INTERNATIONAL ARBITRATION
&
PAKISTAN'S STATE RESPONSIBILITY

REDEFINING THE ROLE OF COURT.

BY

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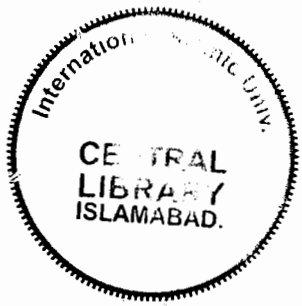

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DEDICATION

THIS WORK IS DEDICATED

To my parents

i.e., Muhammad Tariq Nadeem & Ulfat Jabeen Tariq

Who looked after me, the inconvenience born by them regarding my educational expenses, besides rendering me a helping hand in achieving my desired dream which compelled me to take admission in the esteemed institution, to have completed my LLM degree and the courage, confidence advanced by them from time to time in preparation of this thesis, side by side with my overwhelmingly heavy professional engagements.

The International Islamic University, Islamabad (Pakistan) for bringing an opportunity of higher education in the field of law To this part of country by introducing few years back the LLM degree courses at its campus

The Honorable Members of the Faculty of Shariah & Law for working very herd in teaching and guiding us in the completion of the course work as well as the research work.

And finally

To the Courts

Who owe their existence to doing justice and who have a heavy burden to discharge.

Acknowledgement

All praise to Allah, the Most Beneficent, the Most Merciful. For Him is all that is on the Earth and all that is in the Heavens. All wisdom and all knowledge belong to Him. Whom Allah wants to do good, He grants him wisdom. With His infinite mercy and bounty, He bestows as much of the wisdom and knowledge upon His such creatures, as strive for it.

In the preparation of my thesis, I thank many individuals who have in some way contributed to this thesis, the Honorable Justice Tassaduq Hussain Jillani, of the august Supreme Court of Pakistan, who have been pleased to have me access to the valuable requisite material on my research topic which include his Lordships own research articles including the papers, articles, & speeches read over at National & International Judicial Conferences. I had the good fortune to be placed under the kind supervision and guidance of Mr. Fakhar Mehmood Makhdoom, Assistant Professor of Law, Faculty of Shariah & Law, International Islamic University, Islamabad, whose advice & support enabled me to conduct and complete my research work. It is going without mention that after his appointment as my Research Supervisor, I found him to be kind, loving & dedicated teacher of good old days. His valuable advise regarding selection of books, reading of various research materials including journals etc, visits of various websites, and other useful tips encouraged me to undertake the work with commitment and confidence. I would also like to appreciate the patience hearing and the welcoming attitude of the worthy Supervisor, extended to me by him from time to time, even at odd hours of a day. Indeed, in him, I found a mentor, a facilitator and a caring teacher, for which I am whole heartedly thankful to him.

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May Almighty Allah reward them all for their help and coordination "Amin".

MUHAMMAD WASEEM TARIQ
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ABSTRACT

INTERNATIONAL ARBITRATION & PAKISTAN'S STATE RESPONSIBILITY

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With growth of international trade and foreign investment in Pakistan, the interaction of foreign commercial elements with local business has increased rapidly. Inevitably the resulting international commercial relations look for dispute resolution mechanisms that are acceptable to both the foreign as well as the local parties. Consensual forms of dispute resolution engender confidence and reduce the risk profile in international business. How much mechanisms can function is a subject of private international law which contains certain agreed, shared and common principles whereby different states having sovereign municipal systems of law recognize and enforce rights conferred by the said mechanisms. However, the rules of private international law of one state may differ from another because for example, not all states are parties to the same international conventions or treaties. Yet on grounds of comity among nations, private international law and practice has witnessed the growth of a new field dealing specifically with the resolution of international commercial disputes. The jurisprudence in this area is evolving both in the developed and the developing commercial world under the generic title of international commercial arbitration. In the last two decades the courts in Pakistan have received a variety of international commercial disputes wherein the question has been whether and if

so in what circumstances should a foreign arbitration clause agreed by the local party with its foreign contracting party, be disregarded. Over the six chapters of this thesis, I take the opportunity of addressing in a historical perspective the importance of International Arbitration, its merits, the diminishing grounds of judicial intervention in Pakistan against arbitrability of international disputes, the role played by the Judiciary, the critical examination pertaining to the implementation process, from the perspective of Pakistan, by advancing few suggestions for improvement of prevailing system etc., starting from introduction and finally concluded with some recommendations and bibliography.

Methodology

Focus of my study would ultimately be to analyze the position of Pakistan in the field of International Commercial Arbitration. On the other hand, before going directly to Pakistan, an attempt would be made to critically overview model laws and legislations, international and regional, on the subject, which would inevitably help draw comparison/conclusion. Therefore, the method of study would be comparative, analytical and deductive.

LIST OF ABBREVIATIONS

1.	AAA	American Arbitration Association
2.	ADR	Alternate Dispute Resolution
3.	AIR	All Indian Report.
4.	BIT	Bilateral Investment Treaty.
5.	COPU	Committee on Public Undertaking
6.	CLC	Civil Law Cases
7.	HUBCO	Hub Power Company Ltd.
8.	ICL	International Law Commission.
10.	ICJ	International Court of Justice
11.	IACCA	Inter-American Commission of Commercial Arbitration
12.	ICSID	International Centre for the Settlement of Investment Disputes
13.	ICC	International Chamber of Commerce
14.	KLRCA	Kuala Lumpur Regional Centre for Arbitration
15.	LCIA	London Court of International Arbitration
16.	LMAA	London Maritime Arbitration Association.
17.	MLD	Monthly Law Digest.
18.	PLD	Pakistan Law Digest.
19.	SC	Supreme Court
21.	SCMR	Supreme Court Monthly Review.
22.	WAPDA	Water & Power Development Authority.
23.	WIPO	World Intellectual Property Organization.
24.	UN	United Nations.
25.	UNCITRAL	United Nations Commission on International Trade Law

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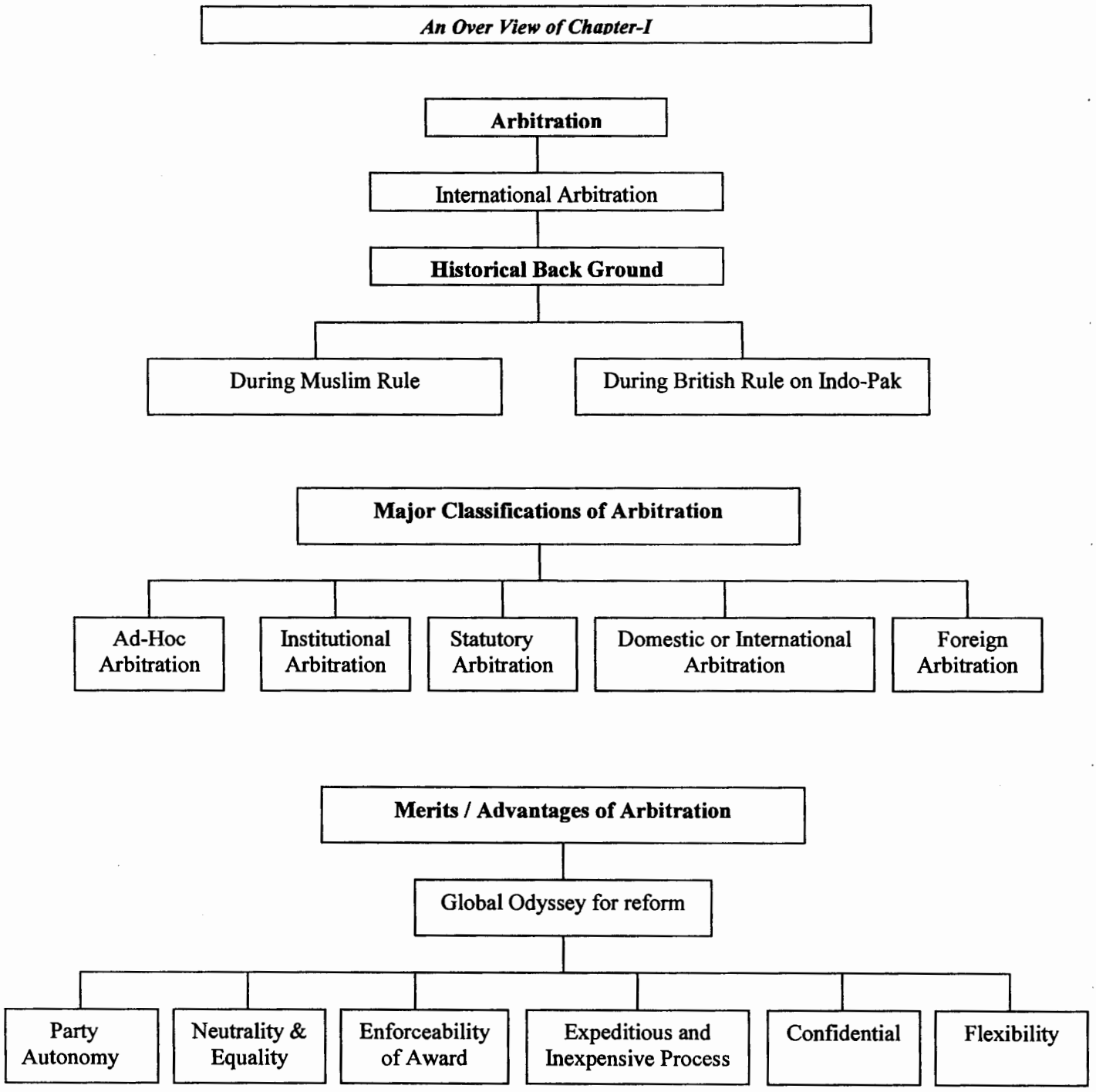
An Over View of Chapter-I
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Statutory Arbitration
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Party Autonomy
Neutrality & Equality
Enforceability of Award
Expeditious and Inexpensive Process
Confidential
Flexibility

INTERNATIONAL ARBITRATION

AND

PAKISTAN'S STATE RESPONSIBILITY:

REDEFINING THE ROLE OF THE COURT

CHAPTER-I

1.1 WHAT IS ARBITRATION?

"Arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties".[1]

Romily M.R. in Collins Vs. Collins, (1958) 28 LJ CH 18 calls arbitration as "reference to the decision of one or more persons of a particular matter in difference between the parties. In its broadest sense arbitration is substitution by consent of parties, of another Tribunal for the Tribunal to be provided by the ordinary process of law; a domestic Tribunal—as contra distinguished from a regularly organised court proceeding according to the course of law—depending upon the voluntary act of the parties disputant in the selection of Judges of their own choice. Its object is the final disposition in a speedy and inexpensive way, of the matters involved so that they may not become the subject of future litigation between the parties."[2]

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1. P.Ramanatha Aiyar's Advance Law Lexicon, 3rd Edition (Extensively Revised and Enlarged) 2005, A-C Vol-I at page 324.

