procedure, conflict of laws and outdated nature of the supreme legislation on arbitration in the country, the Arbitration Act, 1940. The intervention of judiciary in enforcement of award has always been a challenge for arbitration in the country to take a proper place in the judicial structure of the country. The judicial trends regarding arbitration kept on changing and always created a challenge for the smooth running of arbitrational system. Until the Recognition and Enforcement Act, 2011, there was no thorough legislation for enforcement or recognition of a foreign arbitral award and there always have been a confusion regarding the seat of arbitration by Pakistani courts. The cultural differences and unawareness of society especially the unknowingness of legal fraternity has been an obstacle for arbitration in the country. The interpretation of Pakistani courts in the foreign arbitral awards is also questionable as the use of Public Policy as a ground for refusal of award under the banner of New York Convention, 1958 was not properly interpreted by the courts in certain cases.

Key Words: Arbitration, Judicial System, Challenges, Enforcement, Recognition

Introduction

Arbitration law was taken over by the Pakistani legal system since the independence of the country and the Arbitration Act, 1940 served as the prime source for the effective procedural working of the arbitration in the judicial structure of Pakistan, which was comprised purely of the conventional litigation system.¹ Arbitration is a sub-category of Alternative Dispute Resolution, which provides certain non-traditional ways of solving a dispute and arbitration can be defined as the mechanism for the settlement of a matter by appointing a third party known as an arbitrator outside the court in the non-traditional way.² The legislative framework of Pakistan regarding arbitration is under an evolution since the adoption of Arbitration Act, 1940 as the guidelines provided by the UNCITRAL Model Laws are not properly followed by the judicial system of Pakistan for carrying out an arbitration process.³

The role of judiciary in enforcing arbitration proceedings and arbitral awards has always been a highlighted issue, the reason behind this is the emergence and maturation of the civil and common

¹ Yasir Munir, "The Evolution of Arbitration Law in Islamic Republic of Pakistan: Historical Context and Future Directions", *AI-IDRAK Research Journal*, 2024, Vol: 04, Issue: 01, P. 59, 60, available at [file:///C:/Users/AR&CO/Downloads/4.Yasir+Munir,+The+Evolution+of+Arbitration+Law+in+Islamic+Republic+of+Pakistan+Historical+Context+and+Future+Directions.%20\(1\).pdf](file:///C:/Users/AR&CO/Downloads/4.Yasir+Munir,+The+Evolution+of+Arbitration+Law+in+Islamic+Republic+of+Pakistan+Historical+Context+and+Future+Directions.%20(1).pdf), (accessed on 21 March, 2025).

² What is Arbitration?, World Intellectual Property Organization, available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html>, (accessed on 21 March, 2025).

³ *Supra Note*, 01.

law, which has made certain advancements in the field of arbitration but on the other side it has implicated that arbitration will culminate the old and traditional legal system as an unorthodox dispute settlement process in which there will be no space to adopt the normative law, rather it will give rise to a semi-formal system through which the disputes can be sorted out outside the court and the impact of courts and other sets of law will be minimized by this change, the same thing has been observed in many developed countries and the same scenario is adopted by the superiority judiciary of Pakistan which has scrambled the way of arbitration and other ADR methods to stand firmly in the country.⁴ The general perceptions of this view of courts is that arbitration is not as valid as litigation in the countries like Pakistan as in the arbitral proceedings the common legal perceptions and interpretation are not allowed to explain the law or issues as the major objective of arbitral process or arbitration is to bring the parties on a common point of interest for the disposal of the dispute or any matter, to get relief in the minimum possible time with the efficient cost but another contention given by the courts or litigation system is that the consensus between parties is not the main aspiration of justice rather the wrongful must be punished under the law to frame the equality of law.⁵

Research Methodology and Design

The study will be conducted by using different research methodology techniques as the study is purely a social-legal research. Initially, the doctrinal research methodology will be applied to review the existing literature and, as this type of research is a library based research in which all the primary sources such as statutes and case laws will be inquired to conduct the study in depth.⁶ The doctrinal research will be conducted in qualitative pattern as the study is not purely legal rather based on both social and legal issues.⁷ In the later part of research, both descriptive and analytical research methodologies will also be used in order to evaluate the legal documents and draw an analysis of the legal points.

