ROLE OF JUDICIARY AND JURISPRUDENCE IN DOMESTIC AND INTERNATIONAL ARBITRATION[*]

by

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Introduction

Today I will discuss an aspect of arbitration and its impact in Pakistan. Courts in different national systems throughout the world vary with respect to how interventionist they are in the arbitral process. In recent decades, ever since Pakistan has entered the new world of international trade, the role of judiciary in the matter of arbitration has gradually been the subject of much debate, as a result of a number of various decisions given by the courts. Is the role that has been played by the judiciary justified? I must confess that my perspective and vision being a counsel in number of international arbitrations (pre, during and post arbitration) has totally changed since my elevation to the Bench. There is a very interesting observation in paragraph 7.01 of Redfern and Hunter on International Arbitration: Sixth Edition: Oxford University Press. The observation is as follows:-

> *"The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership."*

We shall now look into various arbitration decisions passed by the Pakistani Courts, then venture into the challenges faced by the legal fraternity of Pakistan in arbitration, followed by the need for judicial training and other ancillary matters before concluding this paper.

Role of Pakistan and the International Arbitration since 2005

After ratifying the New York Convention, Pakistan first brought the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 ("2005 Ordinance") which was eventually promulgated as an Act in 2011 called the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the "2011 Act"). When the 2005 Ordinance was introduced, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 "(New York Convention")was attached as Schedule to the said Ordinance and if any person had to enforce the award under the 2005 Ordinance, the grounds to be taken were subject to Article 7 of the New York Convention.

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Role of Courts in the International Arbitrations

The 2011 Act defines the Court under Section 2(d) with the exclusive jurisdiction to adjudicate and settle the dispute under Section 3 and enforcement under Section 4. Hence, the Judge of the High Court is ample jurisdiction to enforcement or refuse the foreign award. Also, the High Court deals with the awards under its appellate jurisdictions or under the judicial review filed under Article 199 of the Constitution of Pakistan, 1973. In one of the first cases in Pakistan on the enforcement of a foreign award titled Shamil Bank vs. Jawad Anwar, Shamil Bank brought the case to enforce the arbitration of Gulf State, Gulf Corporation Council (GCC) against Jawed Textile Mills. I defended the award by taking objections under the New York Convention on the basis that (1) no proper notice was given, (2) the award granted was outside the scope of the arbitration agreement and was not in accordance with the language prescribed in the Agreement- which was in Arabic, (3) it was outside the scope of arbitration and (4) it was against the public policy of Pakistan. The Lahore High Court, instead of enforcing the award, since the law in question was substantive law, framed the issues on 12 November, 2008. Shamil Bank produced one of the leading experts on international arbitration; Mr. Toby T. Landau, who in fact was one of the Draftsmen of the 2005 Ordinance. Thereafter Shamil Bank further produced another international expert on Arab Arbitration, Dr. Hassan Al-Radi, to give information on Gulf Arbitration. They were cross examined on the public policy of Pakistan since it was the first arbitration proceeding where the matter of public policy was brought up. The case was then finally settled. On the same lines, in Jess Smith and Sons Cotton LLC vs. D.S. Industries, Civil Original No. 628 of 2014, the honorable Justice of the Lahore High Court, Mr. Justice Shahid Waheed, has held as follows:

> 7. The above noted points usually involve investigation into the disputed questions but it is not in every case that the Court would be under obligation to frame issues, record evidence of the parties and follow the procedure prescribed for decision of the suit. In my view, the matter has been left to the satisfaction of the Court which has to regulate its proceedings and keeping in view the nature of the allegations in the pleadings, may adopt such mode for its disposal, as in consonance with justice, the circumstances of the case may require. It is thus within the competence of this Court to frame formal issues and record evidence if the facts of a particular case so demand. So far as the case on hands is concerned, inter alia, the questions whether the e-mails/ letters available on record constitute contract containing arbitration; whether Pakistan AXA International was duly authorized to act as an agent of the plaintiff; and, whether the arbitration proceedings were conducted in accordance with the rules of the International Cotton Association Limited, in my view, are the questions which cannot be decided without framing issues and allowing the parties to adduce evidence in support of their respective claims.