2. Justice V.K.Singhal, Judge, Karnataka High Court "Arbitration in construction contracts and dispute resolution mechanism" AIR 2000 Journal pages 67-68.

It is a binding procedure where dispute is submitted for adjudication to an arbitral tribunal, or to any third person called arbitrator, consisting of a sole or an odd number of arbitrators chosen by the parties, which gives its decision in the form of an award that being binding upon them finally settles the dispute between the parties.[3]

It can be Adhoc or Institutional. Adhoc arbitration means an arbitration where the parties and the arbitral tribunal will conduct the arbitration according to the procedure which will whether be agreed by the parties or, in default of agreement, laid down by the arbitral tribunal at a preliminary meeting once the arbitration has begun. However, this is not only way of proceeding. There are many other set of rules available to parties who contemplate arbitration; including (where applicable) the rules of their own trade associations. An "institutional arbitration" is one that is administered by one of the many specialist arbitral institutions under its own rules of arbitration. There are many such international and national institutions. Amongst the better known international institutions are the American Arbitration Association (AAA), the Iner-American Commission of Commercial Arbitration (IACCA), the International Centre for the Settlement of Investment Dispute (ICSID), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).[4]

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3. P.M. Bakshi, "Alternative Dispute Resolution (ADR) in the Construction Industry" Alternative Dispute Resolution P.C. Rao & William Sheffield, ed, 2006 [p 317]

4. Walter Mattli, "Private Justice in a Global Economy: From Litigation to Arbitration", International Organization Vol: 55, No: 04, page No: 921, The Rational Design of International Institutions (Autumn, 2001), Published by The MIT Press.

1.1.1 WHAT IS INTERNATIONAL ARBITRATION?

Arbitration becomes international when the party to a dispute resides or conducts their main business in different countries. International Arbitration is the established method today for resolving disputes between parties to international commercial agreements. As with arbitration generally, it is a creature of contract, i.e., the parties decision to submit any disputes to private adjudication by one or more arbitrators appointed in accordance with rules the parties themselves have agreed to adopt, usually by including a provision for the same in their contract. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their underlying legal systems. [5]

Ambrose Bierce defines International Commercial Arbitration as "the substitution of many burning questions for a smoldering one. In the picturesque language of Nani Palkhiwala, Court litigation is a 'Rolls Royce of 1907 vintage, stately and solemn, while an International Commercial Arbitration is a 1987 Honda car which will take you to the same destination with far greater speed, higher efficiency and dramatically less fuel consumption." [6]

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5. http://en.wikipedia.org/wiki/Internatioanl_arbitration, lastly visited on 29.09.2008

6. O P Malhotra Indu Malhotra on "The Law and Practice of Arbitration and Conciliation" Second Edition (2006) (Published by Lexis Nexis Buttar Worths) at page No: 129.

The UNCITRAL Model Law and International Commercial Arbitration in Article 1(3) defines an arbitration as international where, the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(a) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(b) the parties have expressly agreed that the subject-matter of the arbitration agreements relates to more than one country.[7]

Article 1(4) goes on to provide the following: -

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.[8]

According to Sir Bernard Rix, international trade is, "one of the most important instruments of international peace, cooperation and reconciliation. And international arbitration, for the most part free of the interference of national intervention, plays an immensely important role in facilitating such international trade."[9]

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7. Article 1(3) of UNCITRAL-United Nations Commission on International Trade Law Model Laws 1985.
8. Article 1(4) of Ibid (see infra note).
9. Sir Bernard Rix "International Arbitration, Yesterday, Today and Tomorrow" published in The Journal of the Chartered Institute of Arbitrators Volume 72 Number 3 August 2006: Page 224.

Here a question arises as to what kinds of disputes could be referred to arbitration. The answer to the above query could be found from some of the prominent sectors as detailed referred herein below, but not limited to, the following transactions. i.e.,[10]

S.No	*Types of Agreements/Contracts*
a.	Distribution Agreements.
b.	Intellectual Property and Know-How Licenses.
c.	Joint Venture Agreements.
d.	Research and Development Contracts.
e.	Merger and Acquisition.
f.	Share Sale and Purchase Agreements.
g.	Construction and Engineering Contracts.
h.	Buy-out and Earn-out Agreements.
i.	Sale and Purchase of Goods.

The Philosophy behind the ADR approach is to save the aggrieved person from hardship of going to a court of law, involving heavy expenses and very often indefinite and unjustified time period and with the least surety that justice will be done to the aggrieved party, as decisions of the courts are generally based on evidence produced, the capability of the lawyer pleading the case.[11]

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10. Paper on "Drafting of Arbitration Agreements" Presented by Dr. Laurence Shore at LESI World Conference Oslo held on 18th June 2003.

11. Paper on " Alternate Dispute Resolution (ADR) in Pakistan and other Countries" delivered by Justice ® Dr. Ghous Muhammad Advocate Supreme Court of Pakistan and Director General Sindh Judicial Academy at Workshop on ADR arranged by Institute of Cost & Management Accountants Pakistan on 09th April 2005 at Head Office Karachi.

1.2 HISTORICAL BACK GROUND & RECENT DEVELOPMENT OF ENGLISH ARBITRATION LAW IN CONTEXT OF MUSLIM & BRITHISH INDO-PAK RULE

Historically the development of Arbitration Law can be bifurcated into two major groups i.e., Arbitration during the Muslim Era and the Arbitration which gradually grown up & formed its present shape, i.e., during the British Sub-continent Rule. Now we will discuss these into some detail.

1.2.1 *ARBITRATION DURING MUSLIM RULE*

Muslim law came to India with Islam, which came via Cochin, Surat and Bombay harbours in the south-west and Khyber Pass in the north. Imam Abu Hanifa and his disciples Abu Yusuf and Imam Mohammad, in their commentary which is commonly known as the Hedaya, systematically compiled the Muslim Law. It needs to be emphasized and to be reminded that there is nothing wrong or unusual in seeking dispute resolution through ADR techniques. Islamic law is not oblivious of the concepts of the ADR and the importance of expeditious justice. The Holy Prophet Muhammad (PBUH), while discharging the onerous responsibilities as the head of State and the Government, was always prepared to dispense justice expeditiously as soon as it was possible. Shameem Hussain Qadri, the late Chief Justice of Lahore High Court Lahore in his book "Islami Riasat, Quran Wa Sunnat Ki Roshni Mein" identified different techniques which were employed by the Holy Prophet Muhammad (PBUH) in resolving the disputes, which included, amongst others, persuasion, consensual agreement, conciliation and consultation.[12]

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12. Justice Shameem Hussain Qadri, "Islami Riasat, Quran Wa Sunnat Ki Roshni Mein" (July 2001), the Chief Justice of Lahore High Court, Lahore, by Raza Publications Urdu Bazar Lahore.

During Muslim rule in India, all Muslims were governed by Islamic laws—i.e., The Shariah as contained in the Hedaya, which inter alia contains provisions for arbitration inter-se the parties. On the other hand non-Muslims were continued to be governed by their own personal laws, i.e., by the Hindu Law. However, a hybrid system of arbitration laws developed, with respect to transactions between Muslims and non-Muslims. Stephen York makes a special mention of this in his book on ADR and says that "Mediation and Conciliation are the methods preferred by the Prophet (Peace Be Upon Him) and thus are favoured in the Arab world."[13]

In brief the idea of ADR has its roots in ancient times. Even Prophet Abrahim (PBUH) prayed to Almighty Allah in the following words that "Rabbi! Endow me with ability to judge, and include me among the reformists {and peacemakers}.[14] Islam being complete code of life has also laid emphasis on mediation time & again by reiterating that it is incumbent upon the Muslims to make efforts for a compromise between two individuals. In the Holy Quran, in Sura "Hujrat", Sura "Nisa" and Sura "Namal", there are many injunctions indicating such a preference.

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13. Saleh, "The Settlement of Disputes in the Arab World: Arbitration and other Methods". 4 International Tax & Business Law 280.

14. "Quraan Mubeen , 26.83" Literal Translation of the Quran in English & Urdu by Rashiddin Ghaznavi Parah: 19, Manzil: 05, at Page 444, published by Ilmi Kutab Khana, Urdu Bazar, Lahore.

Such as in Sura Hijrat Allah Almighty clearly ordained in following words, "If two parties among the believers fall into a fight, make peace between them; but if one of them transgresses against the other, fight the one who has transgressed until he returns to the command of Allah. Then, if he returns, make peace between them with justice and be fair; for Allah loves those who are fair and just".[15] In the same it is disclosed "the believers are brothers to one another, therefore, make reconciliation between your two your brothers and fear Allah, so that you may be shown mercy".[16] In Surah Nisa Almighty Allah directs, "if both of them agree to reconcile by means of compromise, after all compromise (settlement) is the best".[17] In the same Surah He ordains, "If you work out friendly understanding and fear Allah, Allah is Oft-forgiving, Most Merciful".[18] All these verses transpires the emphasis of Islamic justice system on conciliation & mediation. On one occasion the Caliph Umer (R.A) wrote a letter to Abu Musa Ash'ari in respect of the concept of justice, by stating therein that it is better to mediate between two Muslims unless Haram (Prohibited) is declared Halal (Permissible) and Halal is declared Haram. [19]

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15. The Holy Quran, Surah Hujrat, Verse 9, Part 26.

16. The Holy Quran, Surah Hujrat, Verse 10, Part 26.

17. The Holy Quran, Surah Hujrat, Verse 128, Part 26.

18. The Holy Quran, Surah Hujrat, Verse 129, Part 5.

19. Mr. Khawaja Iftikhar Hussain Butt, Registrar AJ&K High Court "Mediation as Alternative Dispute Resolution" PLD 1990 Journal 64.