The Legal Framework of Arbitration in Pakistan

Pakistan has taken over the Arbitration Act, 1940 to integrate its legal system with the modern practices of solving the disputes by the amicable ways in which the major settlement is done by the way of arbitration, using it as a tool for the alternative of litigation to lower the case thrust on the courts and introduce the people with a new legislation for settling their disputes other than approaching the courts and to give a wide berth to the overlong trails.⁸ This act served as the sole statute on the subject of arbitration until the 21st century and by the start of 21st century the country started to rationalize its arbitral and other amicable ways framework regarding the subject of ADR to merging it in the current statutory substructure of the country as the jurists started to criticize that the law of arbitration lacks certain points which can be helpful for uplifting the arbitration in the proposing the new skeleton of laws to deal with the contentions and disagreements giving rise to disputes.⁹ The Act of 1940 was enriched by many provisions of modern arbitration but still was not targeting the essential sections of the arbitration which play a crucial role in disposal of

⁴ Frederic Bachand, "Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism Symposium", *Journal of Dispute Resolution*, 2012, Vol: 2012, Issue: 01, P. 1, 2, available at <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1125&context=jdr>, (accessed on 29 March 2025).

⁵ Ibid, P. 7, 8.

⁶ Samza Fatima, "Corporate Governance in Pakistan: Beyond a Minimalist Approach" 2016, Chapter: 03, P: 92, available at <https://uobrep.openrepository.com/handle/10547/621843> (accessed on 25 March 2025).

⁷ Ibid.

⁸ Syeda Nimra Sabahat, et.al, "Arbitration in Pakistan Under Islamic Jurisprudence: A Comprehensive Legal Analysis", *Law Research Journal*, 2025, Vol: 03, Issue: 02, P. 03, available at <file:///C:/Users/AR&CO/Downloads/59+-+Final.pdf>, (accessed on 26 March, 2025)

⁹ Ibid.

matters through arbitration.¹⁰

Pre 2000s – Early Phase

Despite the presence of the Arbitration Act, 1940, the legal system of the country was not well informed with the arbitration and its requisites, the results of which have been seen in the form of excessive judicial intervention which has started to put questions on the legalities of the act of 1940, as many of the provisions were unable to secure the purpose of arbitration in the legal framework as well as in the legal profession, many of the court's interpretations about several awards were not upto the standards set by the international institutes, which were organized to carry out the arbitral proceedings on international level in publicized legal matters relating to arbitration and later on extended their services to all the parties looking for arbitration but the view of Pakistani judiciary very narrow about the proceedings of those institutes, rather importance was given to the rulings of Jirgah and relevant bodies as compared to international arbitration, which created a lot of trouble for arbitration to remain upright in the initial phase of pre 2000s.¹¹

Hitachi v Rupali – PLD 1998 SC 841

This was the landmark case regarding the interference of courts in the execution of an arbitral awards and binding nature of an award obtained through the foreign arbitration, in this case the issue regarding the enforcement of arbitral awards in the jurisdiction of Pakistan, which has been obtained from another jurisdiction and under the contract it was clearly highlighted that the matter regarding dispute will be dealt under the Pakistani arbitration law and at that time the act of 1940 was governing the arbitration matters in the country and the due to the foreign nature of award it was also contented that this award shall be dealt as per the Convention and Protocol Act of 1937, which was not a part of contract and it was stated that such award is not sustainable under the laws of Pakistan.¹²

Another point established under this case was the involvement of courts is legal in the arbitration or enforcement of awards or not and regarding the matter it was held that the courts may intervene the matter if the parties wish and the jurisdiction of courts regarding the foreign arbitral awards was defined under this case and the High Courts were given the responsibility to recognize and enforce a foreign arbitral award in the favour of parties, on the other hand due to lacunas in the contract it was held that this award was not sustainable to be enforced in the nature in which it has been pronounced as the act of 1940 does not recognizing the foreign arbitration.¹³

Pro Arbitration Phase - 2000s to 2010

The phase of 2000s to 2010 led to a change in the landscape of arbitration in Pakistan as the courts started to decrease their engagements in the arbitral proceedings and obstinate behaviour of judiciary as well as commercial sector in Pakistan mitigated towards arbitration and certain steps were also taken at the national level by the government such as ratification of the New York Convention as making it the part of legal system by enforcement of new enactments, and the efforts to fetch arbitration under the auspices of the Islamic law were also made in this era to stand up arbitration as a well-recognized alternative of the customary justice system in the country alongwith adherence to the international benchmarks for the arbitration and other alternative approaches, this phase served

¹⁰ Abida Mumtaz, et.al, "An overview the Development of International Arbitration: A Comparative Study in Perspective of Pakistan and the China", *The Critical Review of Social Sciences Studies*, 2024, Vol: 02, No: 02, P. 840, 841, available at <https://thecrsss.com/index.php/Journal/article/view/76/83>, (accessed on 26 March 2025).

