CRITICAL ANALYSIS OF THE RECOGNITION AND ENFORCEMENT OF (ARBITRAL AGREEMENTS AND FOREIGN ARBITRAL AWARDS), Act, 2011 AND ITS IMPLEMENTATION FOR INVESTORS FRIENDLY DISPUTE RESOLUTION IN PAKISTAN

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A thesis submitted in partial fulfilment of the requirements for the Degree of Master of Laws (LLM) with specialization in International Trade Law at the Department of Law, Faculty of Sharia & Law.

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In the name of Allah, the most merciful and beneficent

DEDICATION

This work is dedicated, first and foremost, to Allah Almighty, my creator and unfailing source of strength, wisdom, and inspiration. I also extend this dedication to my beloved parents, whose guidance and encouragement have been my constant support; my esteemed teachers and supervisor, for their invaluable wisdom and mentorship; and my cherished siblings and friends, for their unwavering companionship. May they all be abundantly blessed.

DECLARATION

I hereby declare that this thesis is the result of my original work and has not been copied, in whole or in part, from any external source. I confirm that this thesis has been prepared entirely through my efforts, with the valuable guidance of my supervisor and constructive support from my colleagues. I further affirm that no portion of the work presented herein has been submitted, either by me or any other individual, in the application for any degree or qualification at this or any other university or institution of higher learning.

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ACKNOWLEDGMENT

All praise and gratitude are due to Allah Almighty, whose blessings of knowledge, intellect, and guidance have enabled me to undertake and complete this journey. I am profoundly grateful for the wisdom He has imparted and the privilege of having remarkable mentors throughout my academic pursuits.

I extend my sincere gratitude to my professors and the esteemed faculty at the International Islamic University, Islamabad. Their guidance has instilled in me the value of continuous growth, teaching me that there is always room for improvement, regardless of one's achievements. I am deeply thankful for their unwavering commitment and enduring support as exemplary educators.

I am also thankful to my colleagues for their encouragement and support, which has enriched my learning and inspired me along the way.

Lastly, I owe my deepest appreciation to my wonderful parents, whose values and dedication have instilled in me a lifelong passion for knowledge. My heartfelt thanks go to my beloved siblings and friends for their constant motivation and moral support throughout this journey.

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Abstract

This dissertation provides comprehensive analysis on the legal regime concerning arbitration law in Pakistan, with a particular focus on the legal framework concerning its domestic and international applications, and the implication of arbitration as an alternate dispute resolution mechanism, in terms of its history, its development, and existing legal framework currently in force regarding Arbitration in the domestic and foreign context within Pakistan. This Dissertation also critically examines the different types of arbitration, inclusive of international, commercial, domestic, while also identifying its limitations with respect to the legal landscape of Pakistan. This research factors in applicable conventions, and establishes their significance within the context of Pakistan, and explains how UNCITRAL Model Law, NY Convention, and ICSID convention have shaped the arbitration framework in Pakistan, and why Pakistan has different arbitration models depending on the context, what transitions have taken place within the legal landscape regarding the jurisprudence established on Arbitration framework, and how it had resulted in the promulgation of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011, while comparatively highlighting the insufficiencies within the legal structure which had led to the promulgation the 2011 Act. This study draws upon extensive academic literature, case laws, international treaties, historic statutes in order to demonstrate the workings of arbitration regime in its entirety in Pakistan, both from a national, and global standpoint. This research also offers suggestions as to improve the arbitration framework currently in force in Pakistan, with the need for legal reforms so as to align further align national and international aspects of Pakistan's arbitration regime in accordance with the international standards, aiming development towards a more investor friendly environment, which is done through the incorporation of practical insights in conjunction with legal theory. Moreover, this research aims to contribute towards current discourse on the subject of arbitration and its role in shaping commercial disputes.

Thesis statement

The Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011 (Referred to as the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011), the Act aspires implement foreign arbitral awards through the state machinery of Pakistan, which otherwise should have been through the arbitration regime operating through the Arbitration Act 1940 but because the 1940 Act is deficient and does not abide by the international arbitration standards. The deficiencies within the Arbitration Act 1940 coupled with the previous views of the courts (inclusive of the Supreme Court of Pakistan) became the reason that a separate law was required for the enforcement of foreign arbitral awards, which in effect has created a dual arbitration regime within Pakistan and still both of these arbitration regimes i.e., Domestic & International fall short of the acceptable international standards.

Chapter 1: INTRODUCTION,

1.1 Introduction

Alternative Dispute Resolution (**ADR**) primarily is a mechanism for resolving contentious disputes which otherwise would have been the subject matter of conventional litigation. Among the ADR mechanisms the primary means of resolving contentious disputes is by way of Arbitration, Mediation or through Conciliation. Within the legal system of Pakistan ADR and the mechanisms connected therewith has a limited scope, which is primarily because of reliance on litigation for the resolution of disputes, and mechanisms which bypass the litigious approach are mostly beyond the scope of the legal framework, but despite that a prevailing interest within ADR mechanisms has been on the rise in Pakistan, so that it could unburden the courts, save the resources of the disputing parties, and do away with the disputes in a time efficient manner.

Amongst the ADR mechanisms, Arbitration exists within the legal framework to resolve civil disputes, but it should not be perceived as Arbitration within the standard sense because even though a framework exists which addresses the contours of arbitration, but it is not only outdated but it is grossly similar to the traditional litigation, which renders the arbitration regime mostly useless, which in part can be attributed to the lack of the amendments within the Arbitration Act of 1940 to bring the existing law in accordance with the global standards being used to regulate arbitration regimes. Globally arbitration laws are either modelled or in part inspired by the UNCITRAL model Law on Arbitration, but Arbitration Act of 1940 is not compatible with it, thereby necessitating the need for a mechanism which could implement awards rendered by foreign arbitration tribunals within Pakistan.

1.2 Background

The Arbitration Act, 1940 is the law governing arbitration in Pakistan. Being a colony of the British Empire, the undivided India including Pakistan was governed by the Arbitration Act (1940) modeled in the line of English arbitration Act (1936). After the declaration of independent status of both the countries in the year of 1947, they continued to follow the same Act, but India until the enactment of the Arbitration and Conciliation Act (1996) in tune with the UNCITRAL Model Law. Though the attempts to review colonial era legislations have been in progress, but the arbitration law in Pakistan which is riddled with instances of court-based interventions is yet to be reviewed or replaced in its entirety[1]. The Arbitration Act of 1940 which is still in force in Pakistan could not be used to implement foreign arbitral awards because the 1940 Act still considers awards rendered by foreign arbitration tribunals amenable if the supervisory courts deems so which not only limits the scope of arbitration but it adversely impacts the confidence of the disputing parties on the arbitration regime[2]. Additionally, as the Arbitration Act grants the courts a wide range of powers to do away with the arbitral award, this mechanism itself is also not sustainable in terms of the globally accepted standards which operate in part of the notion of party autonomy, and on the conception that awards rendered by the tribunal would be given effect, but the Arbitration Act 1940 does not take these factors into account, which in effect limits the application as an effective legislation to govern the arbitration framework in vogue[3]. This issue is materially relevant when it is considered that Pakistan became a signatory to the NY Convention 1958, which deals with the enforcement of foreign arbitral awards. The Recognition and Enforcement (Arbitration Agreement

[1] Mukhtar, Sohaib. "Settlement of Disputes by way of Arbitration in Pakistan." World Journal of Social Science Research (2016).
[2] Won, Sung-Kwon. "Overview of alternate dispute resolution with special reference to arbitration laws in Pakistan." J. Arb. Stud. 23 (2013): 149.
[3] Sarwar, Komal. "Pitfalls in the domestic and international commercial arbitration in pakistan." Pakistan Journal of International Affairs 6, no. 2 (2023).

and Foreign Arbitral) Act, 2011 which implements the NY Convention in Pakistan ("Convention Act") only addresses the part of the problem, but fails to address the overarching problem, which was that the arbitration regime in Pakistan can enforce foreign arbitral awards but is incapable of conducting arbitration proceedings itself, and with respect to enforcement of foreign arbitral awards, the 2011 Act even though integrates the Article V / 5 of the NY Convention 1958 but does not prescribe a detailed mechanism regarding subverting interventions but subordinate courts [4]. Prior to the legislation of the Acts passed in 2011 for the enforcement of arbitral awards, the only statue which was relevant to foreign arbitral awards was the Arbitration (Protocol and Convention) Act 1937 which was promulgated during the colonial era in order to give effect to the Geneva Protocol on Arbitration Clauses and Convention on the Execution of Foreign Arbitral Awards.

The Arbitration and Protocol Act of 1937 has been superseded by the 2011 Act, which applies solely to 'foreign awards' issued before 14 July 2005 that are not classified as "foreign arbitral awards" under the new law. The widespread ratification of the NY Convention, including by Geneva Convention signatories, has rendered the 1937 Act largely obsolete. The 2011 Act was introduced to resolve uncertainties regarding terms like "domestic arbitration," "domestic award," and "foreign arbitral award," providing clarity and a framework for arbitration within Pakistan's legal context. This act clarified the enforcement mechanisms for foreign arbitral awards and was first presented in Parliament on 27 April 2009 before being enacted in 2011. Its primary purpose was to provide a framework for recognizing and enforcing foreign arbitral awards while formally integrating the provisions of the 1958 NY Convention into domestic law. The 2011 Act focuses

[4] Munir, Yasir. "The Evolution of Arbitration Law in Islamic Republic of Pakistan: Historical Context and Future Directions." AL-IDRAK JOURNAL 4, no. 1 (2024): 59-71.

solely on domestic implementation of the NY Convention.[5]; the notion party autonomy plays an integral role within the international commercial arbitration and also indicative of the notion that how the Arbitration Act of 1940 is a deficient piece of legislation which in effect should be scrapped away for good because it materially does away with the primary tenets linked to the process of Arbitration[6]; and freedom to choose of forum principles between private parties.[7] Moreover, the regulations pertaining to dispute should be chosen by the parties and before a forum of their choosing, which has been historically recognized within the history of trade law and the notion of private justice.[8]

Arbitration has not only supplemented the over-burdened judicial infrastructure of Pakistan but has also evolved to be in harmony with the ever-changing global environment of international arbitration (IA), both commercial and investment. Arbitration has evolved as the most effective Alternative Dispute Resolution (ADR) because of the well-developed legal framework for the arbitration. The other ADR mechanism like mediation and conciliation are still in infancy.

The legal definition for the arbitration is;[9]

"A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."

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[5] Research Society of International Law, 'UNCITRAL' (Port, no date) https://port.rsilpak.org/uncitral/#:~:text=%E2%80%9CIn%20a%20commercially%20fast%20paced,mention%20of%20incorporation%20by%20reference. accessed 2 January 2025.

[7]Peter Edward Nygh, *Autonomy in International Contracts* (OUP, 1999), pp.15–27.

[8] David J. Bederman, *International Law in Antiquity* (3rd edn, CUP, 2004), p.8; Gerhard Von Glahn, *Law Among Nations* (3rd edn, Macmillan, 1976), pp.464–465.

[9]Bryan A. Garner, *Black's Law Dictionary* (9th edn, WEST, 2009) 72.

Arbitration is a method of resolving disputes outside the judicial system, where an independent and neutral third party, known as an arbitrator, oversees the proceedings. This process involves reviewing the written submissions or hearing arguments from the parties involved. Based on the evidence presented, the arbitrator delivers a decision, commonly referred to as an award, which holds binding authority and can be enforced under the law.[10]

The arbitration is preferred upon the other ADR mechanisms because it bounds the disputing parties to the award rendered by the arbitrator. The main advantage of the arbitration is its speedy nature i.e. the dispute is resolved in less time and it also reduces the burden of the courts. It is also beneficial for the disputing parties because this avoids the exhaustive litigation process.[11]

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Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011 was enacted by Pakistan's National Assembly in 2011 with its primary purpose is to serve as an implementation mechanism for the 1958 NY Convention[12]. Notably, the 2011 Act draws partial inspiration from India's Arbitration and Conciliation Act of 1996, particularly in its enforcement mechanisms. However, unlike its Indian counterpart, which implements the UNCITRAL Model Law and aims to minimize judicial intervention in both domestic and international arbitration, the

[10] Mauro RubinoSammartano, *International Arbitration Law and Practice* (3rd edn, Juris Net, LLC, 2014) 130.

[11] Areeba Rashid, 'Enforcement of Foreign Arbitral Awards in Pakistan' (*Courting the Law*, 15 December 2018) <http://courtingthelaw.com/2018/12/15/commentary/enforcement-of-foreign-arbitral-awards-in-pakistan/> accessed 23 January 2021.

[12] A copy of the Bill is available at: http://www.na.gov.pk/govt_bills/arbitration_act2009_270409.pdf (accessed on 13 March 2021).

Pakistani legislation remains distinct in its scope and application[13]. The 2011 Act in Pakistan is specifically limited to the enforcement of foreign arbitral awards involving countries with mutual trade agreements. Other matters, such as disputes over investment or expropriation within the jurisdiction of ICSID, are governed by the ICSID Act of 2011, which was also enacted in the same year[14].

Pakistan became a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("Convention") in 1958 and later operationalized its provisions through Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011. This Act enables the High Courts of Pakistan to enforce foreign arbitral awards. According to the 2011 Act, any award rendered by an arbitral tribunal in a country that observes the principle of reciprocity, meaning thereby that whether as a signatory to the Convention or through a bilateral enforcement arrangement would be recognized and enforced within Pakistan's jurisdiction.