According to Islamic Shariah, compromise and conciliation is better than litigation. "The Muslim jurists have laid down to the extent that it is incumbent upon the Qazi (Judge) to ask the parties to enter into a compromise before he starts regular hearing".[20] The practice of recourse to arbitration in the sub-continent evolved up to the end of the Mughal empire and continued during the British period throughout the country, in one form or the other. Arbitration, in most Islamic countries, is governed by Shariah, being the basic law of the Muslims. Shariah comprises the Holy Quran, Sunnah (The sayings and traditions of the Prophet Mohammad "P.B.U.H"), Ijma (consensus among recognised religious authorities) and Qiyas (inference by precedent). An arbitration governed by the Shariah is subject to the procedural and substantive laws of Shariah, wherever the arbitration is held. The effect of the agreement to submit disputes to the Shariah law is that the parties agree that Shariah will govern all aspects of arbitration to the complete exclusion of any 'secular system'. According to Shariah, an arbitral award is enforceable like a court decree, and is also liable to be set aside on the same grounds as applicable to a decree. However, in the area of International Commercial Arbitration, strict application of Shairah has diminished with emergence of arbitration rules. Many Muslim states, such as Egypt, Algeria and Tunisia, have either adopted the UNCITRAL Model Law and the UNCITRAL Arbitration Rules, or implemented them in their own arbitration legislation. In connection with recognition and enforcement of foreign awards, most of the Islamic states have adopted the New York Convention 1958.[21]

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20. Syed Amir Ali, "Ain-ul-Hidaya", Qanooni Kutab Khana Katchary Road, Lahore, at Page 434.

21. Supra note 06 at pg 06.

1.2.2 *ARBITRATION DURING BRITISH RULE ON INDO-PAK*

Redressal of disputes by arbitration was available in one or other forum since history of civilized society is available. There is a sense in which it may be legitimately claimed that England is the home of arbitration , as such the principles and practice of arbitration became established here earlier than they had did in other countries, as since long it became practice of this country to insert arbitration clauses in many types of contracts.[22]

In ancient Hindu India there were several grades of Arbitrator in systematic hierarchy. PUGA or a Board of Persons belonging to different sects and tribes but residing in same locality; SRENI or Assemblies of traders, artisans connected in some way with each other; and lastly KULA or KULANI or group of persons bound by family ties. The decision of Kula was subject to revision by Sreni which in turn be revised by Puga. These Arbitral Tribunals were having sanction of society and not of king and were widely accepted. Later on systems of *panchayat* was well established, accepted and continued in Medieval India.[23]

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22. Lord Tangley, K.B.E "International Arbitration: A Symposium" at Page 720, July 1996 International & Comparative Law Quarterly Vol (15).

23. Ashok Mehta, Advocate "Arbitration-Past and Present", AIR 1998 Journal 65.

Even after the advent of British rule, the panchayat system continued to flourish as it was observed in 1927 by the Bombay High Court that to refer matters to a *panchayat* is one of the natural ways of deciding many a dispute in India. The casting of arbitration in a form more recognizable by modern eyes started in the sub-continent essentially with the Indian Arbitration Act, 1899. This was however, a statute of limited scope, being applicable only to the Presidency-towns of Madras, Bombay and Calcutta and such other towns in India as were notified for purposes of the Act. In 1908, a new Code of Civil Procedure, applicable to the whole of British India, was enacted, and in its Second Schedule, provision was made for arbitration, but only in respect of pending suits. Thus, there was initially a piece meal approach to making arbitration part of the corpus of laws. Recommendations and suggestions were made most prominently by the Civil Justice Committee in 1925, to provide for a new and comprehensive Arbitration Act. However, it was not until 1940 that the appropriate Act was passed by the Indian Legislative Assembly. The Arbitration Act, 1940 remains in force in Pakistan till today, and was in force in India till 1996.[24] It would not be out of place to mention here that the partition of the Sub-continent is a good example of arbitration, when in June 1947, British India was to be partitioned and two independent dominions India and Pakistan were to be established, for which a judicial forum was created to deal with the demarcation of the boundaries of the two states.[25]

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24. Mr. Justice Mian Saqib Nisar, Judge Lahore High Court, "International Arbitration in the context of Globalization: A Pakistani Perspective" PLD 2008 Journal page 21.

25. Paper on "Rooted In Our Culture" delivered by Qaisar Mufti, FCMA, Chairman, Research & Technical Committee, ICMAP at Workshop on ADR arranged by Institute of Cost & Management Accountants Pakistan on 09th April 2005 at Head Office Karachi

Prior to Independence in 1947, Indo-Pak Sub-continent accession to International Arbitration Laws dates back to 1923 when the undivided India signed Geneva Protocol on Arbitration. It was followed by ratification of Geneva Agreement on Execution of Foreign Awards in 1927. Although Pakistan and India were being Part of the British Empire, but in certain domains British India was treated as a sovereign entity under international law, and in that capacity was a signatory to the above referred Geneva Protocols on Arbitration, which is described by Redfern & Hunter, an eminent author on the subject of International Commercial Arbitration, as merely the "first step on the road towards International Recognition and Enforcement of International Arbitration Agreements and Awards.[26]

Later on in 1937, an Act known as the Arbitration (Protocol and Convention) Act, 1937 was passed by the Indian legislature to give effect to the aforesaid international agreements. This Act survived independence and continues to remain in force both in India & Pakistan. Thus, three years before getting a statute that comprehensively dealt with domestic arbitrations, British India had in place an Act dealing directly with International Commercial Arbitration. The 1937 Act continued to be in force in Pakistan after 1947 by virtue of Pakistan (Adaptation of Existing Laws) Order. [27]

Moreover, the Geneva Treaty stands ceased to have effect between contracting states on their becoming bound and to the extent that they become bound after promulgation of New York Convention.[28]

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26. Redfern & Hunter, et. al., "Law and Practice of International Commercial Arbitration, 4th edition, (2004) Publisher (Sweet & Maxwell Ltd of 100 Avenue Road, Swiss Cottage), London at para 1-146.

27. The Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947, G.G.O No: 20, dated: 14.08.1947, of The Constitutional Documents Vol: 4-B, by Ministry of Law & Parliamentary Affairs (Law Division) 1964, Published by The Manager of Publications, Government of Pakistan, Karachi at page 1012.

28. Art VII (2) of the New York Convention 1958.

As we know that Pakistan became signatory to the New York Arbitration Convention of 1958 on December 30th of that year, however, for various reasons; the Convention could not be incorporated into Pakistan's municipal law for a long time, despite of the fact that its deficiency was being felt acutely. It was not until July 2005 that the New York Convention was made a part of the law of Pakistan by the promulgation of an Ordinance to give effect to the same. Thus, most of the law in respect of International Arbitrations and Foreign Awards has developed in Pakistan exclusively with reference to the Act of 1937 and to a certain extent the Act of 1940, while it is only very recently that the Courts have begun to deal with issues arising under the New York Convention.[29] Suffice it to say that, by virtue of Article 89 (2) (ii) of our's Constitution of 1973, an Ordinance which has same effect as an Act of Parliament, lapse ipso facto upon completion of its statutory life period of four (04) months unless & until passed by the Parliament.[30] However the New York Convention has been kept alive as being part of the municipal law, through issuance of successive ordinances & the last such ordinance which is available now a days is commonly known as "Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2007, Ordinance No: LVIII of 2007 promulgated on 03rd October 2007, which has yet to be tabled before the Parliament to became as an Act.

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29. Justice Mian Saqib Nisar, Judge Lahore High Court on "International Arbitration in the context of Globalization: A Pakistani Perspective" 2008 CLD Journal 01 relevant at page 06.

30. Article 89 of "The Constitution of Islamic Republic of Pakistan 1973", Edition 2004, as modified upto 29th February, 2008, published by Government of Pakistan, Ministry of Law, Justice and Human Rights Division at Page No: 52-53.

1.3 MAJOR CLASSIFICATION OF ARBITRATIONS.

There are various arbitrations depending upon the terms of arbitration agreement, the subject matter of the dispute in arbitration, and the laws governing such arbitrations. Some types of arbitrations are discussed in following paragraphs.

1.3.1 AD-HOC ARBITRATION.

"When a dispute or difference arises between the parties in course of commercial transaction and the same could not be settled friendly by negotiation in form of conclusion or mediation, in such case ad-hoc arbitration may be sought by the conflicting parties. The arbitration is agreed to get justice for balance of the unsettled part of the dispute only".[31]

1.3.2 INSTITUTIONAL ARBITRATION

"In this kind of arbitration there is prior agreement between the parties that in case of future differences or disputes arising between the parties during their commercial transactions. Such differences or disputes will be settled by arbitration as per clause provide in the agreement. Some of leading institutions are International Chambers of Commerce (ICC), Paris, London Court of International Arbitration (LCIA), London, London Maritime Arbitration Association (LMAA), International Center for Settlement of International Disputes (ICSID), London, Grain And Food Trade Association (GAFTA), London, American Arbitration Association (AAA), New York, World Intellectual Property Organization (WIPO) etc.,"[32]

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31. Supra note 06 at pg 115.
32. Infra note 31 at pg 117.

1.3.3 STATUTORY ARBITRATION

"It is mandatory arbitration which is imposed on the parties by operation of law. In such a case the parties have no option as such but to abide by the law of land. It is apparent that statutory arbitration differs from the adhoc & institutional arbitration because (i). The consent of parties is not necessary (ii). It is compulsory arbitration (iii). It is binding on the parties as the law of land e.g., S-89 of the Code of Civil Procedure 1908, S-36-D of Central Excise Act, 1944, S-195-C of the Customs Act, 1969, S-47.A of the Sales Tax Act, 1990, S-134-A of Income Tax Ordinance, 2001 are the few Statutory Provisions, which deal with statutory arbitration."[33]

1.3.4. DOMESTIC OR INTERNATIONAL ARBITRATION

"Arbitration which occurs in India and has all the parties within India is termed as Domestic Arbitration. An Arbitration in which any party belong to other than India and the dispute is to be settled in India is termed as International Arbitration."[34]

1.3.5 FOREIGN ARBITRATION.

"When arbitration proceedings are conducted in place outside India and the award is required to be enforced in India, it is termed as foreign arbitration."[35]

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33. Paper on "Advantages of ADR" delivered by Mr. Abdur Razzaq Thaplawala, FCMA, Advocate High Court, at Workshop on ADR arranged by Institute of Cost & Management Accountants Pakistan on 09th April 2005 at Head Office Karachi

34. Supra note 06 at pg 118

35. Infra note 34 at pg 118

1.4 MERITS/ADVANTAGES OF ARBITRATION

The growing interest in ADR across the globe is symptomatic of a general realization that methods of dispute resolution under the prevalent justice system are cumbersome, expensive and time consuming. In the above context Arbitration, particularly of commercial disputes, both domestic and international, is viewed by the business community as having certain positive and substantial advantages over litigation. The prime virtue of arbitration is that it offers an extensive repertory of methods on which an imaginative user can draw, thereby avoiding the pitfall of deciding the dispute by rote.[36]

Arbitration normally is more informal and much speedier and less expensive than a lawsuit. Because of the large number of cases awaiting trial in many courts, a dispute normally can be heard much more quickly by an arbitrator than a judge. Often one case that may take a week to try in court can be heard by an arbitrator in a matter of hours.[37]

It is due to the above said advantage, that the Code of Civil procedure (Amendment) Act, 2002 (which came into force on 27.07.2002) has made a provision in S.89-A for settlement of disputes outside the Court by way of Arbitration, Conciliation, Judicial settlement including complementary addition in Order X of the Code of Civil Procedure 1908, empowering the Courts to pass necessary orders for expeditious proceedings. Hence for the first time there has been statutory recognition of ADR. The modes of settlement and mechanism prescribed have also been added to the pages of Statute book.[38]

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36. Paper on "A.D.R-The Role of the Bench & the Bar" delivered by Justice Tassaduq Hussain Jillani at National Judicial Conference 2007, held at Supreme Court of Pakistan, Islamabad.