¹¹ Dr Qazi Abdullah, Dr Lutfullah Saqib, "Arbitration; Legislation, Scope and Functioning in Pakistani Legal System", *AL Idah*, 2018, Vol: 36, Issue: 01, P, 41, 44, available at [file:///C:/Users/AR&CO/Downloads/37-Article%20Text-101-1-10-20190603%20\(1\).pdf](file:///C:/Users/AR&CO/Downloads/37-Article%20Text-101-1-10-20190603%20(1).pdf), (accessed on 30 March 2025).

¹² PLD 1998 SC 841.

¹³ Ibid.

as the best for the advancement of the arbitration law which was previously under the privilege and involvement of judiciary in its early stages.¹⁴ These variations led to the development of a structured configuration of arbitration in the legal system of the country.¹⁵

Hub Power Co Ltd v WAPDA – PLD 2000 SC 841

Hubco's dispute with WAPDA was a landmark case in the history of Pakistan related to recognition and enforcement of foreign arbitral awards and specified certain legal aspects, which emptied the journey of arbitration in Pakistan and settled certain directions to be followed by the arbitration proceedings carried out at the internal level, in this case the Hubco obtained an arbitral award from the ICC against WAPDA for certain amendments made in the contract between the companies but the award was contended before execution in the Supreme Court, that the award obtained against the clauses or amendments in contract, which are made under misrepresentation and fraud by using arbitrary powers, this contention against the enforcement, gave rise to many objections by the law of land which unfavoured the execution of such award.¹⁶

The counterarguments raised against the enforcement of the award were that whether it is lawful to enforce an award which has been obtained by deploying fraudulent clauses in the existing contract and which is prima facie leading to misconduct and violation of the contract act, governing the agreements and contract and it was asserted that when there is violation of public policy and element of fraud is present then it will not come under the scope of arbitration as it has contravened the basic principles of arbitration and hence should not be exercised and enforced in such circumstances, in addition, the court in this case taking the privilege of Public Policy refused this award as pointed out by the New York Convention as the ground for refusal or rejection of an award and element of fraud has already mitigated the essence of reaching at a specific point of common interests.¹⁷

Societe Generale de Surveillance S.A. (SGS) v. Pakistan - 2002 SCMR 1694

In this precedent-setting judgment, the SGS procured an arbitral award from ICSID against the state of Pakistan for the dismissal of a contract between the parties and invoked the jurisdiction of Pakistani courts for the enforcement of award but on the other hand, the state initiated a domestic arbitral proceeding to set aside the award pronounced by the forum of ICSID as the arbitral clause under the contract was to be governed by the domestic law and another counter taken by the state that the enforcement of awards by ICSID did not come under the banner of domestic law, hence cannot be enforced in the country, which came up with many new questions of law as the courts has to decide whether the contention of SGS falls under the principles of domestic law for enforcing a foreign arbitral award which has been dealt under the rules of New York Convention regarding the arbitration and whether the blocking of this award will strengthen the domestic arbitration or not in a step towards intensifying the model of arbitration at domestic level.¹⁸ The court examined both arbitral proceedings and held that the ICSID pronounced awards does not fall under the ambit of domestic law as the Arbitration Act of 1940 only recognizes the domestic awards and ruled out the award obtained by SGS, in addition to this the question of jurisdiction was also addressed that Pakistani courts have the jurisdiction to overview the awards obtained by foreign institutes to validate the legality of the award as where the contract is putting stress on the domestic arbitration the courts have the jurisdiction to annul or ratify the awards which are involved between mixed jurisdiction of

¹⁴ Muhammad Bilal Usmani, et.al, "Reluctance of People using Alternative Dispute Resolution: A Critical Analysis in the Pakistani Context", *Law Research Journal*, 2025, Vol: 03, Issue: 01, P. 73, 74, available at <https://lawresearchreview.com/index.php/Journal/article/view/75/72>, (accessed on 30 March 2025).

¹⁵ Ibid.

¹⁶ PLD 2000 SC 841.

¹⁷ Ibid.