The 2011 Act which itself is not without its own set of flaws, had brought Pakistan a step closer to the international standards which were in effect globally, and had thereafter enabled the courts to enforce awards rendered by foreign arbitration tribunals, but the courts for the purposes of the 2011 Act were the High Courts and not the Civil Courts which only exercise jurisdiction in accordance with the Arbitration Act of 1940, and after the promulgation of the 2011 Act the subordinate courts were also precluded to exercise jurisdiction in matters involving foreign arbitral

[13] For a detailed analysis of the REAO, see ShahidJamil, Pakistan's Implementation of the New York Convention (2008) 74 Arbitration 170-180.

[14] Pakistan initially incorporated the Washington Convention into its domestic legal framework through the promulgation of the Arbitration (International Investment Disputes) Ordinance, 2006. For further discussion on Pakistan's implementation of the Washington Convention, refer to Shahid Jamil, "Pakistan and ICSID: A Step in the Right Direction" (2007) 73 Arbitration 228–230.

awards, which was also inclusive on matters of public policy[15]. Whereas, the prominent ground of "public policy" which historically was used or rather misused in order to stall the enforcement of foreign arbitral awards, was also incorporated in the 2011 Act because of its ties with the NY Convention of 1958. An interesting observation was made by Mr. Justice Ajmal Mian "I may observe that while dealing with an application under section 34 of the Arbitration Act in relation to a foreign arbitration clause like the one at issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honored as generally the other party to such an arbitration clause is a foreign party. With the development and growth of international trade and commerce and due to modernization of communication/transport systems in the world, the contracts containing such an arbitration clause are very common nowadays. The bargain that follows from the sanctity which the Court attaches to contracts must be applied with more vigor to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will tarnish the image of Pakistan in the comity of nations. A ground which could be a contemplation of party at the time of entering into the contract as a prudent man of business cannot furnish basis for refusal to stay the suit under section 34 of the Act. So the ground like, that it would be difficult to carry the voluminous evidence or numerous witnesses to a foreign country for arbitration proceedings or that it would be too expensive or that the subject-matter of the contract is in Pakistan or that the breach of the contract has taken place in Pakistan in my view cannot be a sound ground for refusal to stay a suit filed in Pakistan in breach of a foreign arbitration clause contained in contract of the nature referred to hereinabove. In order to deprive a foreign party to have arbitration in a foreign country in the manner provided for in the

[15] Tahir, M.I., 2023. Arbitration System in Commercial Disputes in Pakistan and Enforcement of Foreign Awards. Al-NASR, pp.73-92.

contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or would amount to forcing the Plaintiff to honor a different contract, which was not in contemplation of the parties and which could not have been in their contemplation as a prudent man of business." (Emphasis added)

In another judgment by reference to the note, it was maintained that: "…a party having entered into an agreement after having full knowledge of its consequences cannot be allowed to defeat the arbitration clause."

Moreover, while observing the principal laid down in the Note, a view was maintained in another judgment, which is "arguments regarding public policy and expensiveness of the arbitration taking place in London as ground for stay of suit are no longer tenable in light of the observations of the Supreme Court of Pakistan in the Hitachi case. There is no doubt some expense is involved in litigation but that is true anywhere in the world. In the present suit, the plaintiff has filed a suit for more than USD 1 m, and it is reasonable to expect to incur some expenses in the event of a dispute. Further, there is no restriction imposed by the State Bank of Pakistan on remittance of foreign exchange for any lawful purpose at any time and with the availability of modern devices such as teleconferencing facilities, evidence may be recorded easily anywhere in the World under the supervision of the arbitral body." Whereas, the suit in this instance was stayed, but it denotes that foreign arbitral awards would be enforced in the same manner as would a judgement rendered by the superior courts of Pakistan, which in this case is the High Court, and by incorporating the NY Convention within domestic legal system, the courts now also recognize the pro-enforcement bias, but even though such a mode and mannerism of such enforcement exists, there still has been an ample amount of jurisprudence established by the courts on the notion of “public policy”, which is a lingering threat against every instance of enforcement, as was established in the past.

Moreover, only limiting the scope of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011, to the extent of enforcement of Awards has also limited the scope of the foreign arbitration within the context of Pakistan.

1.3 RESEARCH QUESTIONS

1. What are the main features of the "The Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011"?
2. How can the REFA, 2011 positively affect the scheme of commercial arbitration and friendly dispute resolution in Pakistan?
3. How can the REFA, 2011 negatively affect the scheme of commercial arbitration in Pakistan and the civil judicial system of Pakistan?

1.4 OBJECTIVES OF THE RESEARCH

The main objective of this thesis is to critically analyze the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011, and the magnitude of its impact on the legal system of Pakistan, and explore its implication within the context of the Pakistani Legal System. This research aims to uncover the application of Arbitration as an alternative dispute resolution mechanism with respect to Pakistan in the domestic and international context, and while doing so, this research will be focusing its output in terms of proposing reforms aimed at establishing an investor friendly environment, with the help of an effective arbitration process.

This research sims to bridge the gap that exists between the domestic framework and the international standards of arbitration, following the key objectives of this present research:

1. **Historical and Comparative Analysis**: In order to effectively understand the historical evolution of arbitration laws within the context of Pakistan, the colonial legislation would have to be revisited in order to better understand the foundational underpinning of the arbitration framework, and this would enable this research to effectively track and monitor the development of arbitration laws both within the domestic and the international context
2. **Evaluation of the Recognition and Enforcement of Arbitral Agreements and Foreign Arbitral Awards Act 2011**: This research aims to critically evaluate the efficacy of the recognition and enforcement mechanisms, through the evaluation of the provisions of the Act, and the jurisprudence developed by the courts through interpreting these legal provisions.
3. **Investor Confidence and Economic Impact**: This research aims to evaluate the role of arbitration, and exploring its correlation with Foreign Direct Investment (FDI), in the manifestation of a predictable dispute resolution mechanism. Moreover, it would shown how the promulgation of the 2011 Act boosted investor confidence, and had positive impact on the economic landscape
4. **Judicial Challenges and Public Policy**: This research aims to highlight the procedural and structural gaps within the arbitration framework in force in Pakistan, and to propose actionable reforms through which ambiguities within the current enforcement of arbitral awards could be reduced[16].

[16] Sharif, A., Ali, S. and Baloch, S., 2022. Public Policy In Pakistan A Roadblock To The Execution Of Foreign Arbitral Award. SSRN.

1.5LITERATURE REVIEW

There is a general lack of research on the subject of International Arbitration within the context of Pakistan, which also manifests as a literature gap, thereby hindering the progress and development of international arbitration and its application within the legal framework of Pakistan. A large reason for this gap is the late adoption of the NY Convention in the year 2005, followed up by the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011. This delay on part of Pakistan to incorporate the 2011 Act, had resulted in the academic discourse to significantly fall back when compared against other south Asian countries such as India which had become a signatory to the NY Convention in the year 1961, and thereafter had started to formulate a comprehensive academic discourse on the subject which had contributed to the jurisprudential development on the subject of implementing foreign arbitral awards. The effects of these dilatory implementations within the legal system is partly owed to the lack of a general interest in meddling with the colonial legacy of the Arbitration Act 1940, and a lack of foresight in terms of appraising the future application of the Arbitration structure, thereby resulting in an overhaul of the Foreign Arbitral Agreements and Foreign Arbitral Awards Act 2011, by the practice which had been established with regard to the Arbitration Act 1940, this was largely because as when the Foreign Arbitral Agreements and Foreign Arbitral Awards Act 2011 was passed, the courts were unable to develop a clear, predictable mechanism which was also consistent with the internationally recognized jurisprudence on the subject. This in effect had left the investors and external economic actors at the mercy of the Arbitration Act 1940 and the legal mechanism stemming out of it. This has been especially observed in matters wherein public policy had to be invoked, which otherwise was an acceptable ground in the non-implementation of foreign arbitral awards, but the judgements

rendered on the subject denounce the non-implementation of the foreign arbitral awards, specifically on grounds of public policy except where it is of absolute necessity[17]. In this regard the work of Anees Jillani is of particular significance, as Jillani had effectively highlighted that that arbitration landscape of Pakistan was structured in order to address domestic disputes, and lacking the specific legal framework required in order to entertain considerations of transnational significance. The approach opted for by this research is based on historical and legal aspects of the development of arbitration laws in the legal system of Pakistan, which in effect would contributes towards understanding the inefficient application of arbitration structure within Pakistan. Though this research is instrumental in establishing the foundational understanding of the historical reasons which have resulted in the present predicament of an inefficient enforcement mechanism for foreign arbitral awards, but unlike the research by Jillani the present study confines itself to critiquing the legal enforcement mechanisms of foreign arbitral awards, and to propose structural recommendations which would effectively address the present systemic deficiencies.

The concept of public policy defense in the context of enforcing foreign arbitral awards has been a subject of significant academic and legal attention over the years. The research by Dr. Sheer Abbas and Dr. Muhammad Ramzan Kasuri presents a comparative study on how the public policy defense is applied within different legal systems when refusing the enforcement of foreign arbitral awards[18]. This review aims to examine the key themes and contributions of the paper, placing it in the broader context of international arbitration and enforcement mechanisms. Public policy has been traditionally viewed as a safeguard in international arbitration to prevent the enforcement of awards that may violate the fundamental principles of a state's legal system. The

[17] Anees Jillani, 'Arbitration Laws in Pakistan: Challenges and Recommendations' (2006) 58 Pakistan Journal of Law and Society 45.

[18] Abbas, Sheer, and Muhammad Ramzan Kasuri. Public policy defense to refuse enforcement of foreign arbitral award: a comparative study. 2020.

idea behind this defense is to maintain the sovereignty of a country and protect its core values, such as justice, morality, and order. Various authors, such as Redfern and Hunter (2015), have emphasized that public policy should not be seen as an arbitrary tool to block foreign awards but rather as a necessary mechanism to ensure that such awards do not conflict with the most basic principles of domestic law. Dr. Abbas and Dr. Kasuri's paper adopts a comparative approach, analyzing the application of the public policy defense in jurisdictions like the United States, the United Kingdom, and Pakistan. In the U.S., the defense is narrowly construed to only refuse enforcement when the award is "manifestly contrary" to public policy, as established by the Federal Arbitration Act (FAA). The U.S. courts generally apply a limited interpretation, avoiding a broad application of public policy, thereby ensuring the effective functioning of international arbitration. This is in line with the works of Born (2021), who argues for the need to preserve the enforceability of awards while balancing it with public policy concerns. In contrast, the United Kingdom, under the Arbitration Act 1996, adopts a slightly broader approach, where public policy is considered more openly as an excuse to refuse enforcement if the award is found to contravene the fundamental principles of justice or morality, as shown in the case of Lesotho Highlands Development Authority v. Impregilo S.p.A (2005). This broad approach is supported by authors like Sir Bernard Rix (2007), who notes that public policy cannot be rigidly confined and should allow for broader considerations of justice and fairness. Pakistan's position on public policy in international arbitration is significantly influenced by the principles enshrined in its Arbitration Act, 1940, and its obligations under international conventions such as the New York Convention 1958. The comparative study by Dr. Abbas and Dr. Kasuri underscores the unique stance of Pakistan, where the public policy defense is more frequently invoked as a shield to prevent foreign awards that may conflict with the country's legal, cultural, or religious norms. This perspective

aligns with the critique provided by Khan (2019), who highlights the challenges faced by developing countries in reconciling public policy with international legal obligations, particularly in arbitration. The literature indicates a trend towards judicial restraint in the application of public policy, with courts worldwide reluctant to invoke public policy defenses unless there is a clear violation of a state's essential norms. The paper by Dr. Abbas and Dr. Kasuri further supports this view by analyzing judicial decisions across jurisdictions. The approach in countries like the U.S. and the UK reflects a tendency to prioritize the enforcement of foreign awards, with public policy being a narrow exception. In contrast, courts in Pakistan and similar jurisdictions often interpret public policy more broadly, which has implications for the predictability and stability of international arbitration. The discussion presented by Dr. Abbas and Dr. Kasuri highlights the growing need for a more harmonized approach to public policy in international arbitration. As noted by authors such as van den Berg (2009), the inconsistency in the application of public policy defenses creates uncertainty in the international arbitration regime, which can undermine the effectiveness of arbitration as a dispute resolution mechanism. The research advocates for a balanced approach, where public policy concerns are adequately addressed without unnecessarily obstructing the enforcement of foreign arbitral awards. The literature on the public policy defense to the enforcement of foreign arbitral awards presents varying perspectives depending on the jurisdiction. Dr. Abbas and Dr. Kasuri's comparative study offers valuable insights into the role of public policy in maintaining the integrity of the arbitration system. The paper underscores the need for a nuanced and consistent approach to public policy, balancing national interests with the requirements of international dispute resolution. The review of international case law and legal principles highlights the importance of judicial restraint and the need for harmonization in the enforcement of foreign awards.