37. Paper on "You Don't have to Sue, Here are some other ways to Resolve a Civil Dispute" presented by the Judicial Council of California and the State Bar of California, at Page No: 05, (2005) held at USA.

38. S-89-A r/w Ord X, R-1(A) (iii) of the Code of Civil Procedure 1908 at Pages 250 & 605 respectively, by Aamer Raza. A Khan Senior Advocate, Professor University Law College Lahore, Formerly Judge Lahore High Court, Advocate General Punjab, Ninth Edition 2005, Printed at Irfan Afzal Printers Bund Road, Lahore.

In this back drop, it is desirable to make a mention here that, Arbitration is increasingly the dispute resolution mechanism of choice in international transactions. Parties to trans-border contracts choose arbitration in part because of the inherent advantages of the arbitration process and in part because each party wishes to avoid the risk of having to litigate in the other party's courts. Most contracts drafted today to govern international transactions contain clauses providing for the arbitration of disputes in a neutral forum.[39]

1.4.1. GLOBAL ODYSSY FOR REFORM.

The parties to trans-border trade some times may face many different choices when it came across to a mechanism for resolving disputes arising under their contract. If the provisions of their contract are silent, they will be subjected to the courts of wherever a disaffected party decides to initiate legal proceedings. This may not be in the interest of parties that need to know at the time of entering into their contract that their contractual rights will be enforced. The solution to silence is to specify a method of binding dispute resolution, which can be either litigation before the domestic tribunal of one of the parties or arbitration as the case may be. If the parties choose the former course, they may encounter difficulties. Because at the first instance they may be confined themselves to choose the jurisdiction of one or the others' courts, as the courts of a third country may decline to interfere, on the ground that e.g., the matter does not involve any of that country's citizens, companies, or national interest. The second, and perhaps more significant difficulty, is that judicial decision are not very "portable" in that it is difficult and sometimes impossible to enforce a court decision in a country other than the one in which it was rendered.[40]

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39. Paper on "International Arbitration: The Fundamentals" presented by Markham Ball, at Judicial Conference June 2006.

40. Supra note 06 at pg 131

As has rightly been observed by Mr. Ms Navin Merchant, that: [41]

> "Contract enforcement in Pakistan on average takes 46 procedures and 02 to10 year litigation process. It is generally recognized that commercial dispute settlement processes are slow, inadequate and inefficient and do not support market based growth or encourage domestic and foreign investment".

According to another statistic report the backlog in our judicial system is 1.6 million cases out of which 140000 cases pendency is in the Apex Courts of Pakistan alone.[42] On the other hand the prevalent judicial system is costly both for the Government as well as litigants and an average, 35% of the assets of the businesses are caught up in the litigation. All this compelled to the policy makers in tandem with jurists and the heads of superior courts to look for its solution in the light of world's experiences. The consensus of all concerned with the problem lead to inevitable solution, i.e., through various recourse to ADR, which of course includes the Arbitration.[43] It is also worth to note here that the constitution accepts arbitration as form of dispute resolution, which falls in the concurrent legislative list at item No 8, over which both the Federal & Provincial Governments have power to legislate, respectively, but unfortunately no serious reformative steps have been taken so far by the Governments concern in this regard.[44]

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41. Paper on "Commercial Dispute Resolution" delivered by Ms Navin Merchant at National Judicial Conference 2007, held at Islamabad.

42. Editor's Column titled as "New Judicial Policy" published in Daily Dawn, Islamabad of 02.06.2009 at page 07

43. Paper on "Alternative Dispute Resolution—An overview" delivered by Ch. Mustaq Masood, Senior Advocate, Supreme Court of Pakistan at National Judicial Conference, 2007 held at Islamabad.

44. Item No: 08, of the Concurrent Legislative List, of the Fourth Schedule to *"The Constitution of Islamic Republic of Pakistan 1973"*, Edition 2004, as modified upto 29th February, 2008, published by Government of Pakistan, Ministry of Law, Justice and Human Rights Division at page No: 213.

Arbitration is normally considered to have the following potential benefits as compared to court litigation.

1.4.2 PARTY AUTONOMY

"Party Autonomy" comprehends various options available to the parties with respect to the conduct of arbitration, besides giving to the parties freedom from judicial intervention except where otherwise provided in the Act, in this regard. The parties are free to select their own tribunal in accordance with the nature of the subject matter of the dispute. For instance, in an "International Commercial Arbitration" of a highly technical nature involving transfer of technology, arbitrators with appropriate technical expertise who are well-versed in the area of their field and are conversant with the jargon and techniques of resolving such disputes, may be selected.[45] Article 28(1) of the UNCITRAL Model Law also give precedence to the parties autonomy.[46]

1.4.3 NEUTRALITY AND EQUALITY

Where the parties come from different origin/places, arbitration is preferable to litigation by them because of the reason that quite often either of the party is not willing to submit to the jurisdiction of the national court of the other. In such a situation arbitration offers them neutrality in the choice of law, procedure and tribunal. Parties may agree upon the law and procedure of a third country or leave the choice to the tribunal concern. Likewise they may appoint an arbitrator from another country or made a request to an international arbitral institution for the appointment either of the sole arbitrator or one or more members of the tribunal as the case may be. In so doing the parties may be more confident that there will be equality of treatment.[47]

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45. Aga Faquir Muhammad Advocate, Supreme Court of Pakistan "Alternate Dispute Resolution and Income Tax Law" 2005 CLD Journal 42.

46. Article 28 of the UNCITRAL Model Law 1985.

47. "Russell on Arbitration" Twenty-First Edition (1998) by David St. John Sutton Published by Sweet & Maxwell Ltd of 100 Avenue Road, Swiss Cottage, London at Page 10

1.4.4. ENFORCEABILITY OF AWARD

Another important advantage of arbitration is the extensive enforceability of the award. Having incurred the cost of proceedings, a successful claimant wants to be in a position to enforce the award, if necessary. As a result of various conventions, prevailed through out the world, arbitral awards are recognized and enforced in those countries accordingly.[48]

1.4.5 EXPEDITIOUS & INEXPENSIVE PROCESS

Arbitration, prima facie promises the possibility of comparatively expedite proceedings than any other mode of proceedings. It is because of this reason that at the conclusion of arbitral proceedings, there is the prospect of earlier enforcement of the award announce pursuant to domestic law as well as the international conventions, bilateral or multilateral treaties as the case may be. Arbitration also holds out the promise of predictability of the costs and expenses particularly in the areas of congested jurisdictions. The ultimate object of arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.[49]

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48. Infra note 47 at pgs 10-11

49. Soia Mentschikoff "Commercial Arbitration" Published by Columbia Law Review Association, Inc, Columbia Law Review Vol. 61, No: 5 (May 1961) at Page 849

1.4.6 CONFIDENTIAL

The Courts are normally known as Public Institutions, which became dangerous to the interest of a party when it opt to approach the normal Court for redressal of its grievances, which ultimately results in the loss of privacy etc., which would otherwise be of paramount consideration for the aggrieved party in cases of serious natures.[50] On the contrary Arbitration proceedings being private and protected by Laws of privilege and confidentiality is of great significance in commercially sensitive disputes involving, for instance, know how, lists of clients, the development of business strategies, high-tech, intellectual property, trade secretes etc, in which the presumption of confidentiality to arbitration proceedings and awards may be of great importance and in such like other commercially confidential matters. Arbitration is completely different, in which every thing, ranging from head to tail can be, and often is, maintained in absolute confidence. That's why it attracts the parties than to litigate in normal courts.[51]

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50. Paper on "Alternative Dispute Resolution" delivered by Mr. Muhammad Nawaz Baig, Assistant Advocate General Lahore, at National Judicial Conference 2007, held at Supreme Court of Pakistan Islamabad.

51. Diane P. Wood, Circuit Judge, U.S. Court of Appeals "The Brave New World Arbitration", 2003 Capital University Review at page 398 [31:383].

1.4.7 FLEXIBILITY

Arbitration can be much more flexible both ways i.e., in time as well as to the procedure. If the dispute needs urgent resolution, the parties concern can choose a tribunal who will act promptly rather than to wait their turn in the queue by way of normal court proceedings. Arbitration is consensual, therefore the parties can choose the most suitable procedure as they desired i.e., neither they nor the tribunal are tied to inflexible rules of court.[52] In appropriate cases written submissions in letter form may be sufficient for a dispute over the interpretation of a written agreement, whereas in some cases examination of witnesses may be required for the determination of factual controversy inter se them. Likewise the parties may also be represented by any one of their choice; moreover they are also not bound by rules limiting appearance to persons with particular legal qualifications.[53]

