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Pakistan

INTERNATIONAL ARBITRATION

Contributing firm

RIAA BARKER GILLETTE

**RIAA
Barker
Gillette**

Yousaf Khosa

Partner | yousaf.khosa@riaabg.com

Mobeen Imran Shah

Associate | mobeen.shah@riaabg.com

This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Pakistan.

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PAKISTAN INTERNATIONAL ARBITRATION



1. What legislation applies to arbitration in your country? Are there any mandatory laws?

Arbitration in Pakistan is regulated by the Arbitration Act, 1940 ('Arbitration Act') for domestic arbitrations and the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ('Foreign Arbitral Awards') which applies to foreign arbitrations. Both the laws are mandatory laws.

The Foreign Arbitral Awards has been enacted to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or New York Convention, which Pakistan has ratified.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Yes. Pakistan is signatory to the New York Convention and the same has been duly ratified by Pakistan. Vide an Ordinance in 2005 and then as an Act of Parliament namely Foreign Arbitral Awards, the New York Convention has been adopted as domestic law pertaining to the Foreign Arbitral Awards.

Pakistan expressed the following reservation for the application of the Convention

"The Islamic Republic of Pakistan will apply the Convention to the recognition and enforcement of awards made only in the territory of [a] Contracting State."

3. What other arbitration-related treaties and conventions is your country a party to?

In addition to the New York Convention, Pakistan is also a signatory to the ICSID (International Centre for Settlement of Investment Disputes) Convention.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

Neither the Arbitration Act nor the Foreign Arbitral Awards is based on the UNCITRAL Model Law ('Model Law'). Some of the key differences between the two are as follows:

- a. The Arbitration Act allows a reference to two arbitrators and an umpire; whereas the Model Law does not expressly provide for this. If appointed, the Model Law refers to the 'umpire' as a 'third arbitrator';
- b. The Model Law does not empower courts to remit a matter back to the arbitral tribunal. Instead, the arbitral tribunal is allowed to resume proceedings and address grounds that could lead to the award being set aside. As opposed to this, the Arbitration Act which duly vests such power to a court to remit the matter back to the arbitral tribunal;
- c. The Arbitration Act is broadly scripted as compared to the Model Law which contains an exclusive list of limited grounds on which an award may be set aside under Article 34 Model Law (and identical to those contained in Article V of the New York Convention). Conversely, when it comes to grounds for setting aside an award, the Arbitration Act provides for misconduct construed to include only serious errors of law by the arbitral tribunal and/or error apparent on the face of the record;
- d. Under the Arbitration Act, the court has discretion whether to grant a stay of legal proceedings pertaining to a matter that is the subject of an arbitration agreement; whereas in respect of a foreign arbitration, the Pakistani law prescribed by the Foreign Arbitral Awards provides that the court does not have any discretion and the legal proceedings must be stayed wherever the

matter pertains to a foreign arbitration agreement. The Model Law however provides that unless the arbitration agreement is null and void, inoperative or incapable of being performed, the court must stay its proceedings and refer the parties to arbitration; and

- e. UNCITRAL Model Law facilitates the appointment of experts by the arbitral tribunal; whereas the Arbitration Act remains silent on this matter with case law developed leaving the power with arbitrators to devise their own rules of procedure and evidence;
- f. Under the Arbitration Act, the arbitrators do not have power to grant interim measures during pendency of the arbitration or prior thereto and the same is exclusively in the domain of courts in Pakistan; whereas the UNCITRAL Model Law provides express power for interim measures to be within the jurisdiction of the arbitrators.