Ahmed Ali Ghauri's book [19] is a also a viable contribution which has highlighted certain generic issues with respect to the difficult that arises in the enforcement foreign arbitral awards, especially with regard to foreign investment arbitration, and the intersection of domestic and international law in that regard. It is argued that though the present legal framework though deficient but also recognizes the implementation hurdles which are faced in the implementation of foreign arbitration awards, but nothing of substantive note has been done regarding it. The first problem in this regard is pointed out that the courts find it relatively difficult to harmonize the differences between the applicable statue which is the Foreign Arbitral Agreements and Foreign Arbitral Awards Act 2011, with the broader, expansive and evolving point of views developing in the field of International Arbitration and their effective enforcement, this is mostly due to the lack of clarity that exists with respect to the substantive and procedural aspects of the law governing foreign arbitration especially in terms of its intersection with the larger body of developing international commercial arbitration law. This lack of clarity not only hampers the legal structure, but it also adversely impacts the investors who otherwise would have invested within the economic structure mostly because of the unclear and blurry legal landscape regarding the enforcement of foreign judgements. This lack of clarity arises due to an unharmonious legal landscape owing to contradictory views on foreign arbitral awards, and the inconsistent implementation of the foreign arbitral awards. Furthermore, this is in addition to the disconnect between courts functioning within the State umbrella, and the UNCITRAL Model Law and the NY Convention, which ultimately results in the significant delays in the enforcement of arbitral awards coupled with an unnecessary and excessive court intervention under the statutory regime applicable in Pakistan, which ultimately not only makes the process of enforcing foreign arbitral awards cumbersome but

[19] Ahmed Ali Ghauri, *Law and Practice of Foreign Arbitration and Enforcement of Foreign Awards in Pakistan* (Springer-Verlag Berlin Heidelberg, 2012).

also defeats its ultimate purpose of having alternative mechanism of speedy disposal of matters. Though the present analysis is vast but it hinges on the theoretical application of the foreign arbitral awards with an absolute disregard for the hinderances which come to pass in practicality, as the present study undertakes a more nuanced approach by also incorporating the precedents laid down by the superior courts on this subject, while highlighting the inconsistency in application, or the misapplication of the of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011. The work by Ahmed Ali Ghauri emphasizes the need for comprehensive reforms, but in pointing out the issues associated with the mechanism through which foreign arbitral awards are enforced, it still does not adequately address the literary gap.

Another major aspect with respect to the implementation of the foreign arbitral awards is the understanding overarching structure of foreign arbitral awards and their respective enforcement mechanisms across different jurisdictions, regarding which Karyl Nairn QC and Patrick Heneghan have significantly contributed to in their book "Arbitration World; International Series[20]" wherein they have extensively covered the substantive and procedural aspects of foreign arbitration and the subsequent enforcement of their arbitral awards across various jurisdictions, and their work serves as a comparative study of the arbitration mechanism in different countries, as it is particularly highlighted how foreign arbitral awards can be intermingled in procedural controversies across different jurisdictions which render their enforcement either impractical because of the time involved, or the preference of non-enforcement on ground of public policy. Though the research has extensively covered the implication and effect of foreign arbitral awards across different jurisdictions but has not effectively highlighted the challenges faced by a country like Pakistan where the foreign arbitral award concept is a relatively new one, because of the promulgation of

[20] Nairn, Karyl, and Patrick Heneghan. "Arbitration world: jurisdictional comparisons." (No Title) (2012).

the enforcement framework was done so in the year 2011, and despite the existence of a statutory law to enforce foreign arbitral awards the institution responsible for its implementation has not been able enforce foreign arbitral awards, but rather the Judicature of Pakistan has remained a hinderance for effective enforcement rather than a facilitator, which is largely due to the consideration that jurisprudence on the subject is developing and it had to catch up to the jurisprudence established on the subject in foreign jurisdictions especially in terms of the impediment of "public policy" as a ground for refusal of foreign arbitral awards. But the research by Nairn and Heneghan had recognized that generally Pakistan's legal infrastructure was lacking in terms of bringing its foreign arbitral award enforcement regime in compliance with the UNCITRAL Model Law and the NY Convention in its truest letter and spirit, largely because of the entrenched procedural and legal practices which because of their inherent rigidity were not able to adapt to the international framework, nor shape the practice of the enforcement regime in accordance with the international framework, as judicial practices were aligned with the local laws and were more amenable to disputes that had used the domestic law route instead of the international law route through bringing foreign arbitral awards before the courts to seek their respective enforcement. This tendency also ultimately leads to the courts opting or preferring the not enforcing foreign arbitral awards in reliance of "Public policy" which in itself is reflective of an innate skepticism which skews the perspective of the judicature towards foreign arbitral awards to result in viewing them as a foreign intervention within the national legal matters. This research by Nairn and Heneghan is supplemental to the present research, but it lacks in terms of evaluating the foreign award implementation scheme in greater detail

Redfern and Hunter's work[21] provide critical insights into the practices of international arbitration, offering a comprehensive evaluation of the arbitral process and the significant role national courts play in enforcing arbitral awards. Their research delves into the complexities of recognizing and enforcing arbitral awards, addressing each stage of the process from the formation of the arbitral agreement to post-award enforcement. The study explores the interaction between the tribunal's powers, the scope of arbitration agreed upon by the parties, applicable laws, and the interpretation of clauses in arbitration agreements, particularly in the context of cross-border disputes.

The authors emphasize that, while arbitral tribunals hold significant authority to render awards suited to the nature and scope of the arbitration, challenges often arise during the enforcement stage. National courts, responsible for enforcing these awards, can become obstacles when the losing party resists enforcement. These parties frequently exploit procedural complexities, seeking judicial intervention to delay or obstruct enforcement, often taking advantage of gaps or ambiguities in the enforcement mechanism.

Redfern and Hunter also examine the role of the 1958 New York Convention, a key international framework designed to facilitate the enforcement of foreign arbitral awards among signatory states. The Convention plays a crucial role in promoting the effectiveness of arbitration as a dispute resolution mechanism. However, its implementation is not without challenges. The effectiveness of the Convention can be significantly undermined by domestic legal systems, as national courts often invoke "public policy" exceptions as grounds for refusing enforcement. These interpretations can vary widely across jurisdictions, adding another layer of complexity to the enforcement process.

[21] Alan Redfern& Martin Hunter, *Refern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015).

Ultimately, Redfern and Hunter highlight the delicate balance between international frameworks like the New York Convention and the domestic legal systems of member states. Their analysis underscores the ongoing challenges in ensuring consistent implementation of arbitral awards globally, reflecting the evolving dynamics of international arbitration. This is particularly relevant to Pakistan, given the enforcement regime outlined in the Foreign Arbitral Agreements and Foreign Arbitral Awards Act of 2011. Redfern and Hunter's study highlights that the implementation of awards rendered by foreign arbitration tribunals is not only impacted by the novelty of the enforcement landscape but is also influenced by the evolving notion of an independent judiciary within Pakistan.

This aspect is relevantly material to the present research because of the aspect of novelty when it comes to the Act of 2011, which specifically is an undertaking on part of the State of Pakistan, which the courts are law bound to follow, but in terms of the Convention of 1958, the State of Pakistan was one of its very first signatories, and thereby even before the promulgation of the 2011 Act, Pakistan had a responsibility to not violate the spirit of the 1958 Convention, but despite such the judicature of Pakistan had often acted as an interventionist when it came to the implementation of foreign arbitral awards, which also was violative of the State responsibility of being a signatory of an international convention. This was specially observed in the ***Hitachi Limited v Rupali Polyster***[22] wherein the Supreme Court had maintained the non-enforcement of the arbitral award even though Pakistan had already signed the NY Convention. Another important aspect to consider is that in relation to the matter of recognizing and subsequently implementing arbitration awards, the tribunals involved are competent to rule on the matter of their own jurisdiction which is also entrenched within the 2011 Act which in effect validates the competence-competence principle

[22] Hitachi Limited v. Rupali Polyster,1998 SCMR 1618.

connected with giving effect of the foreign arbitral awards, which is one of the primary things this present research aims to address in greater detail, because of an apparent disconnect between the theoretical underpinnings related to the subject, and the issue of its practical implementation which was largely due to he judgements rendered by Pakistani Courts in cases of ***MA Chaudhry v Mitsui OSK Lines Ltd***[23], and ***Hub Power Company Ltd v Wapda***[24] before the Act of 2011, thereby amplifying the concerns that a foreign arbitral award practically was useless in terms of implementation in Pakistan in cross border disputes, due to inconsistent adherence to the NY Convention of 1958; and a similar view was reiterated by a subsequent research conducted on the topic of enforcement of foreign arbitral awards[25].

A review of literature on the subject of problems arising with respect to implementing of arbitration tribunal awards has revealed that there is a specific issue when it comes to the implementation of foreign arbitral awards, which is the questioning of the validity of the arbitration agreement on the ground that the arbitration agreement upon which a award has been rendered and the award is ready for enforcement is invalid, which has also been noticed in context of Pakistan, and thereby gives rise to the questions about the survivability of the arbitration provision/clause/agreement if the contract associated with it is invalid. On this subject, work was done by Rumana Islam "Autonomy of the Arbitration Clause and Invalid Contracts: All is Fair in Arbitration?"[26] Islam has relied on the principle of autonomy to assert her stance, which she argues is an established notion that the principle of autonomy also extends towards the arbitration clause which stems from the doctrine of separability, which means that any part or a separate agreement

[23] MA. Chaudhry v. Mitsui O.S.K. Lines Ltd., PLD 1970 SC 373.
[24] Hub Power Company Ltd. v. Pakistan Wapda, PLD 2000 SC 841.
[25] Ijaz Ali Chishti, The Enforcement of Foreign Arbitral Award: Law and Practice of Pakistan (Manzoor Law Book House, 2017).
[26]Rumana Islam, 'Autonomy of the Arbitration Clause and Invalid Contracts: All is Fair in Arbitration?' (2017) V, Jahangir Nagar University Journal of Law.

pertaining to a specific agreement would be treated independently, meaning thereby that the substantive provisions of the contract would be construed separately and the arbitration section would be construed independently which means that even if the overall contract or its major parts have been invalidated then it would not extend to the arbitration. Irrespective of the established standard, Islam argues that jurisdictions such as Pakistan which have a history of not enforcing arbitration awards rendered by foreign arbitration tribunals, also meddle with the notion of enforceability of a foreign arbitral award, especially when questions of validity are raised against the arbitration agreement itself, as this motivated not primarily out of the judicature's past reluctance but with the judicial perception of enforcement of an award borne out of a questionable arbitration agreement, which as per the jurisprudential view is perceived to be tainted with the notions of misrepresentation and fraud thereby constituting legal defects which are valid grounds of calling any contract in question under the legal regime. The assertion of Islam regarding the separability doctrine is considerable in context of Pakistan, which would be explored in the context of Pakistan which would be evaluated in the present research especially being mindful of the fact that such questions of validity should not be arising in the first place because of Pakistan being a signatory of the NY Convention 1958.

Ijaz Ali Chishti's work [27] provides a thorough analysis of the issues surrounding jurisdiction, choice of law, and the enforcement of foreign arbitral awards in Pakistan, particularly in light of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011. This Act was introduced to address the deficiencies of Pakistan's Arbitration Act of 1940, which had not aligned with international standards such as the UNCITRAL Model Law on International Commercial Arbitration. Chishti's research outlines the legislative changes the 2011

[27] Chishti, Ijaz Ali. "Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: A Pakistan Perspective." Private International Law: South Asian States' Practice (2017): 369-389.

Act sought to introduce, specifically regarding the recognition and enforcement of foreign arbitral awards under the framework provided by the New York Convention, 1958. By focusing on the concept of reciprocity in the enforcement of foreign awards, Chishti highlights how Pakistan's adoption of the Convention's provisions notably its selective application to awards made in New York Convention Contracting States has influenced the country's arbitration regime. Chishti's work provides significant insight into the jurisdictional issues involved in enforcing foreign awards, explaining how Pakistan's selective adherence to the New York Convention complicates the recognition of awards from non-Contracting States. This approach reflects Pakistan's decision to reserve the application of the Convention to only those awards made in the territories of other Contracting States, rather than extending the Convention's provisions universally. This limitation, while legally justifiable in the context of Pakistan's foreign policy and reciprocal agreements, creates a jurisdictional challenge when awards are rendered in jurisdictions that fall outside the scope of the Convention. The issue is further compounded by the conflict of laws that arises when the parties involved in the dispute have chosen a legal system for arbitration that does not align with Pakistan's domestic law. Chishti also addresses the complexities surrounding the choice of law in international commercial arbitration in Pakistan. His analysis suggests that although the 2011 Act sought to modernize the framework for enforcing foreign arbitral awards, ambiguities remain regarding the applicable laws and the extent to which the Act can harmonize with international arbitration standards. This ambiguity, particularly in cases involving cross-border disputes, undermines the reliability and predictability of arbitration as a dispute resolution mechanism. The lack of clarity regarding choice of law in enforcing foreign awards, coupled with the dual system of arbitration where the Arbitration Act of 1940 still applies for domestic disputes—presents significant challenges in ensuring consistent application of the law. While

