

PAKISTAN

The international arbitration matrix

Mobeen Rana, partner in **MR Legal Inn**, examines the structure of the international arbitration laws in Pakistan and the attitude of the local courts in interpreting them

Arbitration as a mode of resolving disputes around the world by states and global businesses has gained much traction owing to its numerous benefits. Until recently, Pakistan has been in the spotlight of international arbitration proceedings, having nexus with foreign investments in high yield sectors like energy, mining, shipping and technology. One of the recent highlights in the public domain include Reko Diq, Karkey Karadeniz and Agility, where billions of dollars' worth of claims were filed by foreign investors in the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

In light of the high stakes involved in the international arbitral proceedings, which led to the enforcement of arbitration agreements and awards in local courts, Pakistan has incorporated international conventions into domestic legislation to enable the parties to enforce arbitration agreements and arbitral awards locally. Under Pakistani law, there is specialised legislation encompassing investor-state disputes and disputes between private parties. This specialised arbitration legislation only applies to foreign arbitral awards and agreements to arbitrate outside the geographical boundaries of Pakistan.

The ICSID Convention (For Investor-State Arbitrations)

Pakistan is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (Washington Convention). The Washington Convention received recognition under the Pakistan arbitration law when the Parliament of Pakistan passed Arbitration (International Investment Disputes) Act 2011 (AIID Act).

Under Section 3 of the AIID Act and read alongside Article 53 of the annexed Schedule to the AIID Act, arbitral awards issued by ICSID shall be binding upon the parties and shall not be subject to any appeal or any remedy except those provided under the Washington

 **MR LEGAL INN**
ADVOCATES & CORPORATE COUNSELLORS

www.mrlegalinn.com



Mobeen Rana

Partner, MR Legal Inn
Pakistan

T: +923 227 373 922

E: mobeenrana@mrlegalinn.com

W: www.mrlegalinn.com

About the author

Mobeen Rana is a barrister and partner at MR Legal Inn and his practice focuses on commercial dispute resolution. He has acted for clients including Franzen Landbouw Netherlands, International Industries, Reuters, Johnson Controls, Beijing Auxin Chemicals, Jamshoru Joint Venture, Lotte Engineering & Construction and Ahad International.

Rana is a member of the arbitration commission of the International Chamber of Commerce (ICC), American Bar Association Section of International Law, Bar of England & Wales and Punjab Bar Council. He has higher rights of audience including in all High Courts of Pakistan.

Rana obtained his law degrees from the University of London and the Honourable Society of Lincolns Inn, London. He previously worked with the World Bank Group and the New York office of Grunfield Desidero Lebowitz Silverman & Klestadt (GDLSK). He has creditable citations as one of the leading lawyers in Pakistan from Legal 500, Thomson Reuters Practical Law and Martindale & Hubbell Network.

Convention. The award can be recognised and enforced in the Pakistani High Court, conditional upon the satisfaction of the burden of proof laid down under those provisions. The award shall be registered in the local High Court for the reasonable costs incidental to the registration.

Under Section 4 of the AIID Act, an award registered under Section 3 AIID Act shall, as respects the pecuniary obligations which it

“Now in Pakistan there are specialised pieces of legislation that encompass investor-state arbitration and arbitrations between private parties”

imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court, provided that certain conditions are satisfied. The award shall not be enforceable against the Pakistan Government on the same grounds that foreign judgments may not be enforceable against the Pakistan Government. This allows the courts to look into the law relating to the enforcement of foreign judgments and their conditions in parallel to the procedure for enforcing an arbitral award.

Furthermore, Section 7 of the AIID Act prohibits the domestic courts to apply the provisions of the Arbitration Act 1940, as this Act only applies to arbitrations conducted within the geographical boundaries of Pakistan.

Section 9 of the AIID Act allows the Federal Government to make rules relating to the procedures for: applying for registration of an award; giving notice to the other parties; satisfying the burden of proof, including evidentiary requirements; a stay of execution of the award under the AIID Act; and any ancillary matters required for fulfilling the purposes of the AIID Act.

Section 10 of the AIID Act empowers the Federal Government to amend the Schedule annexed to the AIID Act.

The overall scope of the AIID Act is to regulate investor-state arbitrations, which involve a state and foreign investor. The AIID Act lays down the mechanisms for enforcement of foreign arbitral awards passed by ICSID subject to certain qualifications. The AIID Act alleviates the status of foreign arbitral awards by reconciling it with the respectable judgment of the honourable High Court in Pakistan. Foreign investors can benefit from the AIID Act for enforcing the foreign arbitral awards in Pakistan.