5. Are there any impending plans to reform the arbitration laws in your country?

The Arbitration and Conciliation Bill intends to bring arbitration law in Pakistan with the UNCITRAL Model Law and repeal the Arbitration Act, 1940. However, this bill is still pending approval in the Senate since January 2016.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

The Center for International Investment and Commercial Arbitration (CIICA) offers both domestic arbitration and mediation services. There have been no significant amendments since the following rules:

- Rules of Sindh Original Side Rules 2012 (Draft)
- Rules and Orders of the Lahore High Court, Lahore (Vol I) Instructions to Civil Courts
- International Chamber of Commerce (Pakistan Chapter) Rules of Arbitration entered into force on 01 January 2021
- SAARC (South Asian Association of Regional Cooperation) Arbitration Rules (SARCO (SAARC Arbitration Council) Rules of Arbitration 2016

7. Is there a specialist arbitration court in

your country?

No.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

The foundation for an arbitration under the Arbitration Act is a pre-agreed arbitration agreement. As such, a determinative written agreement is required to refer the "present or future" differences to arbitration. Since the arbitration agreement is essentially recognized as an agreement, albeit a special one, all the generally applicable international principles of contract law are applicable thereto.

9. Are arbitration clauses considered separable from the main contract?

Yes.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

The Pakistani jurisdiction is a codified law jurisdiction. The Arbitration Act, provides specific definition of an arbitration agreement as under: Section 2(a) Arbitration Act which defines the arbitration agreement as 'a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'. Contract Act, 1872 of Pakistan provides the validity tests of all agreements.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

Multi-party or multi-contract arbitrations are allowed in Pakistan and the same are subject to the overall general scheme of arbitration law in Pakistan. Section 22 of the Arbitration Act, provides that where parties to a suit apply to arbitration to address their differences, the suit shall continue so far as it relates to the parties that have not joined the application.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

Courts do not make third parties or non-signatories bound by an arbitration agreement. However, once an award is made it will bind any one claiming through such parties.

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

The general approach of the courts is to uphold a valid arbitration agreement and direct parties to resolve their disputes in accordance with the provisions of the agreement. An arbitrable dispute is a pre-requisite for a matter to be declared an arbitrable matter. While no exhaustive list is provided by law of what may be considered arbitrable, the courts in Pakistan have held non-arbitrable disputes to be disputes not covered by arbitration clause, no dispute, criminal or public policy matters, and any other reason which a court may determine sufficient.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

Pakistani courts will resort to determine express or implied choice of law by the parties but if no such choice is made, then the closest and real connection will determine applicable law. *Abid Associated Agencies v Areva* (2015 MLD 1646); *Gerry's International (Pvt.) Ltd v Aeroflot Russian International Airlines* 2018 SCMR 662

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

See response to Question no. 14.

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

As noted above, the Pakistan law regime is a codified legal regime whereby the fundamental principle of constitution of Pakistan as provided in Articles 4 and 5 of the Constitution is that except as provided in the codified law, there is no substantive law which can be enforced in Pakistan. Unlike fraud, the UNIDROIT principles are not provided for in the codified Pakistani law in terms of the global ingredients thereof however, similar principles do find mention in the law of Pakistan. It is in the context of the laws of Pakistan that the courts in Pakistan deal with a subject before them. As such, we are unable to point out a general principle in the form of or like the UNIDROIT principles having been applied by the courts in Pakistan making it a principle of substantive law. However, this principle does not find mention in the *obiter dicta* of the case of *Maulana Abdul Haque Baloch v Government of Balochistan through Secretary Industries and Mineral Development* (PLD 2013 SC 641).

17. In your country, are there any restrictions in the appointment of arbitrators?

The arbitral tribunal is required to be appointed in accordance with the arbitration agreement. If the arbitration agreement does not provide for the number of arbitrators, Pakistan law would deem that reference will be to a sole arbitrator. If the arbitration agreement provides for a reference to two arbitrators one appointed by each of the parties, then the arbitrators will be required to appoint an umpire. If the parties have failed to appoint arbitrators, the courts will intervene to make the required appointment(s).

18. Are there any default requirements as to the selection of a tribunal?

Please refer to our response in Question no. 17.

19. Can the local courts intervene in the selection of arbitrators? If so, how?

Under the Arbitration Act, local courts are granted the power to appoint an arbitrator or umpire in accordance with the agreement if the parties have failed to do so.