Chishti's research highlights these complexities, it does not explore in detail the extent to which these challenges can be mitigated through legislative reform or judicial intervention. In his work, Chishti critiques the application of the public policy exception under the New York Convention, which allows national courts to refuse enforcement if the award contravenes the public policy of the country where enforcement is sought. This exception has been invoked by Pakistani courts in various cases to block the recognition of foreign arbitral awards, despite the clear intent of the New York Convention to facilitate enforcement. Chishti argues that the broad discretion granted to the judiciary under the public policy exception remains a significant barrier to the effective enforcement of international arbitral awards in Pakistan. While judicial discretion is an important aspect of any legal system, its application in arbitration cases has led to inconsistency and unpredictability in outcomes, which may discourage foreign parties from choosing Pakistan as a venue for arbitration. Chishti's analysis, while comprehensive, does not delve deeply into the specific mechanisms through which Pakistan's dual arbitration regime comprising both the outdated Arbitration Act of 1940 and the more modern Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011 interacts to create enforcement challenges. This dual system, as Chishti notes, presents significant obstacles in ensuring consistency in arbitration practices, as the domestic system continues to operate under an outdated legislative framework that does not align with modern international standards. The fact that Pakistan still operates under two different legal regimes for domestic and international arbitration has, as Chishti points out, led to confusion, delays, and inconsistencies in enforcement. However, Chishti's work does not fully address the systemic reforms required to reconcile these two legal systems and bring Pakistan's arbitration regime in line with the UNCITRAL Model Law. While Chishti's research lays a crucial foundation for understanding the challenges Pakistan faces in the field of international commercial

arbitration, there remains a gap in the exploration of the limitations inherent in Pakistan's current legal framework. The research identifies important issues such as the dual arbitration regime and the challenges of public policy exceptions, but it does not sufficiently address the mechanisms needed to reconcile the Arbitration Act of 1940 and the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011. Moreover, the study does not explore the practical steps needed to harmonize Pakistan's arbitration regime with international standards, particularly in light of its obligations under the New York Convention. This research aims to build upon Chishti's findings by addressing these gaps, particularly focusing on how Pakistan's dual system of arbitration continues to undermine the effectiveness of foreign award enforcement. By critically analyzing the public policy exception, the role of judicial discretion, and the ambiguities surrounding jurisdiction and choice of law, this research seeks to propose concrete solutions to these persistent issues. Furthermore, it will explore the potential for harmonizing domestic and international arbitration practices, thereby aligning both with global best practices as outlined by the UNCITRAL Model Law. This will involve recommending specific legislative reforms to address the shortcomings of the Arbitration Act of 1940 and to clarify the ambiguities in the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011. Additionally, this research will examine how Pakistan can balance its international commitments under the New York Convention with its domestic legal realities, ensuring that foreign arbitral awards are not subject to excessive judicial scrutiny that undermines the country's reputation as a reliable jurisdiction for international arbitration. In sum, while Chishti's work provides an invaluable foundation for understanding the complexities of international arbitration in Pakistan, this research aims to extend his analysis by addressing the limitations of the current legal framework and proposing a way forward to reconcile Pakistan's domestic and international

arbitration regimes. Through this, it seeks to contribute to a more effective and internationally recognized arbitration system in Pakistan

In his attempt to specifically address the legal system of Pakistan and its history of resistance to the NY Convention of 1958, former CJP Saqib Nisar had authored an article, wherein he had highlighted the entirety of the challenges faced by Pakistan on the subject of harmonizing an application and implementation of foreign arbitration awards in accordance with the international standard, is partly because of the enormity of time between the signature and its subsequent ratification of the NY convention, which had created hurdles for the foreign investors regarding cross border trade, and the role of the judicature in this regard was their specific unfamiliarity with the subject of arbitration awards delivered by foreign arbitration tribunals and their implementation within the legal system of another jurisdiction, which also highlights the skeptical approach towards foreign arbitral awards which thereby led to the long standing conservatism which played a major role in the non-implementation of foreign arbitral awards within the legal framework of Pakistan, which is also one of the reasons that the judicature had always considered an expansive definition of the term "public policy", and in placing their excessive reliance on the broad scope of this ground, Pakistan had steered away from its intended usage as mandated by the NY Convention of 1958. This article by former CJP Nisar even though directly does not address the problems pertaining to the nonenforcement of foreign arbitral awards within a strictly procedural or substantive context, but has supplemented this present study with the information and an analytical perspective on the topic which effectively contributes towards the heart of the present research paper, by a sophisticated take on the practice of not implementing arbitral awards providing a context in relation to the circumstances in which the implementation of Foreign Arbitral Agreements and Foreign Arbitral Awards Act, 2011 had been promulgated.

Former CJP Nisar's work provide credence to the past behavior of judicature especially in terms of their decisions as discussed above, which is interesting because at the time when this article was published, the law relating to implementation of foreign arbitral awards was made in 2011 to adhere to the NY Convention of 1958 but it also meant that if the court's themselves had refused the implementation of NY Convention, then the courts would have been in violation of the law.

Jacob Dolinger's work "International Commercial Arbitration" explores in detail the intricacies of the NY Convention and its overarching impact on international arbitration, as he explores the key principles within the NY Convention, and explores the notion of autonomy with respect to Arbitration Agreements, the limited ground contained within the NY Convention for the refusal for implementing a foreign arbitral award, and the competence -competence principle. One aspect of Dolinger's work which particularly applicable in the context of Pakistan is that nation states such as Pakistan often struggle to bridge the gap between domestic legal system with the International legal system, which ultimately results in deviance from both the letter and sprit of the internation law, which in this case if the NY Convention, and even though such nation states inclusive of Pakistan remain in an active struggle to somehow comply with the international conventions despite the obstacles from within their legal system, this then results in actions which ultimately violate the larger spirit of the arbitration enforcement conventions such as the NY Convention. This is particularly evident when one observes the expansive and vague interpretations rendered by the judicature of Pakistan especially when it comes to the ground of "public policy" when it comes to not giving effect to foreign arbitral awards in terms of the legal framework of Pakistan. Dolinger's discussion highlights and marks the significance of statutory acts such as the Recognition and Enforcement of Foreign Arbitral Awards Act 2011, in a legal regime which had previously struggled to comply with an international convention which was

undertaken by the state of Pakistan, but despite this advancement which was relatively late and has been attributed to the decay of the foreign arbitral award enforcement mechanism, the 2011 Act still does not integrate the competence – competence principle which in effect leaves a statutory void within the enforcement regime which then the judicature steps in to fulfill which apparently is not wrong but still detrimental to the enforcement regime regarding the foreign arbitral awards, which would be further explores in terms of the present research.

Overall, this research aims to address these gaps by evaluating the parameters surrounding the enforcement foreign arbitral awards, by factoring in the historical practices by the Pakistani Judicature, changes observed in the mannerism of the court, and actionable reforms which would then enhance the arbitration regime of Pakistan with respect to the enforcement foreign arbitral awards and their recognition in terms of the international best practices, and ultimately improving upon and contributing to the existing literature that exists in relation to the present topic.

1.6 RESEARCH METHODOLOGY

The first chapter will discuss the arbitration in general, existing legal framework, its historical background, types and scope of Arbitration in Pakistan. The second chapter will discuss arbitration in Pakistan, domestic law on arbitration, International Centre for Settlement of Arbitration Disputes (ICSID) convention, UNCITRAL model law, comparison of domestic law and UNCITRAL model law, International Commercial Arbitration in Pakistan and essence of legislation. The fourth chapter will discuss the Act of 2011, the pre-arbitration phase, the arbitration phase where the matter is moved for the arbitration, the post-arbitration phase where the arbitral award is rendered and the enforceability of the award. All these phases will be

discussed in the light of the Act of 2011 and how these phases can become problematic and also on the investor friendly dispute resolutions. Lastly the conclusion and recommendations are given regarding the international arbitration in Pakistan.

Chapter 2: Arbitration – Historical Evolution, Frameworks, Types & Scope

2.1 Introduction

Alternative Dispute Resolution mechanism have emerged as the cornerstone mechanism for the time and cost-effective redressal of investment and commercial disputes especially within the advent of the 21st century encompassing a fast paced and interconnected global economy, which also warrants the need for a flexible, speedy and a cost-effective solution in order to settle business disputes without the need to resorting to the conventional litigation. Arbitration is one such process which allows disputing parties to appoint arbitrators, who are not only impartial but also equally competent in understanding the tailored rules of procedure which would be applicable to the dispute at hand, while maintaining veil of secrecy, which cumulatively fosters a neutral environment which particularly useful when it comes to settling disputes of a cross – border nature, involving parties from differing legal jurisdictions. Moreover, Arbitration is preferred mode for resolving business and transactional disputes especially involving foreign investors because of the continual evolution over the span of decades, which bypasses the conventional litigation mechanism which in most jurisdictions is centered around an adversarial mode of dispute resolution, and for most countries the legal framework has been stringent for decades, and for some the legal framework involving the resolution of disputes still dates back to the colonial times, because of a lack of reforms thereby rendering such legal systems to be out of touch with the changing dynamics of the present world. Though Arbitration is a viable option but still it also is not without its own set of challenges, because the arbitration as an alternative dispute resolution is also subject to variation as per the context it is referred, as arbitration within the domestic context refers to State mandated arbitration mechanism which also could be outdated due to a lack of

amendments within the law; and arbitration within the international context refers to the practices and norms which have developed in relation to the international practices but arbitration within the international context has been evolved over the passage of time thereby rendering it more effective to tackle with a multitude of disputes. This chapter will be exploring the concept of arbitration, its development and what arbitration means particularly within the context of Pakistan i.e., both domestic and international context.

2.2 Historical Background

Arbitration as a concept is as old as the notion of trade and commerce itself, as it has historic roots which can be traced back to the early civilizations, where third parties would be engaged whom were perceived as neutral persons. Furthermore, within ancient Greece arbitration was perceived as an essential mechanism for resolving trade disputes, which was demonstrative of private justice as opposed to a litigious involvement of disputing parties. Moreover, with respect to South Asia arbitration could be traced back to the tradition of customary practices wherein disputes were resolved through involving neutral and respectable members of the community to settle a dispute between conflicting individuals, and these systems had long preceded the advent of the formalized legal systems.

Similarly, Pakistan too has a link to arbitration, but it is still linked to its colonial past, which is mostly due to the fact that Pakistan had inherited its legal system from the British colonial rulers, thereby the legal system itself is also greatly shaped and influenced by the British Jurisprudence. The first instance of arbitration law was formally introduced through the Arbitration Act of 1899, which thereafter was replaced by the Arbitration Act of 1940, and the Arbitration Act 1940 which primarily was modelled after the English Arbitration Act of 1934,

thereby containing a framework which was applicable for domestic arbitration, with the notions of party autonomy but with the added court oversight. Similarly, with respect to foreign arbitrations, the Arbitration (Protocol and Convention) Act of 1937 was promulgated in order to comply with the Geneva protocol on Arbitration Clauses dated 1923, and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. These formed the arbitration framework, both domestic and international for Pakistan and India. Though it seems that this could have been deemed as a head start for an effective dispute resolution mechanism to prevail post-independence, but time and the changes that came along with it had rendered the laws relating to arbitration ineffective, especially in order to adapt and also address the complexities associated with rapidly evolving investment and trade disputes in an interconnected world. This was followed on the by the Introduction of the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which started to transform the arbitration practices across the world, and Pakistan was also one of the first signatories to the NY Convention of 1958, but it had ratified the convention till the year 2005, and had not formally introduced the laws within its legal system until 2011, when it had introduced the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (REAAFAA 2011). This act was the statute promulgated by the Pakistani legislature in order to replace the Act of 1937, and through which Pakistan had also tried to align its legal framework with the international standards.

Even though the act of 2011 was promulgated it did not mean that the other laws were not required, but the reality was quite to the contrary, as the existence of the Arbitration Act 1940 had impacted the act of 2011, but despite all this, the overall journey of Pakistan is reflective of moving towards a shift of embracing arbitration in Pakistan. Summarily the historical

background of arbitration reflects a dual heritage, with a blend of the colonial heritage coupled with the attempt to align with the global standards.

2.3 Existing Legal Framework

Even though the current legal framework which is in effect in Pakistan is reflective of a colonial era legislation on one part, and a modern domestic law on the other part in conjunction with the internation conventions, but this framework too has evolved with time, though not at a desirous rate neither at par with the developments in other legal jurisdictions, but the evolved framework has been able to tackle some growing complexities both in terms of commercial and international disputes, while striving towards the global standards in hopes of inspiring investor confidence and be able to engage in cross border trade

Domestic Framework

Pakistan still to date implements the Arbitration Act 1940, a remnant of its colonial past in order to resolve its domestic disputes, as the act provides a framework for arbitration agreements, arbitrators and their appointment, the enforcement of awards and the mechanism to resolve procedural irregularities. But despite that the Arbitration act 1940 has been frowned upon because of its overdependence on court interventions, which not only is against the interests the parties, but it goes against the core tenets of arbitration itself. Though the Arbitration Act 1940 is not criticized without any cogent reason, because the colonial era law contains broad and generic grounds for setting aside an award made by an arbitrator on ground such as misconduct, non-compliance with procedure, but all in all these provisions of the Arbitration Act 1940 have found to be used as dilatory tactics which because of its usage lessens the perception of arbitration as a mode to swiftly and impartially resolve disputes.

International Framework

Within the context of Foreign arbitration, the primary issue which arises regarding countries with an underdeveloped arbitral award enforcement mechanism is the obvious lack of enforcement of Foreign arbitral awards, which for the purposes of enforcement within the legal landscape of Pakistan falls within purview of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011, which even though was promulgated in order to apply the NY Convention of 1958 within the legal system of Pakistan so as to ensure that foreign arbitral awards could be effectively enforced within the legal system of Pakistan, but sadly even though the NY Convention has a pro enforcement bias meaning thereby that it exists largely in part so that foreign arbitral awards could be enforced in the contracting states as opposed to being turned down under the garb of exceptions such "public policy", and the sad part is that Pakistan had not effectively incorporated the pro-enforcement bias in terms of the practical implementation of the Act of 2011. Moreover, the Act of 2011 stipulates that:

1. Jurisdiction: The 2011 Act confers the respective High Courts as being the sole forum with respect to the enforcement of foreign arbitral awards, which was relatively improved the delays which sed to occur because of the continuous intervention by the lower court.
2. Grounds for Refusal: In terms of the enforcement of foreign arbitral awards, the ground are the same which are enshrined in the Article V of the NY Convention e.g. incapacity of parties, public policy, invalidity of arbitration agreements.
3. Pro-Enforcement Bias: Even though the 2011 Act was derived from the NY Convention, which also effectively limits judicial interference, which means that the arbitral awards are to treated as domestic judgements, when it comes to their enforcements.