Hence, arbitration is a flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

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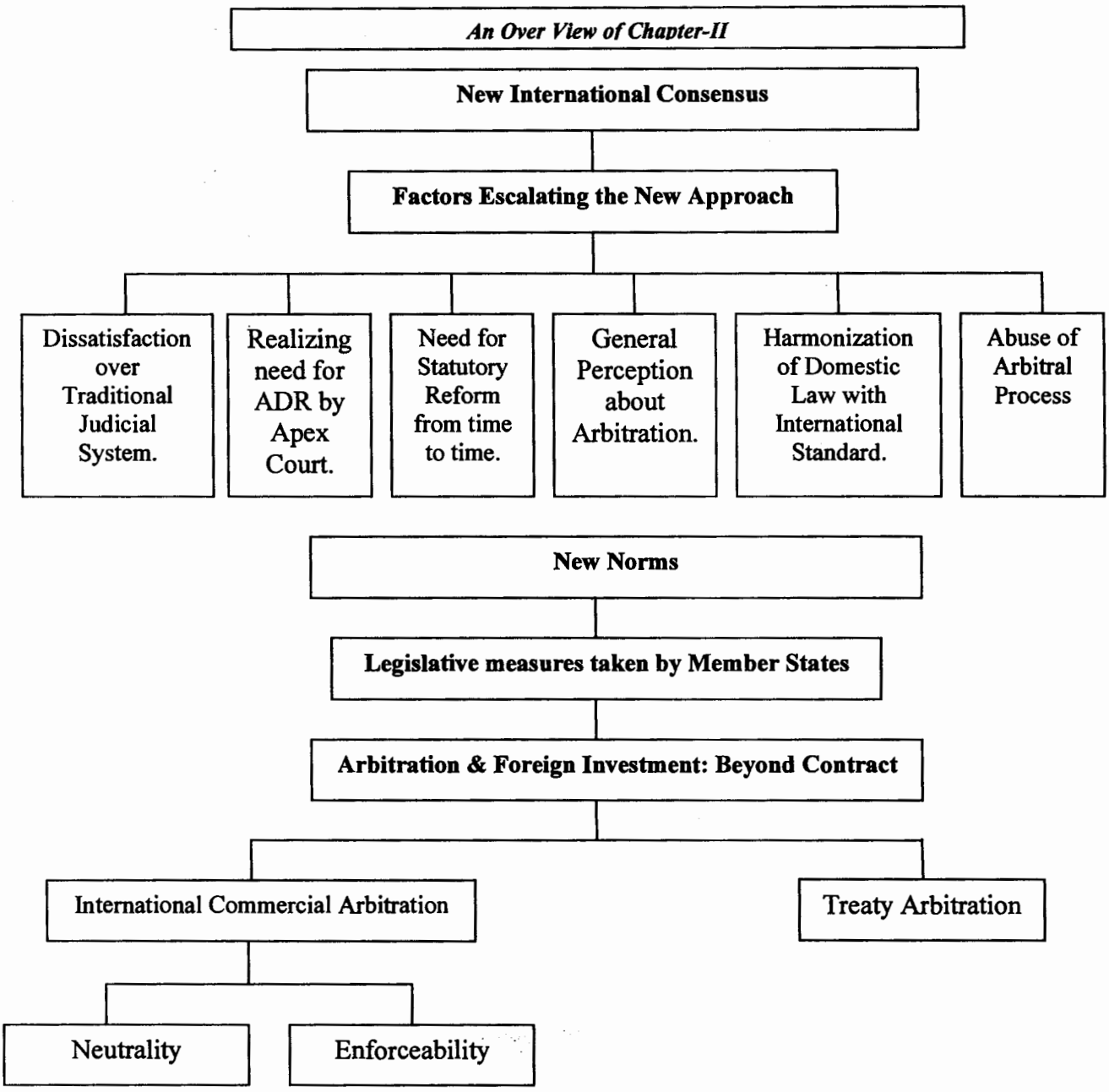
52. Paper on "Alternative Dispute Resolution-A.D.R. Pursuit and Practice", delivered by Justice Syed Zahid Hussain, member of Sub-Committee on ADR at Lahore High Court Lahore

53. Supra note 47 at pg 10


An Over View of Chapter-II
New International Consensus
Factors Escalating the New Approach
Dissatisfaction over Traditional Judicial System.
Realizing need for ADR by Apex Court.
Need for Statutory Reform from time to time.
General Perception about Arbitration.
Harmonization of Domestic Law with International Standard.
Abuse of Arbitral Process
New Norms
Legislative measures taken by Member States
Arbitration & Foreign Investment: Beyond Contract
International Commercial Arbitration
Treaty Arbitration
Neutrality
Enforceability

CHAPTER-II

(B). THE NEW INTERNATIONAL CONSENSUS

In the contemporary international trade individuals, as well as states frequently undertake commercial activities having national and transnational effects. Transnational commercial transactions, with the internationalization of the market have grown in number and thereby involve greater potential for international trade disputes. The international business community, like any other trader, needs a prompt, economical and fair conflict resolution mechanism. Negotiation, conciliation, litigation and arbitration are well known conflict resolution devices. Direct negotiations and conciliation may resolve a conflict. However, when parties fail to resolve the controversy through direct negotiations, they have two choices: litigation or arbitration.[54]

Parties to an international contract may prefer national courts for their (courts) more settled procedures; their power to compel the production of documents and of witnesses and their relatively strict rules of evidence. However, a party to a transnational trade dispute may be reluctant to resort to litigation because of its innumerable undesirable effects.[55]

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54. Dr. K.I.Vibhute "International Commercial Arbitration: Some Reflections on the Problems and Perspectives", Professor of Law, Post-Graduate Department of Law, University of Poona, Pune-411 007 (India). AIR 1994 Journal Page 182

55. Infra note 53 at pgs 182

A transnational trade dispute, which necessarily involves one or more foreign parties and national legal systems may have equally effective jurisdictional links with more than one State. Such a multi-jurisdictional character of a dispute, undoubtedly, prolongs its adjudication and allows forum shopping.[56]

Even where litigation is confined to a single jurisdiction, a claimant may be reluctant to adjudicate his claim before a judge in a far away country, who may be predisposed to the law of his country with which he is familiar. While that is good for one party to the transaction, it is not good for the other party who faces all difficulties of litigating in an unfamiliar procedure, in a language that may be foreign and may not be the language of the contract, and not being able to use its lawyers who are familiar with the company. It is also not irrelevant that the one party is staying at home while other party is staying in a foreign country with all the inconvenience and expenses that entails.[57]

Further, a judgment delivered by a foreign court may be resisted on a number of grounds, such as lack of jurisdiction of the foreign tribunal, denial of procedural due process and contravention of the public policy of the forum in which enforcement is sought. These defences provide another opportunity to a recalcitrant party to prolong rather than to resolve the disputes.[58]

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56. Mr. Jan Paulsson "Arbitration UnBound: Award Detached from the Law of its country of Origin" Published by Cambridge University Press on behalf of British Institute of International and Comparative Law, The International and Comparative Law Quarterly Volume 30, No: 2 (April 1981) at page 358.

57. Paper on "Dispute Settlement" prepared by Mr. Eric.E.Bergsten, for United Nations Conference on Trade & Development held at New York and Geneva, 2005.

58. Infra note 57

FACTORS ESCALATING THE NEW APPROACH FOR ARBITRATION

(a). *Dis-satisfaction over Traditional Judicial System*

Spurred by a growing dissatisfaction with the Judicial adjudication of a transnational trade dispute and problems associated therewith, international business community began a search for a better mechanism to resolution of international trade disputes with minimum costs, delays and devoid of disadvantages of the conventional adjudicatory method. Thus in view, and influenced by the relative efficacy and cheapness of international arbitration. It has increasingly turned to international commercial arbitration as alternative conflict resolution device. It is because of this reason that the Chinese Government, in order to resolve the labours/workers disputes, promulgated 1993 Regulations on the Resolution of Enterprise Labour Disputes and 1994 Labour Law subsequently revised it in 2001.[59]

As earlier pointed out that, in pursuit of development and flourishing of trade and merchandise, endless clash of interest between citizens inter-se and State on the other side, resulting in piling of litigations pending before the Courts and Tribunals in India, compelled the administration of justice to adopt appropriate strategy in order to copped with problem faced by them. It is striking to note here that on 04th December, 1993 in the meeting of the Indian Chief Justices and Chief Ministers, a resolution was put on table to deal with the arrears of cases as expeditiously as possible and the committee finally recommended for alternative dispute resolution mechanisms through Arbitration, Mediation and Negotiation which would go a long way to mitigate the suffering of the masses.[60]

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59. Mr. Jie Shen "The Labour Dispute Arbitration System in China" ER 29,5, Emerald Group Publisher, Employee Relations Vol: 29 No: 5, 2007, University of South Australia, Adelaide, Australia at page 521.

60. Hrudaya Ballav Das, Special Judge, C.B.I "Alternative Dispute Resolution—Its Socio-Legal Dimension" AIR 2004 Journal Page 218.

(b). *Realizing the need for ADR by the Apex Court.*

ADR (Alternative Dispute Resolution) has provided for flexibility of procedural norms so that not only time, but money can also be saved by the litigants. It would also minimize harassment to the parties to the dispute to a considerable extent, as ADR has to succeed basing on some golden principles to be adopted by the disputants like their sense of appeasement, spirit of give and take, compromise, rapprochement and above all, a conciliatory approach of the litigants, so as to end the litigation through this process. The committee thus emphasised the desirability of the disputants taking advantage of ADR so as to avoid the stress of a conventional trial. It is in this context that the Indian Apex Court in the case of Food Corporation of India Vs Joginder Pal, reported in AIR 1989 SC 1263 at page 1266 laid emphasis on ADR system of adjudication.[61] Similarly, in Dunnett's case, the court did not grant costs to the party which won in appeal merely because it had refused mediation at the trial stage, by observing that:

> "It is hoped that publicity will draw the attention of lawyers to their duties to further the overriding objective....and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences." [62]

The reason of accepting such system is for amicable settlement of the transactions between the parties especially through arbitration and conciliation. ADR therefore, does not supplant, but it supplements the existing adjudicative machinery in its attempt to resolve the disputes and clear the back logs.

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61. Food Corporation of India Vs Joginder Pal, AIR 1989 SC 1263, at page 1266.

62. Dunnet Vs. Railtrack plc (in administration) [2002] EWCA Civ 303; [2002] 2 All ER 850, New Law Journal, Arbitration and ADR Supplement, September 27, 2002, at page 1431.

(c). ***Need for Statutory Reform from time to time.***

When we analyze our own history we find that in 1956, when the Supreme Court of Pakistan was founded, a particular conception of arbitration pervaded judicial minds across most trading nations. Arbitration, which had long been recognized as a well-established and widespread system for the resolution of commercial disputes – practiced for as long as merchants have had disputes. With the marked expansion of trade in the post-war period, had evolved as an international as well as domestic process, extending beyond the traditional domains of shipping and commodity trading into new areas of commercial activity, such as construction, insurance, banking and foreign investment.[63]

Over the preceding 50 or so years, there had been important legislative developments in this field in many jurisdictions. Of particular note was the English Arbitration Act 1889, since this formed the core of the Indian, and then Pakistan Arbitration Act 1940. The 1889 Act replaced the Common Law Procedure Act of 1854 and the Civil Procedure Act of 1833, which in turn was the first major statutory reform since the Act of 1698.[64] Each statute made significant improvements to the process, in terms of enforceability and efficiency, and in regulating the degree to which courts could intervene, and arbitration agreements and awards could be avoided.