20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Arbitration Act empowers a court to remove an arbitrator or umpire on the application of a party to arbitration if the arbitrator fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award or has misconducted himself or the proceedings.

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

The Arbitration Act does not expressly prescribe the qualifications or duties of an arbitrator or umpire. However, consistent judicial precedents have pronounced upon the requirement for arbitrators to exercise impartiality and to act fairly in their role as arbitrators.

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

Not specifically. However, please refer to our response to Question no. 21.

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

In the case of a truncated tribunal (i.e. where one of the arbitrators refuses to act), the court may intervene on a party's application subject to notice.

24. Are arbitrators immune from liability?

The Arbitration Act does not specifically provide or prohibit action against the arbitrator(s).

25. Is the principle of competence-competence recognized in your country?

Yes.

26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

The courts may in case of domestic arbitration, and will, in case of foreign arbitration stay the litigation proceedings.

27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

The arbitral proceedings may be commenced by the parties in accordance with arbitration agreement with or without intervention of the court. In an arbitration without intervention of the court subject to the limitation periods provided in the general limitation laws of Pakistan, the parties may proceed to commence arbitration starting with appointment of the arbitrators and proceeding therewith in accordance with the pre-agreed arbitration agreement and the Arbitration Act. An arbitration may also be commenced by either of the parties approaching the court under the Arbitration Act and seek referral of the matter to arbitration in accordance with arbitration agreement and Arbitration Act.

Section 37 of the Arbitration Act provides for the mandatory limitation periods which need to be observed.

28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

Section 45 of the Arbitration Act makes the Arbitration Act binding on to the government and Section 46 of the Arbitration Act clarifies that statutory arbitrations are also required to be conducted in accordance with Arbitration Act.

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

Yes.

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the

tribunal allow for it?

A third party not drawing any authority from one of the parties to the arbitration agreement is deemed a stranger however, if all the parties agree then with the leave of court (tribunal does not have such powers) intervention may be allowed.

31. Can local courts order third parties to participate in arbitration proceedings in your country?

No.

32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

The court has broad powers under the Arbitration Act to grant interim measures to preserve the parties' rights. In particular, the court has power to order the preservation, interim custody or sale of any goods that are the subject matter of the dispute; inspection of any property or thing that is the subject of the arbitration or regarding which any question may arise; secure any sum of money in dispute; grant interim injunctions; or appoint receivers or interim orders to prevent delay or obstruction to the execution of decree/award.

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

There is no specific law providing for anti-suit/anti-arbitration injunctions however, the case law developed in Pakistan suggests that the same is available under the general scheme of Specific Relief Act.

34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

Arbitrators are allowed to set their own rules of procedure and evidence. Yes, the court may be requested for a role in obtaining evidence. Yes, the courts can compel a witness to participate in arbitration proceedings.

35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

There are no specific ethical codes applicable for the conduct of counsel in arbitrations. However, since most counsel and many arbitrators are locally qualified advocates; they are required to observe the Bar Council's rules on professional conduct. Arbitrators are caught by rules of neutrality and impartiality. Arbitrators can be removed on grounds of serious misconduct within the Arbitration Act. Kindly see response to Questions 20, 21 and 24 above.

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

No.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

No recent decisions have been reported regarding use of evidence acquired illegally. However, in case of any such complaints, the court is empowered to take cognizance under Section 43 of the Arbitration Act.

38. How are the costs of arbitration proceedings estimated and allocated?

The cost of reference including legal fees and award shall be at the discretion of the arbitrator or umpire.

39. Can pre- and post-award interest be included on the principal claim and costs incurred?

Pre-award interest can be claimed if provided in the agreement between the parties and post-award interest can be allowed by the court.

40. What legal requirements are there in your country for the recognition and

enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

An award must be in writing, signed by the arbitrator(s) and filed in the court to be made rule of court. The court will enforce the award if the same is duly reasoned.

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

The estimated time for recognition of an award may vary between 3 to 6 months. Yes, a motion for recognition and enforcement of award can be made *ex parte* basis.