The superior Courts in Pakistan have held in number of judgements that procedural laws of Pakistan will prevail over the principles of international law. Back in 2000, I was also the counsel in a case which was decided by the honorable (r) Chief Justice of Pakistan, Mr. Tassaduq Hussain Jillani, who was then the Judge of the Lahore High Court, by passing a remarkable judgment in the year 2000 in T. Zubair Limited vs. Judge, Banking Court, Lahore, 2000 CLC 1405 (Lahore). He developed the concept of forum non conveniens, which refers to discretionary power of Court to decline jurisdiction when convenience of parties and ends of justice would be better served if actions. were brought and tried in another forum (Sixth Edition Centennial Edition, 1891‑1991). Invoking this doctrine in a number of jurisdictions including UK and USA stays were granted where it was found that some other forum was the more appropriate than where the suit was filed. In Maulana Abdul HaqueBaloch vs. Government of Balochistan, PLD 2013 SC 641 the Supreme Court of Pakistan regarding the proceedings of International Chamber of Commerce ('ICC') and International Convention on Settlement of Investment Disputes (ICSID) held that Pakistani Courts are sovereign and the supremacy of Pakistani Courts was established in this ground breaking judgment and it was also stated that where a contract is entered into with a foreign establishment, it is governed by the municipal laws of where the contract is being executed and where it has been specifically written in the agreement that Pakistani laws applies, then parties must abide by the terms.

Recent case law on Arbitration the Supreme Court of Pakistan

Under Articles 189 and 201 of the Constitution, the judgments of the Supreme Court and the High Courts shall be binding on all the Courts below, if they enunciate the principles of law. In a recent landmark judgment, Gerry's International (Pvt.) Ltd. vs. Aeroflot Russia International Airlines, 2018 SCMR 662, the honorable Chief Justice of Pakistan, Mian Saqib Nisar, has settled the law regarding arbitration and powers of an arbitrator. The honorable Chief Justice, in detail, has considered the questions that what is the true scope, import and application of sections 30 and 33 of the Arbitration Act; what is the jurisdiction of the Court while making an award rule of the Court; whether the Court can sit in appeal over the decision of the arbitrators; whether the Court can make a roving inquiry and look for latent or patent errors of law and facts in the award; which flaws and shortcomings, if allowed to remain shall cause failure of justice and vitiate the proceedings before the arbitrator and the award; what are the questions for determination of arbitration agreement; and what are the grounds/basis on which an arbitrator should be held to have misconducted himself? The honorable Court has expanded and laid down thirty (30) principles governing the law in the country.

Last year, judgment of the honorable Chief Justice of Pakistan Mian Saqib Nisar, Province of Punjab vs. Muhammad Tufail and Company, PLD 2017 SC 53, has decided the question that which Court shall have the territorial jurisdiction in terms of Section 2(c) and Section 31(1) of the Arbitration Act, 1940 (the Act) where an Arbitration Award could be filed and the same

could be made Rule of the Court. This case was related to arbitration clause in agreement between private company and Provincial Government for performance of civil work, and it was held that Government in the exercise of its core functions viz, its executive, legislative, judicial and quasi-judicial, and administrative roles exercised sovereign powers, but when it engaged in commercial activities it was not exercising sovereign power, rather it was engaging in business/commercial activities and merited no undue advantage over ordinary litigants. When a government entered into the domain of business and commerce it could not be given a premium of its position and must be treated at par with its competitors or near competitors in the private sector. Commercial activities of government must be regulated in the same manner as those of the private sector;

In another remarkable judgment of honorable Justice Saqib Nisar, Karachi Dock Labour Board vs. Quality Builders Ltd 2016 PLD 121 SC, the principles of the doctrine of least intervention (by the court) were recognized as valid, but it was held that the court would not apply the same where there had been sheer non-compliance concerning the provisions of the Arbitration Act, 1940 ("the 1940 Act"). It was further provided that if an arbitrator is appointed in contravention of the 1940 Act, then Court may intervene to rule that the said-Arbitrator is incompetent to act as one.

Recently, the Supreme Court of Pakistan, in Pakistan Railways through AGM (Traffic), Lahore vs. Four Brothers International (Pvt.) Ltd PLD 2016 199 SC, encouraged the arbitration proceedings where the Respondent had gone to the Civil Court by virtue of Section 20 of the 1940 Act referring the dispute of arbitration. While the lower courts and High Court ruled in favor of the Respondent, the Supreme Court held that proceedings of arbitration shall commence and be concluded within four months.

Whether International Arbitration can be stayed by a Pakistani Court?