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63. Paper on "International Arbitration & Pakistan State Responsibility" delivered by Mr. Toby T. Landau Essex Court Chambers London at Supreme Court Judicial Conference 2006

64. Statute 9 & 10 Will III c.15.

In addition to above it is also in pursuance to receipt of a reference from Indian government that Seventy Sixth Law Commission Report recommended for need to improve the certain provisions of the Arbitration Act 1940, which cause delay or hardship to the parties in dispute or unnecessarily introduced the clogs which hinder, the smooth course of the proceedings.[65]

Another factor for the introduction of ADR system was the 9th report of the Indian Parliamentary Committees on Public Undertakings (COPU) recommending to settle litigation by arbitration and also to incorporate arbitration condition in agreements of public undertakings. Like wise Conference of Chief Ministers and Chief Justices held in 1993 also emphasized the need of Alternative Dispute Resolution such as, Arbitration, Mediation, Conciliation negotiation to ensure procedural flexibility, saving of valuable public money and time and to avoid pressure and laches of conventional court trials. This was again resolved by Law Minister's conference in 1994 and ultimately Act 1996 came into existence.[66]

That's why those in the trade and industry profession of Pakistan also demand drastic changes in the Arbitration Act, 1940. Therefore the Pakistan should also take guidance from the government of India that considered it necessary to provide a new and rejuvenated forum and procedure for resolving international and domestic disputes expeditiously.

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65. Law Commission of India, Seventy: Sixth Report No: D.O.No.F.2(8)/77-L.C, New Dehli-110001, dated: 09.11.1978 on Arbitration Act, 1940, at page No: 01.

66. Supra note 23 Page 65

(d). *General perception about arbitration.*

Yet the underlying view of the judiciary remained that arbitration was a process essentially inferior to that of national courts, thus requiring careful supervision and control. Unlike its sister process mediation, arbitration imposes a binding ruling upon its participants, and deprives them of what would otherwise be a constitutional right of access to a national court. As such, it was to be treated with caution, and sometimes suspicion, all the more so since arbitrators lacked the expertise of judges and the full range of powers available to a court. It was an important complement to court litigation, but not a true replacement. This was a view with a long heritage. Too many, thing had changed since Justice Story's well-known observation, over one hundred years earlier, let me quote them for ready reference:

> "Now we all know that arbitrators...cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but *rusticum judicium*...Indeed, so far as the system of compulsive arbitrations has been tried in America, the experiment has not, as I understand, been such as to make any favorable impression upon the public mind, as to its utility or convenience." [67]

Likewise the golden words of the Black brun-J are also of worth importance to be reproduced here, who says that: "The Judgment of Court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts [in country of enforcement] are bound to enforce."[68]

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67. ***Tobey v County of Bristol, et al.*** 23 Fed. Cas. 1313, 1320 (1845).

68. H.L.Ho on "Policies Underlying the Enforcement of Foreign Commercial Judgments" Published by Cambridge University Press on behalf of British Institute of International and Comparative Law, The International and Comparative Law Quarterly Volume 46, No: 2 (April 1997) at page 443.

Although these precise sentiments had been the subject of piecemeal legislative correction in many countries, in the hearts and minds of most lawyers and judiciary, they persisted. And then came 1956 – a year when three significant events coincided. Just as the Supreme Court was born in Pakistan, thousands of miles away in mid-town New York the United Nations Economic and Social Council formally approved plans for the convening of a meeting at the UN Headquarters in New York, to be held in May and June of 1958, and to be entitled "Conference on International Commercial Arbitration".[69]

Most notably, the key item on the agenda as agreed in 1956 was a Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Two years later, at what became known as the New York Conference, this draft evolved into, and was adopted as, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, or the New York Convention. The New York Convention introduced a worldwide system for the mutual recognition and enforcement of arbitration agreements and arbitral awards. More than this, it marked the birth of an entirely new era in international arbitration, and compelled a fundamental reappraisal of the traditional relationship between national courts and arbitration.[70]

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69. The decision to convene this Conference followed a consultation exercise that had been undertaken in 1955 on an ECOSOC Draft Convention. See: UN DOC E/2704 and Corr.1 (the 1955 Draft Convention), and UN DOC E/2822 and Add. 1-6; E/CONF. 26/3 and Add.1; E/CONF.26/4.

70. Julion D.M.Lew on "The Arbitration Act, 1975", by, The International and Comparative Law Quaterly Vol: 24, No:4 (Oct.1975), Publisher Cambridge University Press on behalf of the British Institute of International & Comparative Law, at Page 873.

(e). *Harmonization of Domestic Laws with International Standards*

1956 was also the year in which the world's first Bilateral Investment Treaty was concluded – between Pakistan and Germany. In the fifty years that have since elapsed, a revolution has occurred in this field. The vast majority of trading nations have completely recast their arbitration laws; numerous international arbitration centres and institutions have been established across the globe; As of 22nd February, 2009 an extraordinary 142 countries of the 192 United Nations Members States and the Holy See have now adopted, signed and ratified the New York Convention, and arbitration is now the single most important form of transnational dispute resolution worldwide. The revolution has produced an unprecedented degree of harmonization amongst national arbitration laws and, even more significantly, judicial attitudes.[71]

For example the New York Convention on the Recognition of Foreign Arbitral Awards came into force on 7th June 1959. India became party to this convention on 13th July 1960 and Foreign Awards (Recognition & Enforcement) Act was passed in 1961.Thus prior to the commencement of the Arbitration and Conciliation Act, 1996 the law of arbitration in India was contained in three enactments i.e., The Act of 1937, 1940 and the Act of 1961. The present Act on Arbitration passed in the year 1996 consolidated all the above noted laws relating to arbitration in India.[72]

Preamble of Act 1996 clearly refers that UNCITRAL Rules 1980 and UNCITRAL Law 1985 has made significant contribution to the establishment of a unified legal frame work for the fair and efficient settlement of disputes and it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid UNCITRAL Rules and Law and thus Arbitration and Conciliation Act 1996 is enacted.[73]

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71. Current status of the members to New York Convention 1958, collected from www.uncitral.org lastly visited on 01.07.2009

72. Devendra Nath Mishra on "Arbitration as a mode of Alternative Dispute Resolution (A.D.R)-its necessity and implications" by:, Reader Deptt. Of La, Deen Dayal Upadhya, Gorakhpur University, Gorakhpur (U.P) India, AIR 2001 Journal 249

73. Supra note 23 Page 65

(f). *Abuse of Arbitral Process.*

It is also interesting to note here that, the need for enactment of the codified Act had also arisen on account of several other factors. Like, in a case titled as State of Kerala Vs. Joseph Anchilose, Supreme Court of India pointed out the wide spread abuse of arbitral processes and need was felt to arrest the abuses and evolving effective and speedy mode of alternative dispute resolution through arbitration.[74] In another case titled as M/s. Guru Nanak Foundation Vs. Rattan Singh and Sons, AIR 1981 SC 2075 (2076-2077) the Supreme Court observed:

> "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act 1940 have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes by the decision of the courts has been clothed with 'legalize' of unforeseeable complexity." [75]

the above quoted observation of the Honorable Apex Court inspired the Indian Government to replace the old Act of 1940, with the new Indian Arbitration and Conciliation Act 1996.

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74. State of Kerala Vs. Joseph Anchilose, AIR 1990 Ker 101 (106-107)

75. Devendra Nath Mishra on "Arbitration as a mode of Alternative Dispute Resolution (A.D.R)-its necessity and implications" Reader Deptt. Of La, Deen Dayal Upadhya, Gorakhpur University, Gorakhpur (U.P) India AIR 2001 Journal 249, (relevant at Page 251).

2.1 NEW NORMS

Keeping in view the above discussion a new approach is built upon the global acceptance upon a number of basic principles which are summarized as below: [76]

-- that the arbitral process is a consensual mechanism; it arises out of the agreement of the parties, and that agreement, and party autonomy generally, must be respected and enforced;

-- that the process must be cost effective, fair, efficient and flexible, and a truly alternative form of dispute resolution that can be adapted to the needs of any particular dispute – without simply mimicking the procedures of the courts;

-- that in agreeing to arbitration, parties expect not to have to fight any issues in court, and courts must therefore enforce arbitration agreements, and not interfere: arbitration should be final, binding, and as far as possible, independent and insulated from the courts;

-- that courts however should intervene in the arbitral process where – and only where - this is necessary to support it and protect the expectations of the parties;

-- that arbitrators should have wide and effective powers – in some respects even wider than the powers of judges;

-- that arbitration awards must be recognized and enforced in so far as possible.

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76. The List of Global New Norms Developed in UNCITRAL Model Law member countries collected from www.uncitral.org last visited on 03.10.2008

These principles are perhaps most clearly manifested in the Model Law on International Commercial Arbitration adopted on 21 June 1985 by the United Nations Commission on International Trade Law (UNCITRAL), in order to meet the need of increasing international trade and also domestic needs of member countries. This Model Law was adopted by the UN General Assembly on 11th December, 1985.[77] Thirty-two states were represented during its creation, with a further twenty states and fourteen international organizations observing. The end result was a model law that has since been adopted in 57 jurisdictions, together representing the full spectrum of legal and cultural traditions, namely:

> "Australia; Austria; Azerbaijan; Bahrain; Bangladesh; Belarus; Bulgaria; Canada; Chile; in China: Hong Kong SAR; Macau SAR; Croatia; Cyprus; Denmark; Egypt; Germany; Greece; Guatemala; Hungary; India; Iran; Ireland; Japan; Jordan; Kenya; Lithuania; Madagascar; Malta; Mexico; New Zealand; Nicaragua; Nigeria; Norway; Oman; Paraguay; Peru; the Philippines; Poland; Republic of Korea; Russian Federation; Singapore; Spain; Sri Lanka; Thailand; Tunisia; Turkey; Ukraine; Scotland; Bermuda; in the USA: California; Connecticut; Illinois; Louisiana; Oregon and Texas; Zambia; Zimbabwe." [78]

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77. Supra note 23 at pg 65.

78. The Official list of the Members to UNCITRAL Model Law collected from www.uncitral.org last visited on 03.10.2008

LEGISLATIVE MEASURES TAKEN BY MEMBER STATES

Member countries were requested to frame the Arbitration Law in accordance with Model Law. Mean while for enforcement of foreign awards in India two Acts were passed namely Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961. Indian Government on the basis of UNCITRAL Arbitration Law 1985 has promulgated Arbitration and Conciliation (Third) Ordinance 1996 on 25.01.1996 which later on enacted as Act 1996 (i.e., Arbitration & Conciliation Act 1996). Beyond those countries that have adopted the text wholesale, the Model Law has actively influenced the drafting of new legislation in numerous other countries.[79] Keeping in view the India as a glaring example, for instance, bare reading of the preamble to the Act of 1996 clearly refers that UNCITRAL Rules 1980 and UNCITRAL Law 1985 has made significant contribution to the establishment of a unified legal frame work for the fair and efficient settlement of disputes hence it is expedient to make a law respecting Arbitration and Conciliation, taking into account the afore said UNCITRAL Rules and Law and thus finally the Arbitration and Conciliation Act 1996 is enacted.[80] The Act of 1996 has made a number of much needed change in Arbitration Law, which had become necessary especially in view of too much of judicial interference at all stages i.e., Pre-Arbitration, about appointment of arbitrators, on going arbitration, extension of 04 months time and post award.