The New York Convention (For Private Parties Arbitration)

Pakistan became signatory to the Convention on the Recognition and Enforcement of

Foreign Arbitral Awards 1958 (New York Convention) on December 1958. The New York Convention was domesticated into the local law through the enactment of the Recognition and Enforcement of Foreign Arbitral Awards Act 2011 (NYC Act).

Enforcing foreign arbitral awards

The NYC Act specifically defines the meaning of the term ‘foreign arbitral award’: the award made in a contracting state and such other state as may be notified by the Federal Government in the official gazette. The definition of ‘foreign arbitral award’ extends to the awards made in those non-contracting states, which are not even a party to the New York Convention. This enables the parties from a non-contracting state, upon notification in the official gazette, to enforce a foreign arbitral award in Pakistan.

Foreign arbitral awards made prior to July 14 2005 shall only be enforced under NYC Act. Under Section 3, the honourable High Court has exclusive jurisdiction under the NYC Act. The High Court ranks next to the apex court in Pakistan for undertaking the enforcement of foreign arbitral awards in Pakistan. Section 5 specifically entails duty to furnish documentary evidence required as prescribed under the Convention. There must be authenticated original copies of the award.

The substantive provision, Section 6 of the NYC Act, imposes a positive obligation on the local High Court to recognise and enforce a foreign arbitral award in the same manner as a judgment or order of the court in Pakistan. An arbitral award that is enforceable shall be obligatory amongst and between the parties to the foreign arbitration agreement. Section 7 of the NYC Act reaffirms the court’s positive obligation to enforce the foreign arbitral award (see *FAL Oil Company v Pakistan State Oil Company* PLD 2014 Sind 427, where Sind High Court enforced a foreign arbitral award in Pakistan).

Enforcing foreign arbitration agreements

The NYC Act does not stipulate definition of ‘foreign arbitration agreement’, which under the imperative meaning of the NYC Act only includes the parties from the contracting states to enforce arbitration agreements. Furthermore, foreign arbitration agreements made prior to July 14 2005 shall be enforceable because the NYC Act does not expressly restrict the enforcement of foreign arbitration agreements made before that date, in contrast to foreign arbitral awards, as explained above.

Under Section 4 of the NYC Act, the local court deliberating on the matters arising from an arbitration agreement has the power to stay the judicial proceedings where one party files an application to refer the dispute to arbitration. However, the local court may refuse to refer the matter to arbitration where it finds that the arbitration agreement itself is null and void, inoperative or incapable of performance.

The statutory test stipulated under Section 4 of the NYC Act impeding the enforcement of a foreign arbitration agreement is strict. This complements the position under Section 4 of the NYC Act that the court has a positive duty to enforce an arbitration agreement, save for exceptions, and refer the matter to arbitration. This principle has been followed in the string of cases decided by Karachi High Court: *Travel Automation v Abacus International (Pvt) Ltd* 2006 CLD 497;

“Foreign investors can benefit from the Arbitration (International Investment Disputes) Act 2011 for enforcing the foreign arbitral awards in Pakistan”

Metropolitan Steel Corporation Ltd v Mac Steel International UK Ltd 2006 CLD 1491.

Section 9 empowers the Federal Government of Pakistan to make rules, through notification in the official gazette, to carry out the purposes of the NYC Act. The annexed Schedule to the NYC Act enlists the Washington Convention, whose provisions are to be read alongside the NYC Act.

The principle of ‘separability’ of arbitration agreements from the material contract between the parties has been well received by the domestic courts. The courts in Pakistan have taken the view that termination or frustration of the contract would not sabotage the validity of the clause pertaining to an arbitration agreement. Recently, in a seminal case decided by the Supreme Court in Pakistan, some contracts were adjudged void *ab initio*. When the matter surfaced at the Sind High Court, it clarified that the top court meant the substance of the contract to be void *ab initio* and not the arbitration

clause entailing the agreement to arbitrate by the parties.

Effect of repeal of The Arbitration (Protocol and Convention) Act 1937 (VI of 1937)

The Arbitration (Protocol and Convention) Act 1937 (VI of 1937) (the Act) is repealed only for the purposes of foreign arbitral awards made after July 14 2005, while the Act will continue to have effect for arbitral awards made prior to that date.

The NYC Act has been a linchpin for affording foreign arbitration agreements and arbitral awards a legal place in the judicial system of Pakistan. The NYC Act categorises the recognition and enforcement of foreign arbitration agreements and arbitral awards under separate provisions so as to private parties sound legal basis to enforce their rights in Pakistan.