42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

Yes.

43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

Please find our response to question no. 44 below.

44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

Challenging an arbitral award

Under the Arbitration Act, an award may be challenged by a party and the award set aside on grounds of misconduct; or where the award was improperly procured. Even in the absence of a challenge, the court has a duty to ensure that the award was not otherwise invalid or set it aside where there is a clear illegality. The arbitral tribunal has the power to modify an award on its own and a party may also apply to the court for modification within three years from when the right to apply accrues.

Appealing an arbitral award

Any party challenging the existence or validity of an

arbitration agreement or an award, may apply to the court. The court shall then decide the question on affidavits provided that where the court deems it just and expedient, it may, inter alia, hear other evidence also and pass an order for discovery and particulars.

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

The right to challenge an award has been granted by the legislature under the Arbitration Act. Parties seeking to settle their dispute through arbitration cannot by virtue of a private contract exclude the right to challenge granted by statute. Further, the Supreme Court of Pakistan in *Ascon Engineers (Pvt.) Limited v Province of Punjab* (2002) SCMR 1662, has held that the court has suo moto powers to remit or set aside an award if the court finds that it is not fit to be maintained.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

Please refer to our response in Question no. 28.

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

The matter is dealt with in Paragraph 7 First Schedule of the Arbitration Act.

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

Although third party funding in connection with arbitration has not been considered/discussed by courts, the issue of agreements to finance legal proceedings by third parties was considered by the Lahore High Court in *Muhammad Ramzan v Shamas-ud-din* (2012 CLC 1541). Holding that such agreements are not unlawful per se, the Court held that

“Every agreement to finance litigation per se is not opposed to public policy rather there may be a case in which it would be in the furtherance of law, equity,

justice and necessary to resist oppression... Such agreements are to be carefully scrutinized and when found to be unconscionable, unjust and inequitable, for improper object, against law, oppressive or leading to vexatious litigation, the same should be treated as against the public policy."

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

No, for any emergency relief, court may be approached.

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

The arbitration law in Pakistan does not distinguish the matters on the basis of the value of the claim.

CIICA has however issued its Expedited Arbitration Rules. The Expedited procedure has been developed to provide simple, cost-effective and timely resolution of disputes by a sole arbitrator, for a fixed fee, provided that the total amount of the claim and any counterclaim does not exceed USD 600,000.

51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

There are no judgements currently in place to deal with diversity in the choice of arbitrators and counsel.

52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

We have not come across any reported case in Pakistan.

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption?

Which party bears the burden of proving corruption?

An allegation of corruption will bar jurisdiction of an arbitrator in such a matter as corruption/allegations of corruption are deemed criminal matters not referable to arbitration under Pakistani law.

54. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

No.

55. Have there been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

No.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

CIICA commenced offering online filing services. Amidst the COVID-19 pandemic, in order to facilitate dispute resolution involving Micro, Small and Medium Sized Enterprises (MSMEs), CIICA lowered its fees substantially and raised the upper limit of the amount in dispute for its expedited arbitration services. They have also initiated a service providing and advising on online mediation and arbitration services during COVID-19.

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

When the pandemic initially took hold, most courts in

Pakistan suspended regular work and were hearing only urgent cases. Although there were encouraging signs that some benches of the superior courts (the Supreme Court and Lahore High Court) were receptive to the idea of conducting virtual hearings, they haven't as yet done so in the manner that courts in many other jurisdictions had started.

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

The insolvency of a party may not affect the enforceability of an arbitration agreement.

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

Pakistan was granted Observer Status to the Energy Charter Treaty (ECT) since 2005. There are ongoing talks with Pakistani government officials, providing the required information on accession procedures. However, at present, it doesn't bear full membership status yet.

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

There are as such no developments with regard to disputes on climate change and/or human rights by arbitral tribunals.

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

No.

Contributors

Yousaf Khosa
Partner

yousaf.khosa@riaabg.com



Mobeen Imran Shah
Associate

mobeen.shah@riaabg.com