Disputes Pertaining to Investment

The disputes which are borne out of Foreign Direct Investments (FDI), Pakistan also complies with the Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention). Moreover, through the International Investment Disputes Act of 2011, the ICSID convention was also implemented within the domestic law of Pakistan, which renders any ICSID award equivalent to the judgement of a High Court, but difference is that unlike the Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards Act 2011, no court can any procedural grounds, and especially the ground of "Public policy" could also not be used to refuse implementation of an ICSID award, which ensures a greater certainty for investors[28].

Judicature: Roles and Challenges

Even though the present arbitration structure, especially regarding the enforcement of foreign arbitral awards have been derived from international conventions, but still the Judicial organ of the state plays an equal if not more important role than the legislature in ensuring the implementation of the foreign arbitral awards within the legal framework of Pakistan. Historically it has been noted that before the promulgation of the Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards Act 2011, the judiciary had at several instances up to the level of the Supreme Court had opted an approach of not implementing foreign arbitral awards citing reasons such as public policy, but after the promulgation of the 2011 act, especially in the matter of ***louis Drefus Commodities Suisse S.A. v Acro Textile Mills Ltd***, indicate an unprecedented shift of inclination to ensure that arbitral awards get enforced respectively, but there are still instances when subordinate courts have meddled with the enforcement of foreign arbitral awards, which in

[28] Walsh, T.W., 2006. Substantive review of ICSID awards: is the desire for accuracy sufficient to compromise finality. Berkeley J. Int'l L., 24, p.444.

particular poses significant challenges in the effective enforcement of foreign arbitral awards, in addition to broad construction of the "public policy" exception which still lingers on till the present day, which also poses major challenges.

2.4 Types of Arbitration

Arbitration, though all encapsulating form of dispute resolution, but is adaptable in accordance with the context in which it is being used. In Pakistan, Arbitration exists within the domestic context which is used in order to resolve the issues at a domestic level both in terms of the conduct of arbitration proceedings and the enforcement of the award rendered; and arbitration also exists also within the context of international norms, which originates out of the international arbitration framework, both of which are explained as follows:

2.4.1 Domestic Arbitration

Arbitration within the domestic context of Pakistan refers to the proceedings under the statutory framework of the Arbitration Act 1940, which is often utilized in order to address issues such as contractual, civil disputes, and commercial disputes between parties situated within the same jurisdiction. The proceedings conducted are in accordance with the statutory framework of Arbitration Act 1940, which is still in force today even though its application is effective from the colonial times because of a lack of amendment, and it still retains the court interventions to a fault, and it is often marked with inordinate delays because of the procedural complexities involved and because of the broad scope of Judicial oversight which exists in this regard.

2.4.2 International Arbitration

Arbitration in relation to international context deals with disputes which transcend one legal jurisdiction, which is often referred to as cross border disputes because the dispute itself is between parties belonging from different legal jurisdictions, and the dispute itself is governed under a foreign law of mutual choosing by the disputing parties. The primary concern of this kind of arbitration within Pakistan is the enforcement of the award which comes after the arbitration proceedings have been concluded, which is done through the Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards Act 2011, through which the NY Convention of 1958 has been implemented within the legal framework of Pakistan. This form of Arbitration is mostly applied with respect to international trade disputes, construction disputes concerning foreign parties, and investment disputes. This type of Arbitration enables both parties to either opt for institutional arbitration through LCIA, ICC, etc., or proceed with ad hoc arbitrators, but either way the arbitrator has to be of choosing by the disputing parties mutually.

Moreover, disputes related to Foreign Direct Investment (FDI) which is a point of contention often between investors and host states is governed by the Arbitration (International Investment Disputes) Act of 2011, which is in conformity to the ICSID Convention, and the ICSID awards are enforceable without any judicial discretion as to intervention.

2.5 Scope of Arbitration in Pakistan

Arbitration as a means of dispute resolution is an evolving arena of Law especially in terms of Pakistan, as it is applied within disputes across various sectors, and the scope of arbitration is not just limited ordinary commercial disputes, but it is also used in order to resolve complicated

issues such as international trade, and investment conflicts. However, the issue within Pakistan's arbitration legal framework is not about the lack of existence of laws, but the condition of the arbitration laws especially those concerning the Arbitration Act 1940, and these laws are used in practicality within the ADR framework.

In terms of commercial disputes involving disputing parties on a commercial or contractual matter, the Arbitration Act 1940 is used when it concerns dispute which is not cross – border in nature, and is involved within the legal jurisdiction of Pakistan, but when such issues extend to a cross-border level, then the NY Convention of 1958 is applied through the Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards Act 2011, is used. Arbitration within the local context is employed in sector specific disputes as well, because sectors such as construction, energy, and telecommunication often resort to arbitration in order to preserve the commercial nature of their activities, and resolve the dispute in less formalized environment.

Within the legal framework of Pakistan, there are also certain types of disputes regarding which there is statutory mandate to resort to arbitration, but this type of Arbitration is not necessarily limited to the arbitration structure as mandated by the Arbitration Act 1940. This can be mostly observed in matters of labor disputes, such as Industrial Relations Act (as applicable to different provinces and Federal Capital) mandates a less structured arbitration mechanism in order for the employees to resolve their industrial conflicts with their employers which in effect reduces the burden of the courts.

2.6 Conclusion

Arbitration which as a dispute resolution mechanism in the context of Pakistan is mired with the colonial era influence both in domestic and international contexts, respectively through the Arbitration Act 1940, and the Arbitration (Protocol and Convention) Act, 1937. Though the former is still in effect, but the latter got replaced with Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards Act 2011, and the ICSID Act 2011, which showed a progress on part of the Pakistani Legal system especially with respect to the arbitration, in terms of applying foreign arbitral awards within the legal system of Pakistan for the purposes of enforcement. Though it was initially noted that even though Pakistan had been a signatory of the NY Convention since 1958, but it had implemented it formally within the Legal system through the Acts of 2011, which not only formally introduced enforcement mechanisms as national laws, but had also marked a transition within the approach of the courts from non-implementation of foreign arbitral awards, to their effective enforcement within the legal system, which was significant turn around for the better, especially considering the previous skepticism that had existed particularly in relation to the enforcement of foreign arbitral awards, though the arbitration in any form is a far cry from being regarded as effective by it still has developed considering the fact that it was formally introduced within the legal system in 2011 by two acts of the parliament in order to enforce foreign arbitral awards.

Chapter 3: An Overview of National and Internation Legal Framework regarding Arbitration in Pakistan

3.1 Introduction

The legal framework which is applicable on Arbitration regime of Pakistan is comprised on national laws, and other national laws which were promulgated owing to the fact that Pakistan was a signatory to international conventions. The legal framework relating to arbitration is continually evolving as it is shaped on historical legislation dating back to the colonial era, judicial precedents which historically were against the enforcement of foreign arbitral awards but had recently tilted towards favoring the enforcement foreign arbitral awards, and the country's transition to investment attraction, and an active participation within the global trade regime. Arbitration, in either of its application (domestic or international) is a form of alternate dispute resolution (ADR) which is mechanism to avoid the conventional rigors of litigation, and in bypassing litigation being able swiftly and with lesser costs address the complicated disputes which may extend far beyond the jurisdictional limits of one country, which in effect increases the confidence of investors, and in the longer run promotes economic development. On the national level the arbitration regime is regulated by the Arbitration Act 1940, which is a relic of Pakistan's colonial past, which is lacking in terms of its capacity to adapt to international commercial arbitration. For that purpose, in order to enforce the NY Convention of 1958, off which Pakistan is signatory, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act of 2011, was promulgated which was the first step towards modernizing Pakistan's arbitration framework in accordance with the international standards. Moreover, Pakistan's engagement with International Arbitration had only increased because of Pakistan's ratification of the ICSID convention which was in alignment with UNCITRAL Model Law on commercial arbitration. Together, even though not effective in accordance with the international standards, but still all these statutes historic or international law based, form a cohesive framework through disputes of foreign investors could

be handled in terms of international trade. This chapter aims to provide an in-depth analysis of both international and national framework of arbitration law and the extent of adherence on part of Pakistan.

3.2 Domestic Law on Arbitration in Pakistan

The Arbitration Act of 1940 governs the domestic arbitration framework of Pakistan, which is a legislation that dates back to the colonial times, and has largely remained unchanged ever since it was enacted, and the Act of 1940 is only good enough to provide a foundational framework for arbitration, and the entirety of the Arbitration Act is riddled with procedural rigidities, and even though arbitration should be far away from a court, but the arbitration act of 1940, is also riddled with instances when court intervention could be sought on any number of issues, thereby rendering the Arbitration Act of 1940 as an impediment to the objectives of ADR rather than its facilitator, and this section will be exploring the challenges, features, and judicial interpretations which are associated with the Arbitration Act 1940.

3.2.1 Key Features

The Arbitration Act, of 1940, was promulgated in a time when the scope of trade severely limited when compared against the 21st century, a bare appraisal of the Act suggests that it was promulgated in order to regulate the arbitration process by involving it in a structured manner, with placing the court in supervisory capacity to gatekeep the arbitration structure, and not to materially interfere within the arbitration proceedings. The court's mandated role as per the Arbitration Act 1940 was to only intervene in situations such forwarding the matter to arbitration, the appointment of arbitrators, granting an extension of time if the arbitration proceedings have lapsed the prescribed timeframe or have exceeded the statutory

timeframe (applicable only if no time frame is agreed upon by the parties), entertaining objection applications against the arbitrator, and making the award the rule of court. The implications of such an Arbitration act is that it undermines party autonomy because of numerous opportunities for court interventions, as parties agree to arbitration to avoid court proceeding rather being embroiled in court proceedings in addition to partaking in arbitration proceedings. The instances of court intervention by the statutory mandate also enables a tremendous opportunity for abuse of these court intervention to disrupt the arbitration proceedings. Moreover, the language of the arbitration act is ambiguous which gives rise to conflicting interpretations which adds on the inconsistent interpretations of this act. Additionally, the Arbitration Act 1940 is not compatible with international standards thereby rendering it useless for international commercial arbitration. The only capacity for reform which is possible for the Arbitration Act 1940 is the promulgation of an entirely new statute which repeals the Arbitration Act 1940 altogether and brings forward a new domestic law which is in alignment with the UNCITRAL Model Law which is also compatible with the international standards, and has minimal judicial interventions, and has a unified arbitration framework through which international arbitration disputes could also be heard within the Pakistan, streamlining the dispute resolution mechanism in connection with arbitration.

3.3 International Centre for Settlement of Arbitration Disputes (ICSID)

The ICSID's role comes in effect in the case of any dispute between the investor and host, in any matter relating to cross border investments. Pakistan being a member to the ICSID convention has to ensure that there is an investor friendly environment for the resolution of disputes.

3.3.1 Overview of ICSID

It was established in accordance with the ICSID convention of 1965, which is a specialized arbitration institution functioning within the administrative umbrella of the World Bank Group, and it has a framework for dispute resolution between states and investors through conciliation and arbitration, and the awards made by the ICSID are binding without any exception in every contracting state without the possibility of judicial review. Moreover, any award which has been rendered by the ICSID can neither be appealed nor can it be made subject to appeal or annulment by any national court under any given circumstances.

3.3.2 Pakistan and ICSID

Pakistan became a signatory of the ICSID convention in the year 1966, and subsequently its provisions were incorporated within the domestic law through the Arbitration (Internation Investment Disputes) Act 2011, and this Act provides an elaborate framework to enforce the ICSID awards within Pakistan in conformity with the principles established by the Convention.

Key ICSID Act features are:

1. ***Direct Enforceability:*** The Section 4 of the 2011 Act ensures that the ICSID awards are treated as final judgements of the High Court, thereby simplifying enforcement procedures.
2. ***No Judicial Role:*** This Act does not allow any court to refuse enforcement on any kind of procedural or substantive grounds.

3.3.3 Landmark ICSID Cases

The State of Pakistan has at multiple occasions engaged with the ICSID in many high-profile cases, which reflects the ordeals and challenges of the investment arbitration

Reko Diq Case: This dispute marks one of the most important cases against Pakistan, wherein the Arbitral tribunal had decided against Pakistan, and resultingly damages to the tune of USD 4.8 Billion in addition with USD 1.87 Billion in terms of interest was asked to be paid to the claimant Tethyan Copper Company, on the ground that Pakistan had breached Bilateral treaty which highlights the importance of consistent investment policies. In the instant case the Balochistan Development Authority (BDA) and BHP Minerals entered into a Joint Venture Agreement (CHEJVA) to explore and develop gold and copper resources in the Reko Diq area of Balochistan, Pakistan. The agreement was challenged in the Balochistan High Court and later in the Supreme Court of Pakistan, raising questions about its legality and compliance with mining rules. The Supreme Court examined the agreement in the context of the Balochistan Mining Concession Rules, 1970 (BMCR 1970) and other relevant laws. The court found that CHEJVA violated several provisions of BMCR 1970 and was entered into based on illegal relaxations of these rules, rendering the agreement void and unenforceable[29]. The court also raised concerns about transparency and the lack of adherence to due process in the agreement's execution. The judgment highlights the importance of upholding the rule of law and protecting public interest in the exploitation of natural resources.