As a lawyer, I have also been involved in similar petitions before the Islamabad High Court in the case of Orient Petroleum vs. OMV where the sovereignty of Pakistani courts was in question. OMV itself came to Islamabad High Court in 2011 to initiate arbitration proceedings under a local agreement which we challenged. (Please see OMV Energy vs. Ocean Pakistan 2015 CLC 1504 and OMV vs. Ocean Petroleum 2016 MLD 1615).Upon receiving no relief from the Pakistani Courts, OMV on the same agreement chose to invoke the English arbitration clause, and filed a petition before the ICC, London. There, they tried to challenge the proceedings of Pakistani Courts of December, 2014 and simultaneously, on the advice of English barristers and solicitors, filed a claim titled OPL and others vs. OMV Maurice [2015] EWCA Civ. 1171 in the English Courts where it was held that OMV is entitled to pursue a claim for sums due under the agreement in arbitration against ZPCL under the rules of the ICC and the arbitrators had jurisdiction over arbitration proceedings. During the same time, the Delhi High Court in the case

of McDonald's India Private Limited vs. Vikram Bakshi & ORS, stayed the English arbitration in London on the principle that the dispute between McDonald's and Bakshi needed to be resolved through arbitration before the London Court of International Arbitration and had the mandate to refer the parties for arbitration, noting that the arbitration agreement between the parties was in place and that the proceedings could not be prevented as they were not null, void, inoperative or capable of being performed. This was then challenged by McDonald's in Supreme Court but English jurisprudence on arbitration is so strong it states that where the arbitration is on-going in UK Courts, only they have the power to stay proceedings in the foreign courts, hence their claim failed.

English Jurisprudence on Hashwani vs Jivraj Case

Similarly, in another case Jivraj v. Hashwani [2010] EWCA Civ. 712, UK Court of Appeal ruled that the requirement that arbitrators must be members of the Ismaili community was not severable from the rest of the agreement for arbitration, and for this reason the said agreement was null and void in its entirety. This worked in favour of our party where the UK Court of Appeal made a decision to rule on a matter of arbitration and declared it to be invalid. However, the Court of Appeal's decision was reversed by the Supreme Court of the United Kingdom in Hashwani v Jivraj (2011) UKSC 40, where Lord Clarke in his judgment held that Jivraj's application which requested the court to strike out Mr. Hashwani's arbitration claim form shall succeed; and the agreement was not held to be invalid. This case has gained so much popularity that it is now included in various textbooks. Finally, the matter came to a stop in Hashwani v Jivraj [2015] EWHC 998 (Comm**),** where Mr. Sadruddin, aggrieved by the decision of the Supreme Court, filed a fresh application in March 2013, but the claim was struck out by Justice Walker of the English Commercial Court stating that the fresh proceedings involved unjust harassment.

Challenges faced by the legal fraternity of Pakistan in arbitration

Generally in Pakistan, it is an evident fact that people think that going to court should be a last resort, whether you are suing or are being sued because commercial, or for that matter, any litigation can be very expensive, stressful and time-consuming in which you have to make sure that you understand and follow the procedures. However, the most common and traditional form of judicial dispute resolution is litigation, in which the proceedings are very formal and are governed by rules, such as rules of evidence (Qanun-e-Shahadat Order) and procedure (Civil and Criminal Procedure Code), which are established by the legislature. In litigation, an impartial judge, based on the factual questions of the case and the application law, decides the outcomes of the cases, by following an adversarial system. The verdict of the court is binding, not advisory; however, both parties have the right to appeal the judgment to a higher court. Moreover, the

same set of civil rules applies to all civil cases in court, regardless of the size, complexity, or subject matter of the case, or the amount in controversy.

We should be appreciative of the fact that it is being seen that judges no longer sit back passively and let the lawyers manage their cases. Rather, the judges are now taking control of their cases from the very start. Therefore, starting from the independence of Pakistan and continuing into the present era, a series of amendments have enshrined our judicial system into Civil and Criminal Procedure Code and other laws, formally validating it as a favored practice to encourage and enable the courts to use case management tools in pursuit of justice.

But even though we are nearly fifty years into amending the procedural laws, many practical questions about the real-world effectiveness of judicial system remain at least partly unanswered, and one can think of the possible questions in mind like, does amending the procedural laws really work? Does it actually reduce expense and delay? Do judges have the right tools at their disposal for complete dispensation of justice? Do judges have the resources they need? Are judges sufficiently and properly using the tools and resources they do have? If judges are not using those tools and resources effectively, why is that occurring and what can be done to change it?