¹⁸ 2002 SCMR 1694.

arbitrational proceedings and the court set out that mere the ratification of a convention or international rules does not mean that they can override the law of the land and hence the arbitral awards of ICSID cannot be recognized without the assimilation of the local law.¹⁹

Post 2010 Phase – A Hope for Arbitration to Stand

In the phase from 2010 to present certain changes have been made in the arbitrational system of the country, the ADR Act of 2017 has been legislated which has awarded preference to the alternate means for deciding the disputes and the judicial intervention in this period was considerably less as compared to the previous periods as the judiciary was triggered with an opinion that it is not feasible to keep arbitration under the shadow of litigation and ordinary justice system, these changes led to the introduction of alternative methods in other enactments as special provision, additionally the Act of 2011 regarding enforcement and recognition of foreign arbitral awards was also enforced in this phase and to minimize the court's intervention and influence the powers of granting interim relief in the form of interim awards were also given to the arbitrators serving at the domestic level, which mitigated many old perceptions and led to the independence of arbitration from judiciary and court's dominance in the country.²⁰

Taisei Corporation v. A. M Constructions – 2024 SCMR 640

Taisei case was one of the most notable cases in the history of Pakistan and has been decided recently, in this case Taisei, a Japanese Company obtained an award from the ICC and sought its enforcement in Pakistan, the AM construction joined the proceedings and invoked the jurisdiction of Civil Court Lahore and contented that the contract between the parties was existing before the enforcement of the Act of 2011 and hence cannot be recognized as foreign award rather it should be under the Arbitration Act, 1940 and regarded as a domestic award, which was upheld by the civil court as the award was obtained under a contract before the legislation of Recognition and Enforcement Act, 2011 and hence cannot be a foreign award in this case.²¹

The Taisei Corporation filed a petition before the Sindh High Court and the court recognized it as a foreign arbitral award and then the Supreme Court decided the matter establishing that the award in the favour of Taisei Corporation was foreign in nature and shall be recognized and enforced under the Act of 2011 and shall not be a domestic award as contended by the A. M Constructions, the Act of 2011 was given a retrospective impact based on the ratification of New York Convention by the country and once again certain legal points were held by the Supreme Court such as the matter of jurisdiction as it was a settled principle that only High Courts will have the jurisdiction to recognize and enforce a foreign arbitral award and in this case the civil courts have no jurisdiction as observed in this case regarding the nature of award.²²

Impact of Judicial Intervention on Arbitration in Pakistan:

In Pakistan the judicial intercession in the arbitral proceedings is not a new concept as from the early 1950s to the current times courts have continued to make their influence on the independent arbitral proceedings, this intervention has caused a lot of trouble on the arbitral proceedings as many of the foreign investors has not trust on the legal system after obtaining an award from any foreign institute because it has been noticed that the use of public policy as a refusal ground is employed as many

¹⁹ Ibid.

²⁰ RIAA Barker Gillette, "A Study of the Arbitration Law Regime in Pakistan", available at <https://www.riabarkergillette.com/usa/wp-content/uploads/Insight-Article-A-Study-of-the-Arbitration-Law-in-Pakistan.pdf>, (accessed on 31 March 2025).

²¹ 2024 SCMR 640.

²² Ibid.

times as the courts intervened in the recognition of award and this factor has led to the downfall of arbitration and other non-coercive methods for solving the disputes outside the court and this judicial involvement has brought arbitration to the courtrooms, which ended up in the lengthy trials and judicial proceedings after arbitration.²³

An important factor in the judicial intervention is that in Pakistan, the judicial intervention has been observed after the pronouncement of award but less judicial intervention is seen during the proceedings which means that the major issue that is faced by arbitration is regarding the enforcement of award that has not properly addressed by any statute or rules defined by superior courts, although the judicial participation is less during the proceedings of arbitration yet it has been scene that the courts impact the proceedings also and in results many parties culminate the arbitration and tend towards the court proceedings, the reasons behind this are the limited powers of arbitrators and bars on implementation of direction issued by arbitrators as in many cases the prior consent of court is required.²⁴

In Pakistan, the judicial involvement has not been positive in the context of arbitration as many of the foreign awards have been refused just on the ground of public policy which has always been a sword, used by the Pakistani judiciary against the arbitral awards, this ground has not been interpreted correctly by the superior courts as refusal ground and became the only provision of the New York Convention which has been properly utilized but not in the true sense as the term public policy has not been addressed properly in any law regarding arbitration in Pakistan, which marks a question on judicial intervention of courts in the ordinary proceedings of arbitration and non-recognition of foreign awards and delay in the implementation of awards by the courts.²⁵ With the judiciary, the lawyers played an important role for the downfall of arbitration in the country such as the unwilling behaviour to tend towards the system which is beyond the judicial control and have extrajudicial impacts, this reluctance provided a space to the courts to continue their involvement in the arbitration and making it pro judicial wing as seen in the early 2000s and pro 2010 phases where judiciary had a remarkable impact regarding arbitration and this conduct ended in the diminution of the arbitration centres in the country and left the investor's confidence at back, which is strongly condemned by the international arbitration centres as the protection to arbitration seemed ending by reluctant behaviour of courts to stay away from the arbitration and the whole phenomenon became a game of power for the courts as they think if they are stopped from doing so then they will lose the authority to adjudicate the disputed matters.²⁶