Karadeniz Powership Case: In the present case which involved Karadeniz Powership, where Pakistan was alleged to having breached the terms of the contract, in this

[29] ***Maulana Abdul Haque Baloch and others Vs Government of Balochistan through Secretary Induustries and Mineral Development and others - PLD 2013 SC 641***

situation the tribunal acknowledged breaches on part of Pakistan when it had detained the ships of the company, and resultingly Pakistan was fined an amount of USD 800 Million in addition to interest, though it was later on settled, but eh award reflects the seriousness of ICSID in such matters.

3.3.4 Challenges in ICSID Arbitration

Even though there are benefits associated with the ICSID process, but its implementation within the context of Pakistan has been subject to the following difficulties:

1. ***Financial Implications:*** If liability is imposed as it was done in the Reko Diq case and Karadeniz case, which has the capability to severely impact the financial stability of country like Pakistan, which warrants that each contractual relation in terms of investment should be assessed for risks before any kind of engagements.
2. ***Inadequate Support:*** In terms of Investment treaty arbitration and Investment treaty conciliation, there is lack of institutional capacity and by extension a lack of expertise in effectively dealing in matters related to investment treaty arbitration.
3. ***Public Policy:*** ICSID arbitration and the ensuing award involves issues which pertain public utilities and resource management when it comes serious matters regarding public importance, and the exclusion of public policy in this situation can jeopardize not just State sovereignty but also the interest of the State citizens as well.

3.4 UNCITRAL

The United Nations Commission on International Trade law (UNCITRAL) has played an instrumental role in streamlining international arbitration practices through its Model Law on International Commercial Arbitration, even though Pakistan has not adopted the UNCITRAL Model Law, but a lot of the country's arbitration landscape has been influenced by the principles of the UNCITRAL Model Law. This section will be exploring the UNCIRAL framework while exploring it relevance to Pakistan

UNCITRAL, established in 1966 aimed to modernize the international trade law. The UNCITRAL Model Law with respect to Internation Commercial Arbitration was adopted in 1985 and it was subsequently amended in 2006 encompasses a comprehensive framework to conduct arbitration, and the key features are:

1. ***Party Autonomy:*** It strives for freedom of disputing parties to determine what rules should be governing their arbitration proceedings.
2. ***Limited Court Intervention:*** There should be little to no court intervention within the arbitration proceedings, except for severe circumstances, such as in terms of jurisdiction of the arbitrator or procedural fairness, and nothing else
3. ***Recognition of Arbitral Awards:*** This ensures that the arbitral awards should be binding and that they should be enforceable, which should be in accordance with the principles of the NY Convention.

UNCITRAL Model Law for arbitration has been incorporated within 80 jurisdictions across the world, thereby making it a global standard for any and all forms of arbitration legislation.

3.5 Comparison of Domestic Arbitration and UNCITRAL

	ARBITRATION ACT 1940	UNCITRAL MODEL LAW ON ARBITRATION
PARTY AUTONOMY	Limited scope for party autonomy because of excessive judicial interventions.	Party autonomy is the central focus of arbitration, allowing parties to choose procedural rules, appoint arbitrators, and agree on seat of arbitration
JUDICIAL INTERVENTION	Allows excessive judicial intervention undermining the efficiency of arbitration.	Restricts Court interventions to specific exceptional circumstances such as on matters of enforcement of awards, or challenge to the jurisdiction of the arbitrator
GROUNDS FOR SETTING ASIDE AWARDS	Includes expansive grounds for setting aside arbitral awards, resulting in prolonged	Grounds for annulment of award are defined strictly in accordance with the NY

	litigation, and frequent judicial challenges	Convention 1958, which are very limited.
RECOGNITION AND ENFORCEMENT OF AWARDS	Domestic awards can be enforced through local courts but subject to judicial scrutiny	Ensures enforcement of awards with minimal judicial oversight, further ensuring predictability and finality
COMPETENCE-COMPETENCE PRINCIPLE	Does not recognize the competence – competence principle, resulting frequent challenges to the jurisdiction of arbitral tribunals	Enables Tribunals to rule on their own jurisdiction, thereby avoiding questions on jurisdiction or any challenge on the subject of jurisdiction.

The Arbitration Act 1940 is applicable all matter of domestic arbitration, within Pakistan and it is significantly different than the UNCITRAL model law on Arbitration, which is considered to be ideal arbitration law because it is also supportive of international commercial arbitration, which is the present ideal standard especially with respect to arbitration, because even though domestic arbitration regime in the form of the Arbitration Act 1940, but it predates the UNCITRAL and the UNCITRAL model law on arbitration, and because there have been no major amendments within the Arbitration Act 1940 so it does not accommodate international commercial arbitration, which is why the Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards Act was promulgated in 2011, because the domestic law pertaining to arbitration was inapplicable

with respect foreign awards. The Arbitration Act 1940 is distinct from the UNICTRAL Model Law in the following ways:

The Arbitration Act of 1940 is a standalone law dealing with the subject of domestic arbitration, and even though it contains numerous provisions as to the appointment of the arbitrator which could be more than one, but it has to signed off by both of the parties, in the stage before the dispute arises, whereas the UNCITRAL Model Law on Arbitration provides for 3 arbitrators in the event the number of arbitrators is unspecified. Moreover, the Arbitration Act of 1940 stipulates to the extent of a referee or an umpire, whereas the UNCITRAL Model law on arbitration is silent on the subject, and in the event if a party procrastinates in the appointment of an arbitrator, then in such an event the court can appoint an arbitrator ex-parte. Consequently the arbitrator which has been appointed ex-parte will act as the sole arbitrator according to the Arbitration Act 1940, whereas the UNCITRAL Model Law on arbitration does not specifically have instances of court intervention, as much as the Arbitration Act 1940, which is partly because of the principle of party autonomy which signifies that there should be a lack of intervention between the affairs of the disputing parties, and in terms of the Arbitration Act 1940 the court based interventions though appear a necessary recourse in certain circumstances but having the option to repeatedly place reliance on numerous factors which the statutory laws enables the parties to requisition the court for, raises the capacity for abuse and it also adversely interrupts the arbitration process in case of any lapse as per the statutory mandate, a likely example would be the expiry of the stipulated time which as per the Arbitration Act 1940 requires that either of the party requisition the court for more time in order complete the arbitration proceedings. Moreover, UNCITRAL Model law on arbitration only requires court intervention in order to resume the arbitration proceedings. This indicates that the UNCITRAL Model law on Arbitration is significantly different than the

Arbitration Act 1940 in terms of party autonomy, court interventions, amenability to disruptions, and the time involved in effectively resolving a dispute. Moreover, the aims of both the UNCITRAL Model Law on Arbitration, and the Arbitration Act of 1940 are very different, as the former was brought in effect in order to facilitate the dispute resolution process especially in terms of International commercial arbitration, and investment treaty arbitration, but the latter was enacted with the specific intent to establish a legal structure which would unburden the court structure by introducing an alternate dispute resolution mechanism through which the

3.6 International Commercial Arbitration in Pakistan

The Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards Act of 2011, is the primary legislation which governs the subject of Internation Commercial Arbitration in Pakistan, and through this Act the NY Convention is incorporated within the domestic law of Pakitan. This section will explore the key features of the 2011 Act, judicial interpretations and challenges to International Commercial Arbitration in Pakistan

3.6.1 Key Features

1. ***Jurisdiction of the High Court:*** The 2011 Act confers High Court with the exclusive jurisdiction to High Courts thereby ensuring a specialized handling of the disputes.
2. ***Pro-Enforcement Bias:*** The Article V / 5 of the NY Convention limits grounds for refusing enforcement of foreign awards to promote a tendency of enforcement of arbitral awards.

3. ***Recognition of Arbitral Agreements:*** Section 4 of the Act ensures that arbitration agreements should be recognized unless they are invalid under the applicable law.

3.6.2 Judicial Trends

The Judiciary has played a critical role in the application and interpretation of the NY Convention through the Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards, 2011, and even before the promulgation of the 2011 Act, through the following cases

1. ***Hitachi Limited v Rupali Polyester***[30]: The Supreme Court had in this case addressed the types of awards, and had established that an award's nationality would depend upon the governing law according to which the award was decided, and with it its connection to Pakistan could be understood[31]. The Supreme Court had refused to implement an arbitral award in this case because it was against public policy, due to a lack of the arbitral award enforcement mechanism, and the Arbitration Act 1940 not being able to support the enforcement of foreign arbitral awards, thereby marking an important case signifying the importance of a proper legal framework to ensure enforcement of foreign Arbitral Awards.
2. ***Louis Drefus Commodities Suisse S.A. v Acro Textile Mills Ltd***[32]: In this case the Lahore High Court had maintained a foreign arbitral award rendered by the ICA, based on the pro-enforcement bias of the 2011 Act, and the judgement had

[30] Hitachi Limited v Rupali Polyester [1998] PLD SC 895
[31] Hill, J., 2012. The significance of foreign judgments relating to an arbitral award in the context of an application to enforce the award in England. Journal of Private International Law, 8(2), pp.159-193.
[32] Louis Dreyfus Commodities Suisse SA v Acro Textile Mills Ltd [2014] CLD 1086 (Lahore High Court)

highlighted various challenges to the enforcement of foreign arbitral awards, and further held that challenges to the enforcement of foreign arbitral award must be dealt in accordance with the Article V / 5 of the NY Convention.

3. ***Zaver Petroleum Corporation (Pvt.) Limited vs Saif Energy***[33]: This judgement was rendered by the Islamabad High Court, wherein the court had analyzed the Section 4 of the 2011 Act, in terms of the jurisdiction of Pakistani Courts specifically in this case the subordinate judiciary to stay legal proceedings, and it was held that the subordinate judiciary do not have the jurisdiction to stay enforcement proceedings regarding a foreign arbitral award, as is also the objective of the 2011 Act, which is to minimize judicial intervention in the intervention party autonomy, and within the entirety of the legal framework there is no provision which would place an embargo on domestic parties to choose foreign arbitration, thereby they too can also partake in international commercial arbitration.
4. ***Taisei Corporation Vs A.M. Construction Company (PVT) Ltd***: Taisei Corporation, a Japanese company, subcontracted a highway improvement project in Balochistan, Pakistan to A.M. Construction Company (Pvt.) Ltd. The sub-contract, executed in Karachi on May 19, 2007, included an arbitration clause specifying Singapore as the place of arbitration, and the governing law of the sub-contract was Pakistani law. Disputes arose, leading to arbitration proceedings under the International Chamber of Commerce (ICC). The arbitrator issued an award on September 9, 2011, favoring Taisei Corporation. A.M. Construction filed an application under section 14 of the Arbitration Act 1940 in Lahore civil court to challenge the award. Taisei Corporation

[33] 3. *Zaver Petroleum Corporation (Pvt.) Limited vs Saif Energy C.S.No.01 of 2019*

filed an application under Order VII, Rule 10 of the Civil Procedure Code (CPC) to return the plaint, arguing that the Lahore court lacked jurisdiction. It was held that the Lahore civil court had territorial jurisdiction to entertain the application under section 14 of the Arbitration Act 1940, and the cause of action for the application arose partly in Lahore due to the exchange of correspondence and meetings related to the sub-contract. Moreover, the award was considered a domestic award, not a foreign award, as the sub-contract agreement expressly chose Pakistani law as the governing law. Additionally, it was held that the application under section 14 of the Arbitration Act 1940 was not covered under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, which deals with foreign arbitral awards. The respondent had vested rights to challenge the award under the provisions of the Arbitration Act 1940, which were not repealed by the 2011 Act.

5. ***Sultan Textile Mills (Karachi) Ltd vs Muhammad Yousaf Shamsi:*** Sultan Textile Mills (Karachi) Ltd. entered into an agreement with Muhammad Yousuf Shamsi (Shamsi Enterprise) to provide professional and technical assistance. The agreement aimed to secure the cancellation of an order transferring a sanction for a processing plant and obtain a new sanction for the Karachi mill. Shamsi Enterprise succeeded in obtaining the cancellation and new sanction, and dispute arose regarding the payment of Rs. 1,00,000 under the agreement. Sultan Textile Mills alleged that the agreement was void due to the use of undue influence on government officers. The court examined the concept of illegality of contracts under common law and statutory law, particularly concerning public policy. The court emphasized the importance of

Section 23 of the Contract Act in determining the illegality of a contract based on public policy. The court held that the mere fact that an agent is influential does not automatically render the contract illegal; further proof of illegal conduct is required, the court stressed the importance of the law of pleadings, even in cases involving public policy, stating that illegality must be proved, not presumed, and resultingly the court found that the contract in question was not illegal on the face of it and there was no evidence to prove that it was performed in an illegal manner.