However, one cannot discuss changes to judicial system without considering how those changes might alter the role of judges or whether the changes might conflict with competing international norms. Thus, any proposed amendment would continue to be subject to these critiques even if it was shown conclusively that the proposal in question would in fact improve the trial judge's ability to manage cases. It is also a thought to ponder on that without having the "ownership" of a particular case; the trial judges lack both the ability and the incentive to exercise control. Maybe, the use of a single judge assigned to a case from beginning to end provides the parties in the litigation with a sense of continuity.

The Need for Judicial Training

In Pakistan, the subject of continuing education has so far received only ad-hoc attention amongst the pressures and demands of daily judicial life. However, it is our collective responsibility to ensure that we are equipped to continue to meet the demands of our societies for the timely and efficient dispensation of justice. While we should appreciate that there have been positive results in development of an informed, strong and independent judiciary; but people's lives are on a daily basis affected in the most fundamental and immediate ways by judicial decisions. It is self-evident therefore, that need for continuing judicial education and training must begin by a consideration of the social context for which it is to be applied.A challenge for continuing education and training must therefore be to dispel the age-old criticism that the

judicial system remains very much a part of the social hierarchy bent on preserving the privileged.

Perhaps, the judiciary and the litigants should assume the need of the law reform advocates and the types of programs, which need to be developed for Pakistan, must not be limited only to the continuing judicial education and training, but also to identify the previous deficiencies in legal education and training as well as the imperatives of the contemporary and future global environment. There still are many judicial areas in respect of which many of today's judicial officers were not trained at all at university but which are now or will be part of the everyday legal landscape. Essentially from the very start, the judicial officers should be provided with education about the laws, which are bringing about radical changes at regional and international level. A further area for judicial training should involve the use of information technology as a tool for research because all other countries are also modernizing their systems through the introduction of information technology in their system.

Although, there remains an urgent need to sensitize and train the lower judiciary in the proper application of the new rules, but we must also acknowledge the tremendous role of Federal Judicial Academy in this process. However, there must be more international exchanges, allowing Judges from one jurisdiction to sit with a Judge in another in order to observe the practical operation of the other procedure.

Hence, all new appointees to law service should be given induction training, by providing courses in various subject areas; improving the quality of performance so as to reduce mistakes; examining methods for the more expeditious disposal of cases; strengthening existing training facilities within the region; ensuring that judicial personnel are kept abreast of contemporary developments in the law; promoting best practices in the administration and operation of the justice system; and enhancing the career opportunities of the judiciary.

In pursuit of a Culture of law Education and organized, systematic training under the control of an adequately funded judicial body, it is an objective towards which we are actively working in Pakistan. All this towards the establishment of a regional judicial programme to ensure that our Law Officers are not left behind in the global movement towards assisting judiciaries to respond to the challenges of the new millennium.

Arbitration in Pakistan

My purpose for saying and suggesting all these things was to provide you with the challenges and opportunities to the most traditional dispute-resolution process, the litigation. However, on the other hand, there are also many other options available, like negotiation, mediation and arbitration, often called alternative dispute resolution. Whether you are involved in a family or

neighborhood dispute or a suit involving hundreds of thousands of rupees, these processes have started to be considered in the business course. They often provide a fair, just, reasonable answer for both parties, to allow reaching resolution earlier and with less expense than traditional litigation.

With the growth of international trade and commerce, more and more disputes arise from cross-border transactions involving 'foreign' parties, the businessmen have found that litigating disputes in the national courts of other parties can be an unfamiliar and a difficult, time consuming and costly process with, not always, a satisfactory outcome.

One of the principle advantages of arbitration is the general ease of enforcement of an arbitration award, because of enforcement of the New York Convention. The effect of the Convention is that it lays down a system for the judicial recognition and enforcement of arbitral awards obtained in another country that is a party to the Convention. Given that approximately 120 countries have signed the New York Convention, the result is that arbitration awards are now receiving greater recognition internationally than many national court judgments.

I think it is essential to highlight that while signing any agreement; your first step for choosing the dispute resolution mechanism should be to check the possible dispute that may occur and try to quantify the loss that may arise for each side in the dispute, and you may need to take advice on the legal position in such cases.

Though arbitration was a mechanism introduced to help circumvent the expense and load of the traditional legal process, one of the consequences of arbitration is that the final decision of an arbitrator is not easy to overturn by the aggrieved party of the award given. The arbitration clause, now a part of nearly all the contracts and agreements, allows either party to invoke the clause and settle the dispute among the parties through an entity of their choosing. Retired judges or private lawyers often become arbitrators or mediators; however, trained and qualified non-legal dispute resolution specialists are also growing within this field on account of the technical needs.