Conclusion

Summarizing the preceding discussion, it has been observed that the parliament of the country paid heads towards the mitigation of judicial control over arbitration after the cruel criticism by the international forums upon the Hubco and SGS cases regarding the upholding of foreign arbitral awards.²⁷ Although it has been observed in all the cases discussed previously that the courts focused on mitigation of judicial impact through precedents yet this is also considered as the intervention under the international arbitration rules as the courts continued to set rules regarding recognition of awards in Pakistan instead of properly addressing the issue by passing a single

²³ Niharika Chauhan, "Judicial Intervention in Arbitration – A comparative Analysis", 2022, available at <https://articles.manupatra.com/article-details/Judicial-Intervention-In-Arbitration-A-Comparative-Analysis>, (accessed on 31 March 2025).

²⁴ Ibid.

²⁵ Aishwarya Agarwal, "Extent of Judicial Intervention in Arbitration", 2025, available at <https://lawbhoomi.com/extent-of-judicial-intervention-in-arbitration/>, (accessed on 31 March 2025).

²⁶ Ibid.

²⁷ Ibid.

precedents and eliminating the continuous use of public policy as a refusal ground.²⁸

In the precedents from Hitachi case to the Taisei Corporation case the view of judiciary kept on evolving regarding the enforcement and recognition of the arbitral award and the question of nature of award and proper forum to recognize the award has been a question of law in all cases, this thing on one side has served arbitration with a huge damage but on the other hand it has elaborated certain points which has been missed by the legislature while legislating enactments on the subject of arbitration as many standards of international arbitration were not highlighted in any statute for the clear guidance of the arbitrators and hence judiciary became a pillar to set principles for arbitration in the country and provided a framework to be followed by the arbitrators and parties before entering into an arbitration contract and joining the arbitration seat either domestic or foreign, the involvement of courts is no doubt baseless and detrimental for arbitration but it has given a new shape to arbitration to grow in the country by complying with both local and international laws.²⁹ Following recommendations are made in analysis of the above study for reshaping arbitration in Pakistan:

First and above all, study centres should be established in the country regarding arbitration and other non-coercive ways to solve the disputes outside the court in order to expand the knowledge regarding arbitration and its benefits over litigation in the country by targeting a specific population for the awareness of people, pertaining to arbitration and its importance in the modern legal system, this may help the community to study about the arbitral and its positive aspects over judicial trials and these study centres will also serve as an advertisement place for arbitration, its proper working in the country and will cover the history and present modules of arbitration followed by the international arbitration courts to decrease the caseloads on courts.³⁰

Furthermore, arbitration in Pakistan has always been subjected to practice or included in the academic syllabus of Law as an optional subject which has minimized the interest of subsequent generations to tend towards the utilization of alternative methods of dispute resolution, the Arbitration Laws should be a part of academic journey as a mandatory subject so the students can get proper knowledge and reasons behind implementing Arbitration and other alternative approaches instead of litigation for resolving the disputes and this should not be only a subject of law rather it should be included in other degrees such as international relations, accounts and business management in order to produce experts in certain fields so they can serve as future arbitrators in relevant matters as a consultant and professional.³¹

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2024 SCMR 640.

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²⁸ Lekshmi S Kumar, "A Study on Judicial Intervention in Arbitration", *Indian Journal of Integrated Research in Law*, 2023, Vol: III, Issue: III, P. 1, available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/injloitd4&div=141&id=&page=>, (accessed on 31 March 2025).

²⁹ Muhammad Taimoor Adil, et. al, "Mechanism for Enforcement of Arbitral Awards in Pakistan", *Contemporary Journal of Social Science Review*, 2024, Vol: 02, Issue: 04, P. 1067, available at file:///C:/Users/AR&CO/Downloads/Mechanism_for_Enforcement_of_Arbitral_Awards_in_Pakistan.pdf, (accessed on 22 March 2025).

³⁰ Barbara Warwas, "The Application of Arbitration in Transnational Private Regulation: An analytical framework and recommendations for future research", *Published by Questions of International Law*, 2020, Zoom-out: 73, P. 49, available at https://www.qil-qdi.org/wp-content/uploads/2020/09/03_ADR_Warwas_FIN.pdf, (accessed on 02 April 2025).

³¹ Thomas Schultz, "The Evolution of International Arbitration as an Academic Field", *Journal of International Dispute Settlement*, 2015, Vol: 06, Issue: 02, P. 229, 230, available at <https://academic.oup.com/jids/article-abstract/6/2/229/820051?login=false>, (accessed on 02 April 2025).

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