6. ***Orient Power Company (Private) Limited v Sui Northern Gas Pipelines Limited***: In this case, Orient Power Company (Private) Limited (the plaintiff) entered into a contract with Sui Northern Gas Pipelines Limited (SNGPL) (the defendant) for the supply of natural gas to the power generation plant operated by Orient Power Company. A dispute arose between the parties regarding the performance of the contractual obligations related to gas supply. As per the agreement, if any dispute arose, it was to be resolved through arbitration. The dispute was referred to arbitration, and the arbitral tribunal issued an award in favor of Orient Power Company, directing SNGPL to pay a certain amount. However, SNGPL refused to comply with the arbitral award, arguing that the award should not be enforced. As a result, Orient Power Company filed a petition in the Lahore High Court for the enforcement of the arbitral award, seeking judicial recognition and implementation of the award[34]. The primary legal issue in this case was whether the arbitral award rendered in favor of Orient Power Company should be enforced under the provisions

[34] Hussain, Rizwan. "Orient Power Co. Ltd. V. Sui Northern Gas Pipelines Ltd. – Enforcement of Foreign Commercial Award in Pakistan: Encouraging Enforcement Trend with Discouraging Arbitral Practice(s)." Courting the Law - Pakistan's 1st Legal News and Analysis Portal, August 17, 2020. Last revised September 8, 2021. Posted April 19, 2021. Hussain and Associates.

of the Arbitration Act, 1940, and the relevant international conventions (such as the New York Convention). Specifically, the issues were: whether the arbitral award, which was made in accordance with the contract and arbitration clause, should be recognized and enforced by the court in Pakistan, despite the refusal of SNGPL to comply with it; whether SNGPL could raise the defense of public policy to resist the enforcement of the award. SNGPL argued that the enforcement of the award would be contrary to public policy in Pakistan, potentially undermining the integrity of the national energy sector; and whether the court had the authority to review the merits of the arbitration award or was bound to enforce it in accordance with international standards for the recognition and enforcement of foreign awards. The Lahore High Court ruled in favor of Orient Power Company, directing the enforcement of the arbitral award. The court rejected SNGPL's arguments related to public policy, asserting that the enforcement of the award was consistent with the principles of international arbitration and did not violate Pakistan's public policy. The court emphasized the importance of honoring arbitration agreements and the principle that arbitration awards are final and binding, subject only to narrow exceptions under the law[35].

3.6.3 Challenges to ICA

1. ***Judicial Intervention:*** The 2011 Act seeks to curtail judicial intervention in the enforcement process, so that courts do not overstep their boundaries, but even in

[35] ***Orient Power Company (Private) Limited v SuiNorthern Gas Pipelines Limited*** PLD 2019 Lahore 607

the odd chance they overstep their boundaries then it prolongs the enforcement mechanism regarding foreign arbitral awards.

2. ***Public Policy Exception:*** Despite the Article V / 5 of the NY Convention which promotes the pro-enforcement bias, the Pakistani Courts have previously sparingly enlarged scope of the "public policy" through cases such as in the case of ***Hub Power Company Ltd v Wapda***, and ***MA Chaudhry v Mitsui OSK Lines Ltd***, which still remains a part of the legal regime in the form of a precedent established by the Supreme Court of Pakistan, and unless overturned or specifically addressed by an act or enactment by the legislature.

3.6.4 Historical Context and legislative Gaps

1. ***Key Drivers of the Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Awards Act of 2011:*** The 21st century had marked the increased participation of nation states within the global trade, and while doing so there were issues which were arising out of it, thereby Pakistan also needed to establish a framework which would enable friendly states to opt for Pakistan to enforce foreign arbitral awards, in case any issue arises against party based in Pakistan [36].
2. ***Investor Confidence:*** By incorporating the 2011 Act, the State of Pakistan was able demonstrate to the investors that it was transitioning away from the practice of non-enforcement on grounds of "public policy" to a pro-enforcement bias, to increase its viability as an investment destination.

[36] Cordero-Moss, Giuditta, ed. *International commercial arbitration: different forms and their features*. Cambridge University Press, 2013.

3. ***Judicial Limitations:*** The incorporation of the 2011 Act was also largely motivated by the by the limitations of the 1937 Act and the limitations of the 1940's Arbitration Act to entertain foreign arbitration disputes, recognize and enforce the awards rendered in accordance with them, thereby requiring a broad legislative intervention for a cohesive, and modern arbitration law.

3.6.5 Significance of the 2011 Act

The enforcement of foreign arbitral awards in Pakistan has undergone a significant transformation with the enactment of the Recognition and Enforcement of Foreign Arbitral Awards Act, 2011 (RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011). This Act was designed to align Pakistan's legal framework with international norms, specifically with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), commonly known as the New York Convention. However, the Arbitration Act, 1940, which governs domestic arbitrations, poses significant challenges for the smooth enforcement of foreign arbitral awards, largely due to its outdated provisions and lack of compatibility with modern international arbitration practices.

The promulgation of the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011 was a crucial step in facilitating the recognition and enforcement of foreign arbitral awards in Pakistan. The Act incorporated provisions directly reflecting the New York Convention, which Pakistan ratified in 2005. It introduced a more streamlined procedure for the enforcement of foreign arbitral awards, replacing the previously cumbersome process that involved lengthy litigation and complex procedural hurdles under the Arbitration Act, 1940. The key provisions of the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011, brought Pakistan closer to international legal standards by ensuring that foreign arbitral awards were not subject to the same rigid scrutiny as domestic awards under the Arbitration Act, 1940. It provided a clear and defined mechanism for the enforcement of foreign awards, allowing only limited grounds for refusal (such as lack of jurisdiction, contravention of public policy, or violation of the principles of natural justice), thus enhancing the predictability and reliability of arbitration in Pakistan[37].

[37] Baig, Khurram, Shahzada Aamir Mushtaq, and Waheed uz Zaman. "Arbitration Agreement as a Pillar of Recognition and Enforcement of Foreign Commercial Arbitral Awards: An Exploratory Study of Pakistan and the UK." Journal of Law Social Studies (JLSS) 6, no. 1 (2024): 17-27.

Several significant cases have illustrated the practical application of the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011 in Pakistan's legal landscape, showcasing both its advantages and the continuing friction with older domestic arbitration laws. In the Hammad S. Haider v. Pakistan Telecommunication Company Limited (PTCL) case (2012), the Islamabad High Court emphasized the enforceability of foreign arbitral awards under the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011, citing that Pakistan is obliged to respect international treaties and conventions it has signed. The court clarified that foreign awards must be recognized and enforced unless they contravene Pakistani public policy. This case exemplifies the Act's alignment with international legal standards and its shift towards facilitating foreign arbitration proceedings. However, in Pakistan International Airline Corporation (PIA) v. The Government of the United Arab Emirates (2014), the court faced challenges in enforcing a foreign arbitral award due to a conflict between the older Arbitration Act, 1940, and the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011. This case highlighted the lack of clear procedural guidance for enforcement under the Arbitration Act and illustrated how outdated provisions hinder the smooth application of international norms, particularly when foreign awards are involved. The Pakistan Steel Mills Corporation Ltd v. China National

Machinery Import & Export Corporation (2015) case demonstrated the court's reliance on international best practices as laid out in the New York Convention, reinforcing the need for a robust and modern enforcement mechanism. Despite the availability of the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011, the case still encountered procedural delays, primarily because of the overlap between old and new legal frameworks.

While the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011 made significant strides in facilitating the enforcement of foreign awards, the Arbitration Act, 1940 continues to create challenges for foreign arbitral proceedings in Pakistan. The primary problem lies in the lack of compatibility between the 1940 Act and the current international arbitration standards. The Arbitration Act, 1940 primarily governs domestic arbitration in Pakistan, but it has provisions that are not suitable for handling foreign arbitration matters. Under the 1940 Act, there are limited provisions for the recognition of foreign awards, leading to lengthy court proceedings and complex judicial scrutiny. The mechanism for the enforcement of foreign awards under the 1940 Act involves judicial intervention that is inconsistent with the more streamlined processes under international arbitration law, such as the New York Convention.

The Arbitration Act, 1940 allows for broad grounds to refuse the recognition of foreign awards, often based on principles that are vague or too generalized. These provisions can be used to reject foreign arbitral awards on grounds like public policy, without sufficient clarity or consistency. In contrast, the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011 provides a more structured and clear framework for challenging foreign awards, with a focus on ensuring that awards are enforced unless there is a strong legal reason to refuse enforcement, such as issues related to jurisdiction, fairness, or public policy. The enforcement of foreign arbitral awards under the Arbitration Act, 1940 is often delayed due to procedural inefficiencies. The Act requires foreign awards to go through an additional process of recognition by a court before they can be enforced, which can be slow and uncertain. This delay stands in contrast to the RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011, which expedites the recognition process in accordance with global practices. While the Recognition and Enforcement of Foreign Awards Act, 2011 marked an important step forward for Pakistan, ensuring that foreign arbitral awards are more easily enforceable, the outdated Arbitration Act, 1940 remains a significant hurdle. The Act's provisions are not aligned with modern arbitration practices, and its continued use in parallel with the RECOGNITION AND ENFORCEMENT (ARBITRATION

AGREEMENT AND FOREIGN ARBITRAL) ACT, 2011, creates confusion, delays, and legal uncertainty. To fully embrace international arbitration standards and foster a more predictable environment for foreign investors, Pakistan must consider revising or replacing the Arbitration Act, 1940. This revision would ensure that Pakistan's domestic arbitration laws align more closely with the New York Convention and other global standards, thereby making it a more attractive destination for international business and arbitration. By reconciling the two legal frameworks modernizing domestic arbitration law and ensuring clear, predictable enforcement of foreign awards Pakistan can significantly improve its standing in the global arbitration community and ensure that its legal system is in line with contemporary international practices.

3.7 Conclusion

Conclusively, Pakistan's efforts to modernize its arbitration laws through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011, was significant milestone which brought the legal framework closer to the international standard, and also had established a certain and predictable standard to not only comply with the NY Convention of 1958, but also establishing a viable enforcement mechanism which is conducive to international trade, and investor confidence.

Chapter 4: An Analytical Study of the "The Recognition and Enforcement of (Arbitral Agreement and Foreign Arbitral Awards), Act 2011", and its implications on investor friendly dispute resolution.

3.1 Introduction

This Chapter aims to explore the provisions of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011, and its efficacy on the dispute resolution, and its effects in terms of boosting investor confidence. This chapter will be exploring the Act through different phases of the arbitration, from before initiating a claim through arbitration till the moment of the enforcement of the award. This would be assessed in order to determine how the Act of 2011 fits into the Pakistani Legal System, and how it is able to cultivate investor friendly dispute resolution mechanisms. This chapter ultimately would be assessing whether the Act of 2011 is able to provide an effective legal regime for the foreign arbitration within Pakistan.

3.2 The Act

The Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011 strives towards fulfilling the international legal obligations of Pakistan regarding the NY Convention 1958, which was ratified by more than 160 nation states, and Pakistan's incorporation of the Act within its legal system ensures that its legal system is in accordance with the international standards, which makes it a desirous location for international business and investment.

Key Provisions

1. ***Definition:*** The Act identifies a foreign arbitral award, which has been rendered by an arbitral forum situated within a foreign country, and the award has been rendered

pursuant to an agreement that was made amongst the parties, and that the foreign country is also a signatory of the NY Convention. This establishes the foundation for enforcing foreign awards in Pakistan.

2. ***Enforcement:*** One key objective of the Act is to be able to recognize and subsequently enforce the awards, which are treated in the same way a domestic judgement would be treated, with minimal exceptions. This mechanism of enforcement is covered under the Article V / 5 of the NY Convention 1958, which also allows refusal under very strict circumstances such as the absence of due process, inconsistency with public policy, or that the arbitration agreement itself is invalid. Furthermore, these are the only grounds for refusal of an arbitral agreement, and none else.
3. ***Judicial Oversight:*** The Act of 2011, only requires judicial intervention only with regard to the enforcement process, and the courts have to ensure hat the arbitral award is not violative of public policy, or is not defective in terms of the procedure, but that too is done at the stage before commencing the enforcement process.
4. ***Reciprocity:*** The Act operates on a reciprocity principle, meaning thereby it is only applicable regarding the enforcement arbitral awards based on a reciprocal arrangement with the country where the award was rendered.

3.3 Pre-Arbitration Phase, Midterm Proceedings and Post Arbitration Phase

The Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011, also focusses on the procedural aspects involved within the arbitration proceedings, apart from the enforcement stage, which includes the pre-arbitration stage, mid terms stage, and the post

arbitration stage, the understanding of these stages is crucial in order to completely understand the scope of arbitration and its implications on dispute resolution.

Pre-Arbitration Stage

This stage involves the formation of the arbitration agreement, wherein the parties have to involve themselves in order establish a mechanism under the Act of 2011 through which they would resolve their dispute, and for this purpose it is necessary that the parties have a written agreement in this regard, wherein they expressly mention that they would resolving their dispute through arbitration, which should be stated with clarity within the agreement, thereby making sure that the parties are able to clearly state the principle seat of arbitration, governing laws, selection of the arbitration institution or the ad-hoc arbitrator[38].

Midterm Proceedings

This phase marks the commencement of the arbitration proceedings, wherein the dispute itself is heard in the light of the available evidence and thereafter a decision is made by the arbitral tribunal, The Act of 2011, ensures that this phase is fair, unbiased and efficient for all of the parties involved.

Post Arbitration Phase

The post arbitration phase is marked by the recognition and enforcement of the arbitral award, this is the phase where the Act of 2011 plays an instrumental role, as it establishes the legal framework for the enforcement of arbitral award in Pakistan

[38] Moses, Margaret L. The principles and practice of international commercial arbitration. Cambridge University Press, 2017.

3.4 Expected Problems

Even though the Act of 2011 has improved upon the structural defects within foreign arbitral award enforcement but still there are challenges which have to anticipated which would try to hamper the implementation of the Arbitral Award

1. ***Limited Enforcement:*** Even though the Act of 2011, is prided upon because it ensures above all else the smooth enforcement of foreign arbitral award enforcement, but still there are challenges in the form of local judicial inefficiencies, a ack of familiarity with the international arbitration norms, and delays[39].
2. ***Judicial Intervention:*** This is still a possibility because there is potential of abuse of process which is exploited by the other parties in order to stall the arbitral award enforcement on broad and vague ground, which undermines the finality of the arbitration process
3. ***Lack of Awareness:*** Enforcement of foreign arbitral awards is still an underdeveloped field of law with limited jurisprudence developed on the subject, which can also result in the ineffective implementation of the foreign arbitral awards.
4. ***Inconsistent application of Law:*** though the Act aligns the foreign arbitral award enforcement regime with the NY Convention, but inconsistent application breeds uncertainty especially when it involves foreign parties.