What makes a strong Arbitration Center?

The main purpose of arbitration as we know is to accommodate dispute resolution process that best suits a particular case that can only be determined upon an analysis of the dispute itself and the needs and interests of the parties. To establish what makes those arbitration centers strong, it must be considered what makes arbitration attractive to applicants.

One of the main advantages of arbitration is its capacity to have disputes resolved quickly. Even though the majority of court actions settle before trial, this often occurs only after lengthy and

expensive trial preparation, including examinations for discovery. Arbitration provides the opportunity to side-step prescribed procedural requirements of litigation. The parties also determine the timeframe for the arbitration, allowing them to bypass delays inherent in litigation. Costs are also a major factor in parties choosing to go into arbitration as litigation can be extremely expensive, although in recent times the cost of arbitration has drastically increased but nonetheless less expensive than litigation.

Arbitration provides the parties with the opportunity to choose the individual(s) who will decide the issues in question by, for example, choosing a neutral person with expertise in the subject matter of the dispute. Those centers with the ability to provide individuals who are experienced in all matters of commercial law will be the most attractive for parties looking for arbitration venues.

Many of the disputes involving federal governments and commercial organizations are technical and complex in nature. Resolution of these disputes is often best served by special knowledge or expertise on the part of the decision maker. Arbitration centers often provide the parties with opportunities to secure the services of an individual experienced in a technical area, or one who has knowledge of the commercial norms relevant to a particular business field. Even otherwise, there are some cases, which by their very nature require a confidential outcome. This may occur because the dispute involves privileged information or issues of particular sensitivity. Hence, Arbitration Centers may provide for confidential information to remain privileged.

Creating a specialist Court to deal with arbitration related matters:

Hong Kong was one of the first known jurisdictions which have appointed a dedicated arbitration judge who hears all cases dealing with arbitration. Singapore has recently followed the same model. Hence, the body of arbitration jurisprudence from these two jurisdictions has been undoubtedly contributing to the growth of understanding and acceptance of arbitration in Asia. Similarly, in September 2013, the Chief Administrative judge of the courts of New York State appointed Judge Charles Ramos of the state Supreme Court to hear all international arbitration disputes arising before the Commercial Division. Furthermore an administrative order issued by the department of justice stated that any international arbitration issue that arises before a judge in the county of New York can be transferred to Judge Ramos. But even the New York Law Journal has admitted that in order for this initiative to be successful, there is a need for a judge who will primarily adjudicate on all matters of arbitration at a Federal level which till now has been lacking.

However, the Lahore High Court has lead the project to establish Alternate Dispute Resolution Centres in Punjab, because of which the ADR Centres have been opened across the province of Punjab and in all the 36 districts with 72 dedicated judges to help parties achieve an amicable

solution to their disputes. To refer a matter to the ADR Centre, the parties just have to give an application to the court hearing their case and have to consent to settle the matter through an ADR Centre. The judges in these centres are already trained by the Punjab Judicial Academy to help parties reach a settlement.

The much appreciable step has already started to pay dividends to litigants and they are going in large numbers to the ADR Centres to get the desired results of early disposal and amicable solution to their disputes. As per a report published by the Lahore High Court's website, there were 437 references received by ADR Centres in 36 districts of Punjab in just 3 days, from the 1st of June till the 3rd of June, 2017, out of which 250 have already been settled. This is no doubt a phenomenal figure and a big achievement for everyone involved.ADR centres are without any doubt a blessing for the litigants of Punjab. Where, on one hand, these centres are helping litigants arrive at an early resolution of their disputes, it is also decreasing the workload of the lower judiciary and helping them decide other cases in a justifiable timeframe.

Conclusion

The aims and objectives of the 1940 Act could be met with adequate availability of skilled, trained and honest arbitrators as well as a well-equipped arbitration institution. The need of such arbitrators is also very important. Because if there is an emergent opinion that by choosing arbitration over litigation, parties have substantially diminished their chances of getting good quality of justice, it will obviously darken the future of arbitration. And what is needed is inculcation of a culture of arbitration among the key stakeholders - the Bar, the Bench, the arbitrators and the consumers of arbitration.

Sir LJ Earl Warren once correctly said that "It is the spirit and not the form of law that keeps the justice alive."