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79. Supra note 23 at pg 66.

80. Preamble to "The Arbitration And Conciliation Act, 1996" by H.C.Johari M.Com., LLB (Lucknow) Gold Medalist, I.R.T.S. (Retd) Ex-Member of P.C.S (Judicial) U.P. Author of Commentaries on Railways Act, etc., Edition 1997 Published by Kamal Law House, 8/2, K.S.Roy Road Calcutta 700 001 India at page 23.

(B). ARBITRATION AND FOREIGN INVESTMENT: BEYOND CONTRACT

The single most important domain of international arbitration today is foreign investment. It is now a trite proposition that arbitration is a critical factor in transnational trade, so much so that a significant portion of the world's cross-border economic activity today would simply not exist in the absence of a trusted and workable system of international alternative dispute resolution. To understand this, one must understand the factors that motivate the choice of arbitration. Two related systems must be considered: **(i)** international commercial arbitration and **(ii)** treaty arbitration.

2.2 INTERNATIONAL COMMERCIAL ARBITRATION

It is often said that parties choose international arbitration for the resolution of their disputes because it provides savings in costs and time; avoids the technicalities, procedural complexities and delays of national courts; allows for a more expert adjudication; is entirely flexible in its form; and is confidential. A large number of multinational organizations prefer to use the I.C.C Arbitration Rules especially in cases of cross border disputes. The I.C.C International Court of Arbitration also has Rules of Optional Conciliation (1988) to facilitate the initiation and conduct of the conciliation process, and the amicable settlement of business disputes of international character.[81]

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80. Paper on "ADR in Pakistan and other Countries" delivered by Justice ® Dr. Ghous Muhammad Advocate Supreme Court of Pakistan and Director General Sindh Judicial Academy at Workshop on ADR arranged by Institute of Cost & Management Accountants Pakistan on 09th April 2005 at Head Office Karachi

It is without doubt that arbitration as a process is capable of all these qualities. In truth, however, whether this capability is realised depends on a number of elements, such as the quality of the arbitration agreement; the experience and competence of the lawyers and arbitrators; the reliability of the applicable arbitration law; and how the whole process is perceived by the national court judge who is asked to supervise or intervene. Many modern international arbitrations are fast, efficient, cost-effective, expert and closely tailored to the needs of the particular dispute. Others, however, are slow, inefficient, costly, inexpert processes that closely mimic the procedures of a national court. It is often observed, after all, that "*fast-track*" arbitration was only invented after the invention of "*slow-track*" arbitration. This is perhaps much more common in domestic arbitration, where prejudices against the process are often built in this field. These, then, are advantages of arbitration that are available.[82] In this back drop, it would be profitable to quote the observation of former Chief Justice of India.

> "Those who are practitioners, particularly those who practice in the trial Courts, would appreciate that out of the total number of cases which go to Court hardly 50% require adjudication by a court on a point of law. Most of the cases, almost 50% or more, essentially involve issues of facts and they can certainly be resolved by people of robust common sense outside the Court." [83]

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82. John R . Abersold on "Commercial Arbitration: A Practical Plan" Assistant Professor of Business Law, Wharton School of Finance and Commerce, University of Pennsylvania, Philadelphia, Pennsyluania, Published by: Sage Publications, Inc. in association with the American Academy of Political and Social Science, American Academy of Political and Social Science Vol. 148, Part: 1: Real Estate Problems (Mar, 1930), at page 247.

83. Paper on "Alternative Dispute Resolution (ADR)" delivered by Mr. Justice A.M.Ahmadi at inauguration of International Conference held on 06th October, 1995, at New Dehli.

In his book "International Commercial Arbitration" Gary B. Born comments on the special characteristics of International Commercial Arbitration in the following manner:

> ".....International Arbitration is designed and accepted particularly to assure parties from different jurisdictions that their disputes will be resolved neutrally, among other things, the parties usually seek an independent decision-maker, detached from the courts, governmental institutions and cultural biases of either party. They also ordinarily contemplate the arbitrator's application of internationally neutral procedural rules, rather than a particular national legal regime. In addition, international arbitration is frequently regulated as a means of mitigating the peculiar uncertainties of transnational litigation. These uncertainties can include protracted jurisdictional disputes, expensive parallel proceedings and choice-of-law debates. International arbitration seeks to avoid these uncertainties by designating a single, exclusive dispute resolution mechanism for settling the parties' disagreements. Moreover, intern arbitration awards are often more readily enforceable in jurisdiction other than their place of origin than national court judgments." [84]

Therefore, judges play a very significant role in propagating international arbitrations by understanding arbitration as a forum of resolution outside of the Court system.

There are two critical factors, however, that always motivate the choice of international arbitration. These are unchanging: neutrality and enforceability. The identification of these factors is critical in delimiting the proper role of local courts in their approach to international arbitration. If parties' expectations are to be preserved, both of these elements are central.[85]

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84. Paper on "International Arbitration" delivered by Mr. Dato' Syed Ahmad Idid (Director) Kuala Lampur Regional Centre for Arbitration in Supreme Court's Judicial Conference 2006.

85. Paper on "International Arbitration & Pakistan State Responsibility" delivered by Mr. Toby T. Landau Essex Court Chambers London at Supreme Court Judicial Conference 2006

2.2.1. NEUTRALITY:

The resolution of any cross-border trade or investment dispute in the national courts of one party is likely to be resisted by the other party. This is all the more so in large-scale foreign investment, where foreign nationals may be involved in projects or other trades which raise issues of local economic, political, environmental or other sensitivity. Foreign national courts often entail unfamiliar counsel, judges and procedures. There is the inevitable perception that local parties will have a "home town" advantage; that there will be cultural misunderstandings; delays or inadequacies in the judicial system; or, worse still, that the process will be susceptible to influence, local hostility, or corruption. In so far as the foreign arbitration is, by default, the only choice that remains, and so it is that most modern investment entails a contract with a government, as most do, the latter will rarely accede to a choice of the courts of another sovereign. So it is that international foreign investment transactions depend upon arbitration agreements. International financing and guarantees are usually impossible to secure unless it can be shown that a given transaction or investment has been insulated from the grip of local courts in the host nation, and that there is a secure "exit".[86]

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86. Walter Mattli on "Private Justice in a Global Economy: From Litigation to Arbitration", International Organization Foundation, Publisher MIT Press, at Page 920

2.2.2. ENFORCEABILITY:

The New York Convention has become the single most successful private commercial law convention, with an unprecedented number of ratifications across the world. It allows for the enforcement of arbitration agreements and arbitral awards in the courts of most trading nations, by way of a summary process. There is no single comparable arrangement for court judgments (notwithstanding sustained efforts at the Hague Conference to achieve a worldwide judgments convention). The New York Convention is most important convention in the field of arbitration, which aims to facilitate the Recognition & Enforcement of Foreign Arbitral Awards inter se parties. Article I laid down the scope of convention.[87] While Article II states that member states to convention shall recognize & enforce agreements that contain subject matter that is capable of being resolved by arbitration.[88] In short, this means that if there is any prospect of seeking enforcement of a ruling in more than one country, or of chasing assets around the world for execution (as is the case in most modern transactions, in an ever shrinking world), then parties must arbitrate, for in the absence of a bilateral or regional arrangement, a judgment of a court may be of no use at all.

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87. Article I of the Convention on the Recognition & Enforcement of Foreign Arbitral Awards, 1958

88. Ibid (see Article II of Convention infra).

In relation to enforcement of arbitrations, there are options for the court; e.g., the court can pronounce judgment according to the award or set the award aside. Once the judgment is pronounced, a decree will follow and (subject to appellate review) the decree may be executed as a judgment of the Court, to which presumption of truth is attached unless contrary is proved otherwise.[89] In case of local arbitration, the stance of the courts towards enforcement of arbitral awards is well expressed in the famous case of Pakistan Vs Al Farooqi Builders. The Division Bench of the Sindh High Court held that:

> " Truly Speaking the arbitrator is a judge of all matters arising out of a dispute whether of fact or of law and the court is not to act as a court of appeal sitting in judgment over the award. The Court should always endeavour to sustain the award rather than destroy it unless it could be shown by sufficient and reliable material on record that the arbitrator was guilty of misconduct or that the award was beyond the scope of reference or that it was violative of statute or in contradiction to the well settled norms and principles of law". [90]

The English Arbitration Act, 1996 also reiterate generally that the enforcement of an award could be refused if it was obtained by fraud, was illegal and therefore contrary to "Public Policy". Likewise, in Harbour Assurance Co (UK) Ltd v. Kansa General International Insurance Co Ltd, the Court of Appeal held that an illegal act would constitute misconduct and therefore the enforcement could be refused.[91]

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89. Section 14 of the Code of Civil Procedure, 1908, at page 166, of The Civil Major Acts by M. Mehmood, Fifth Edition 2008, Pakistan Law Times Publication, Kabir Street, Urdu Bazar, Lahore.

90. Pakistan Vs Al Farooqi Builders, 2001 MLD 99

91. Andrew Tweeddale as quoted in "Arbitration of Commercial Disputes, International & English Law & Practice" by OUP Publisher UK [1993] QB 701.

In Soleimany v. Soleimany, the English Court of Appeal commented on the effect of an illegal contract on its arbitrability and found as follows:-

> "Harbour Assurance Co (UK) v. Kansa General International Assurance Co Ltd was not concerned with enforcement of an award, but with whether there should be a stay of legal proceedings in favour of arbitration. The illegality was at that stage contested, and at least in the view of Hoffmann LJ ([1993] 3 All ER 897 at 912, [1993] QB 701 at 721) it was open to question whether there was illegality such that the contacts were void ab initio. By contrast it may be that in the case of palpable illegality (to use the expression adopted by Colman J in Westacre Investment Inc v. Jugoimport-SDPR Holding Co Ltd [1998] 4 All ER 570, [1999] QB 740), an English court would declare that there was no arbitrable dispute, or refuse to grant a stay in favour of arbitration, on the ground that an arbitrator could not lawfully enforce the contract. As already indicated, there may be classes of contract trading with the enemy was cited as a plausible example, and the robbers referring their dispute would be another where the making of the contract will itself be an illegal act, and where the court would be driven nolens volens to hold that the arbitration clause was itself void." [92]

On the contrary the cases in which the U.K. Courts have refused to enforce a foreign arbitral award can be classified as follows:- [93]

(i) Where the fundamental conceptions of English Justice are disregarded;

(ii) Where the English conceptions of morality are infringed;

(iii) Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers;

(iv). Where a foreign law or status offends the English conceptions of human liberty and freedom of action.