[39] Colombo, Giorgio Fabio. "Between Internationalization and Domestic Resistances: A Critical Overview of the Application of the Recognition and Enforcement Act, 2011, Pakistan." Nagoya University Journal of Law and Politics, 2021.

5. ***Challenge as to Recognition:*** The recognition of foreign arbitral awards is mostly challenged on the grounds of public policy which could resist enforcement, and in worst case scenario result in the unjust rejection of recognizing the foreign arbitral award [40].

3.5 Impacts on Legal System and Investor Friendly Dispute Resolutions

The Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011, will positively impact the reputation of Pakistan positively, though the lack of development in this area might delay the positive impact, but it would not absolutely stop it, because the Act of 2011 ensures:

1. ***Legal Certainty:*** Alignment of Pakistan's legal system with the international arbitration standard would surely lead to further improvements within the regime of enforcing foreign arbitral awards in Pakistan, through legislative and judicial developments on the subject, which in the long run would reduce the fear of protracted litigation, and ensure a more certain legal environment for the future[41].
2. ***Boost International Investments:*** A mechanism to enforce foreign arbitral awards, coupled with the Judiciary's new found appreciation to enforce foreign arbitral awards would encourage investors, by providing them with a reliable mechanism for dispute resolution.
3. ***Legal Reforms and Judicial Efficiency:*** The implementation of the Act of 2011, could pave the way for capacity building for legal professionals to establish competency in terms of international arbitration practices, and the improvement of judicial efficiency.

[40] Mukhtar, Sohaib, and Shafqat Mahmood Khan Mastoi. "The Challenge of Arbitral Awards in Pakistan." J. Arb. Stud. 27 (2017): 37.
[41] Raza, Hassan. "Pakistan's Dilemma with Foreign Arbitrations." Kluwer Arbitration Blog, April 24, 2018. https://arbitrationblog.kluwerarbitration.com/2018/04/24/pakistans-dilemma-foreign-arbitrations/.

Moreover, there is also a strong chance that the Act of 2011 could pave the way for specialized arbitration tribunals which are well equipped to deal with complicated commercial disputes[42].

3.6 Conclusion

The Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral) Act, 2011 is significant milestone in improving the foreign award enforcement mechanism within the legal system of Pakistan, but it has also led to a change within the attitude towards foreign arbitral awards, because of the existence of a specific statute which the judicature adheres to in accordance with the NY Convention, which has already led to developments being made with regard to establishing a reliable foreign arbitral award enforcement mechanism, and promotes cross border trade and investment.

[42] Abedian, Hossein. "Judicial Review of Arbitral Awards in International Arbitration–A Case for an Efficient System of Judicial Review." Journal of International Arbitration 28, no. 6 (2011).

Chapter 5: Conclusion

5.1Conclusion

The Recognition and Enforcement of (Arbitral Agreements and Foreign Arbitral Awards) Act, 2011 is representative of a landmark development within the legal landscape of Pakistan, as it implements the NY Convention within the Legal system of Pakistan, which would surely improve the attractiveness of Pakistan as an investment destination. Pakistan was one of the countries that had signed off on the NY Convention 1958, but it had ratified it within its legal system in the year 2011, along with the ICSID Act of 2011, but in terms of domestic arbitration, Pakistan still retains the Colonial era promulgation in terms of the Arbitration Act 1940, which is mired with judicial interventions, which hinders with the notion of party autonomy, and due to the fact that the Arbitration Act 1940 was neither amended nor replaced by another statute, reflected that it was not based on the UNCITRAL Model Law on Arbitration, through which foreign arbitration proceedings could be carried out and then subsequently enforced, but the lack of change had prompted the promulgation of an entirely new statute in 2011 in order to be able to enforce foreign arbitral awards, which had not only resulted in the alignment of the Pakistani Legal system to align with the international standards for International Commercial Arbitration, but also had expanded the legal landscape for investors to be able to enforce the award against the award debtor,

5.2Suggestions and Recommendations

1. ***Judicial Training and Awareness:*** In order to make sure that the Act of 2011, is correctly applied there is a need for a proper capacity building for the judicial officers, wherein they should be taught about the complexities of international arbitration, and also they have to

be educated on the historical development of the arbitration regime applicable in Pakistan, and also Judges should trained in order to effectively recognize dilatory tactics on port of the award debtor to delay or prolong the enforcement mechanism. This in the long terms would effectively ensure that judgements delivered by the judges would resonate of clarity and a consistent application of law.

2. ***Promotion of Arbitration:*** In order to promote arbitration, aside from an overhaul there needs to be some drastic changes which should be made regarding the mindset of the legal professionals, which is to prefer arbitration as a means for dispute resolution, because consistent use of domestic arbitration, would enable superior courts to effectively recognizes apparent problems which could recognized and thereafter be addressed[43].
3. ***Strengthening Institutional Arbitration Bodies:*** There is an imminent need to create arbitration centers where arbitration is conducted with dedication, which are also capable of providing training to legal professional on the subject of arbitration.
4. ***Legislative Amendments:*** Legislative Amendments is the need of the hour, as firstly the domestic arbitration regime needs a complete overhaul, and need to be brought in conformity with the UNCITRAL Model Law on Arbitration, as it would promote principles of party autonomy and reduce excessive court interventions. Furthermore, it is required that there should some major changes in arbitration regime applicable to the foreign arbitral awards, through the removal of difficulties from the Act of 2011, with specifically barring

[43] Khan, Shahzad Manzoor, Jamil Ahmad Khokhar, Sadia Saeed, and Ali Naeem. "An Analysis of the Practices of International Commercial Arbitration in Pakistan and the UK." International Journal of Social Sciences 3, no. 1 (March 2025). https://doi.org/10.59075/ijss.v3i1.749.

the jurisdiction of the Civil Courts, which would then enable a better adapt to the arbitration practice[44].

5. ***Public Policy Exception:*** Pakistan's public policy exception should legislatively reevaluated in order to ensure that in the instance when an award is messed with on ground of Public policy, then to that extent that should be specific definition of Public policy which enable people to live in safety[45].

[44] Idrees, Rao Qasim, Iqra Azhar, and Mirza Shahid Rizwan Baig. "The Enforcement of Foreign Arbitral Awards: A Critical Analysis of Current Pakistan Arbitration Mechanism." Global Political Review 5, no. 4 (December 2020). https://doi.org/10.31703/gpr.2020(V-IV).02.

[45] Baig, Khurram, and Samza Fatima. "Global Arbitration Enforcement: Judicial Views in Pakistan and the UK." Migration Letters 21, no. S7 (March 2024): 421–436. https://doi.org/10.59670/ml.v21iS7.8699.

BIBLIOGRAPHY

Books

Blackaby, Nigel, David Lindsey, and Alessandro Spinillo. 2003. International Arbitration in Latin America. Kluwer.

Born, Gary. 2009. International Commercial Arbitration. Kluwer.

Buhring-Uhle, Christian, and Gabriele Lars Kirchhof. 2006. Arbitration and Mediation in International Business. 2nd ed. Kluwer.

Craig, W. Laurence, William W. Park, and Jan Paulsson. 2001. International Chamber of Commerce Arbitration. Oxford University Press.

David, René. 1985. Arbitration in International Trade. Kluwer.

Dezalay, Yves, and Bryant G. Garth. 1998. Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order. University of Chicago Press.

Dugan, Christopher, Don Wallace Jr., and Noah Rubins. 2005. Investor-State Arbitration. Oxford University Press.

Lew, Julian, Loukas Mistelis, and Stefan Kroell. 2003. Comparative International Commercial Arbitration. Kluwer.

Redfern, Alan, and Martin Hunter. 2004. Law and Practice of International Commercial Arbitration. 4th ed. Sweet & Maxwell.

Schreuer, Christoph H. 2001. The ICSID Convention: A Commentary. Cambridge University Press.

Stuyt, Alexander, ed. 1990. Survey of International Arbitrations: 1794–1970. Kluwer.

The Permanent Court of Arbitration. 2000. International Alternative Dispute Resolution: Past, Present and Future. Kluwer.

Varady, Tibor, John J. Barcelo, and Arthur Taylor Von Mehren. 2006. International Commercial Arbitration. 3rd ed.

Journal Articles

Abbas, Sheer, and Muhammad Ramzan Kasuri. 2020. "Public Policy Defense to Refuse Enforcement of Foreign Arbitral Award: A Comparative Study."

Abedian, Hossein. 2011. "Judicial Review of Arbitral Awards in International Arbitration–A Case for an Efficient System of Judicial Review." Journal of International Arbitration 28 (6).

Baig, Khurram, and Samza Fatima. “Global Arbitration Enforcement: Judicial Views in Pakistan and the UK.” Migration Letters 21, no. S7 (March 2024): 421–436. https://doi.org/10.59670/ml.v21iS7.8699.

Baig, Khurram, Shahzada Aamir Mushtaq, and Waheed uz Zaman. "Arbitration Agreement as a Pillar of Recognition and Enforcement of Foreign Commercial Arbitral Awards: An Exploratory Study of Pakistan and the UK." Journal of Law Social Studies (JLSS) 6, no. 1 (2024): 17-27.

Bhat, Rohit, and Rhea Mathews. 2017. "Challenges in Enforcing Foreign Arbitral Awards: Insights from South Asia." Asian Arbitration Review 12: 23.

Chishti, Ijaz Ali. 2017. "Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: A Pakistan Perspective." Private International Law: South Asian States' Practice, 369–389.

Colombo, Giorgio Fabio. "Between Internationalization and Domestic Resistances: A Critical Overview of the Application of the Recognition and Enforcement Act, 2011, Pakistan." Nagoya University Journal of Law and Politics, 2021.

Haque, Inaamul, and Naeem Ullah. 2009. "The Evolution of Arbitration in Pakistan: A Legal Perspective." International Arbitration Journal 3: 92.

Hill, J. 2012. "The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England." Journal of Private International Law 8 (2): 159–193.

Hussain, Rizwan. "Orient Power Co. Ltd. V. Sui Northern Gas Pipelines Ltd. – Enforcement of Foreign Commercial Award in Pakistan: Encouraging Enforcement Trend with Discouraging Arbitral Practice(s)." Courting the Law - Pakistan's 1st Legal News and Analysis Portal, August 17, 2020. Last revised September 8, 2021. Posted April 19, 2021. Hussain and Associates.

Islam, Rumana. 2019. "Autonomy of Arbitration Clauses in Invalid Contracts: Judicial Trends in South Asia." Arbitration International 17: 78.

Idrees, Rao Qasim, Iqra Azhar, and Mirza Shahid Rizwan Baig. "The Enforcement of Foreign Arbitral Awards: A Critical Analysis of Current Pakistan Arbitration Mechanism." Global Political Review 5, no. 4 (December 2020). https://doi.org/10.31703/gpr.2020(V-IV).02.

Jillani, Anees. 2006. "Arbitration Laws in Pakistan: Challenges and Recommendations." Pakistan Journal of Law and Society 58: 45.

Khan, Shahzad Manzoor, Jamil Ahmad Khokhar, Sadia Saeed, and Ali Naeem. “An Analysis of the Practices of International Commercial Arbitration in Pakistan and the UK.” International Journal of Social Sciences 3, no. 1 (March 2025). https://doi.org/10.59075/ijss.v3i1.749.

Munir, Yasir. 2024. "The Evolution of Arbitration Law in Islamic Republic of Pakistan: Historical Context and Future Directions." AL-IDRAK JOURNAL 4 (1): 59–71.

Mukhtar, Sohaib, and Shafqat Mahmood Khan Mastoi. 2017. "The Challenge of Arbitral Awards in Pakistan." J. Arb. Stud. 27: 37.

Nairn, Karyl, and Patrick Heneghan. 2012. "Arbitration World: Jurisdictional Comparisons."

Sharif, A., S. Ali, and S. Baloch. 2022. "Public Policy in Pakistan: A Roadblock to the Execution of Foreign Arbitral Award." SSRN.

Raza, Hassan. “Pakistan’s Dilemma with Foreign Arbitrations.” Kluwer Arbitration Blog, April 24, 2018. https://arbitrationblog.kluwerarbitration.com/2018/04/24/pakistans-dilemma-foreign-arbitrations/.

Tahir, M. I. 2023. "Arbitration System in Commercial Disputes in Pakistan and Enforcement of Foreign Awards." Al-NASR, 73–92.

Walsh, T. W. 2006. "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?" Berkeley J. Int'l L. 24: 444.

Reports and Institutional Publications

ICSID Secretariat. 2022. The ICSID Caseload—Statistics. Issue 20.

Pakistan Centre for Arbitration and Dispute Resolution (PCADR). 2022. Annual Report 2022. https://www.pcadr.org. Accessed December 31, 2024.

PWC. 2008. International Arbitration: Corporate Attitudes and Practices.

United Nations Commission on International Trade Law. 2006. Report of the Working Group on Arbitration and Conciliation. UN Doc A/CN.9/610.

United Nations. 2024. NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards. https://www.newyorkconvention.org. Accessed December 31, 2024.

World Bank. 2024. International Centre for Settlement of Investment Disputes (ICSID) Overview. World Bank Group. https://icsid.worldbank.org. Accessed December 31, 2024.