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92. Soleimany v. Soleimany, [1999] 3 All E.R. 849.

93. Cheshire and North Private International Law, by Peter North (Author), J.J.Fawcett (Author), Published by OUP Publisher UK 12th Ed., (pp.131-133).

2.3. TREATY ARBITRATION

Dispute resolving forums between states are invariably created and regulated by treaties. The treaty is in effect an expression of consent of two or more states in a concrete form. However, even in the absence of a treaty, the states can agree to refer any matter to an existing judicial forum or a specially constituted arbitration panel. For example, the arbitration between Libya and Tunisia regarding delimitation of its maritime boundaries was done by a specially constituted arbitration panel set up by consent of the two states and it ended its life after delivering the decision or the award and not only became functus officio but also seized to exist.[94]

Secondly, consent by states can be formalized in a permanent treaty creating a specialized dispute resolution forum for arbitrating dispute in the area of the scope of the treaty. For example, the arbitration provision in the Indus Water Treaty between India and Pakistan provides a procedure under which either state can invoke the provisions leading up to arbitration when the dispute relates to the subject matter of the treaty.[95]

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94. Paper on "International Arbitration" delivered by Mr. Ahmer Bilal Soofi Advocate, Supreme Court of Pakistan at Supreme Court Judicial Conference 2006.

95. Ibid (see infra note)

Lastly, there are international judicial forums that are products of multilateral treaties. Contrary to the popular belief - often confined to International Court of Justice (ICJ) – they are quiet in abundance. In fact ICJ or World Court is only one of them and is also a direct product of a treaty called UN Charter, which annexes its Statute. Another well-known forum is the International Criminal Court set up under a multilateral treaty called the Rome Statute. Both, ICJ and ICC are located in Hague, the informal legal capital of the world. However, ICJ is politically unpopular for its inability to take direct or suo moto cognizance of crises. What general analysts do not realize is that ICJ under its Statute has a restricted mandate confined to disputes under the UN Charter. The Charter is a carefully drafted legal document that administers international politics and political relations between states. It has laid down certain rules of international behaviour for the member states; such as prohibiting occupation of territory but also recognized use of force in self-defence. When the occupation of territory constitutes-and when it does not- an act of permissible self-defence can be a very difficult question and opinion would naturally differ on the legal positing of the contesting parties. If ICJ were conferred a mandate to judicially intervene, it would tantamount giving an open license to a judicial forum to make legal interventions in sometimes highly political crises and keenly contested international issues. Therefore, it was thought to preserve the judicial standing of the forum and restrict its mandate to only disputes that states themselves bring to it.[96]

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96. Yawar Faruqui, Advocate, Karachi "Dispute Settlement under International Law and SAARC issues" 2006 CLD Journal 105.

The changes in international arbitration, however, have not been confined to transnational contractual relationships. Over recent years, in the field of foreign investment, there has been a parallel revolution, at the level of public international law. This is a revolution of which surprisingly few are aware – yet it bears directly upon the role of national courts in this field. There exist today approximately 2,600 individual interstate agreements collectively known as Bilateral Investment Treaties, or "BITs". These are treaties which contain mutual undertakings by each contracting state to afford protection and security to the investments of each other's nationals. For long, these were seen as little more than broad statements of mutual goodwill, and convenient "photo-opportunities" to conclude state visits. Unfortunately, these treaties tend to be the subject of close scrutiny only after their conclusion, when the matter is a *fait accompli*.[97]

Upon a closer look, each treaty contains:

(a) a range of usually far-reaching substantive promises given by one state to the individual investors of the other state, including undertakings with respect to fair and equitable treatment; expropriation; transparency; freedom of transfer of funds; taxation; security; and even the performance of contractual obligations undertaken by the state. In certain respects, individual investors are thereby endowed with substantive rights well beyond those that are recognized by customary public international law;

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97. Paper on "International Arbitration & Pakistan State Responsibility" delivered by Mr. Toby T. Landau Essex Court Chambers London at Supreme Court Judicial Conference 2006.

(b) a procedural mechanism for the enforcement of rights by individual investors directly against the contracting state, by way of international arbitration. Most frequently, this is by means of consent to ICSID arbitration, as well as other forms of international institutional and *adhoc* arbitration.

It is also to be noted that ICSID arbitration, unlike all other systems of international arbitration, itself operates under the auspices of an international convention (the Washington Convention of 1965), at a supra-national level. The Washington Convention provides that no court in any contracting state may intervene in any way in the arbitral process – even on grounds of public policy – and must enforce the resulting arbitral award.[98]

Likewise it is also clearly envisaged under Art-25 (1) of the ICSID Convention, which reads as:

> "When the parties have given their consent no party may withdraw its consent unilaterally". [99]

Different investment treaties refer to a variety of different dispute resolution mechanisms but they usually do not create new mechanisms. Many BITs permit private investors to choose between local courts, international arbitration, tribunals and institutions already designated for arbitration.

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98. Article 27 of the Washington Convention of 1965.

99. Article 25 of the International Centre for Settlement of Investment Disputes (ICSID) 1965

Since the advent of 21st century there has been a significant rise[100] in investor state arbitration where investors have brought claims at different arbitration tribunals.[101] The most common in ICSID where there are more than a hundred claims pending. There are other ad hoc tribunals such as the ICC International Court of Justice Arbitration, London Court of International Arbitration etc., where parties bring treaty-related claims.

Bilateral Investment Treaties (BITs) are designed to promote foreign direct investment, by providing a safe and secure environment for foreign investors, with specific safeguards and protections against local risks. The recent realization that foreign investors have available to them this additional tier of protection has given rise to dramatic developments. Arbitration directly against a state under a BIT places dispute resolution at the level of Public International Law in the hands of individuals: an extremely powerful political weapon, which has international diplomatic and economic significance. A charge (even by an individual) that a state has failed to meet its obligations under a BIT is a charge that it has breached its obligations to another state. Adverse BIT awards are matters of note in interstate relations, and in international economic policy. In short, if a country refuses to comply with its BIT obligations, it may lose its international credit rating, and be the subject of political and diplomatic pressure. As is held in case titled as Soeite des Grands, Travenex de Marseille Vs Republic Populaire due Bangladesh.[102]

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100. ICSID website, www.worldbank.org/icsid/cases/main.htm, lastly visited on 29.05.2009

101. See Luke Eric Peterson, "All Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties", International Sustainable and Ethical Investment Rules Project, available on line at http://www.nautilus.org/enviro/partners.html, lastly visited on 29.05.2009

102. Georges. R. Delaune on "State Contracts and Transnational-Arbitration" 1981 American Journal of International Law Volume 75 at page 788-89.

Hence, there has been an extraordinary explosion of activity in this field. According to survey report of UNCTAD, between 1987 and 1995, there had only been about 10 ICSID and other BIT arbitrations in all, between overall 1996 and 1999, there were 8-10 new cases each year. In 2000, there were a further 15 new cases. In 2001, a further 18 cases. In 2002, 25 new case. In 2003, 45 new cases. Again in 2004, another 45 cases. In 2005, 50 new cases, again in 2006, 05 another cases, as of 30th March, 2007 ICSID had registered 263 cases while in last year 17 cases were pending against the eastern European countries.[103] This rush of cases has given rise to a whole new area of practice, and importantly a whole new international jurisprudence on the protection of investment and transnational commercial activity.

New principles are fast evolving – principles of which every court must now be aware in its approach to both foreign investment and international arbitration. Pakistan, in particular, has already signed 48 BITs, of which 23 were in force as at 1 June 2005. It has signed and ratified the Washington Convention. It has also already been the subject of a number of major international arbitrations brought by foreign investors under BITs.[104] Notably: SGS v Pakistan (Swiss/Pakistan BIT); Impregilo v Pakistan (Italian/ Pakistan BIT); and currently Bayinder v Pakistan (Turkish/Pakistan BIT).

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103. Paper on "Treaty Vs Contract: Which Panel" delivered by Gerold Zeiler at Vienna Conference of European Branch, 2006, as well as www.worldbank.org/icsid, lastly visited on 01.07.2009.

104. Pakistan's interest towards FDI has remained particularly high under the Musharraf Government. Pakistan has signed BITs with 48 countries which include Germany, Sweden, Kuwait, France, South Korea, Netherlands, Uzbekistan, China, Singapore, Spain, Turkmenistan, United Kingdom, Turkey, Portugal, Romania, Malaysia, Switzerland, Kyrgyz Republic, Azerbaijan, Bangladesh, U.A.E, Iran, Indonesia, Tunisia, Syria, Belarus, Mauritius, Italy, Oman, Sri Lanka, Australia, Japan, Belgium, Qatar, Philippines, Yemen, Egypt, OPEC Fund, Lebanon, Denmark, Morocco, Bosnia and Herzegovina, Kazakhstan, Laos and Cambodia available at http://www.pakboi.gov.pk/I Agreements/bilateral investment treaties.html lastly visited on 01.05.2009

In the past, international investors, had two remedies for investment related disputes, i.e., either to approach to ICJ or to the domestic courts of host state, but due to the inefficiency of both the given options, now the investors can directly consult international tribunals and claim remedies. The most preferred venue for arbitration is ICSID. It is the only venue where the claim has to be submitted publically. Other venues do not provide public record of the proceedings and, ultimately the awards. Thus, the primary source of information regarding investment disputes under BITs is ICSID.[105]

Disputes referred to ICSID have been of varying types. Examples include the Argentinean Financial Crises on which there were 34 claims in 2004, the challenges to tax policies,[106] situations where investors were involved in armed conflicts or coups[107] and energy/natural resources investments etc.,[108].

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105. ICSID website, www.worldbank.org/icsid, lastly visited on 29.05.2009

106. An example of this case is *Antoine Goetz and Others Vs. Republic of Burundi.* Where there were undertakings from the government of Burundi to provide tax exemptions to a group of Belgium investors. When government did not honor its promise the investors brought claim against the government in 1995.

107. Examples are inter alia.
   (a). Victo Pey Casado and President Allende Foundation Vs Republic of chile (ICSID Case No: ARB/98/2) and

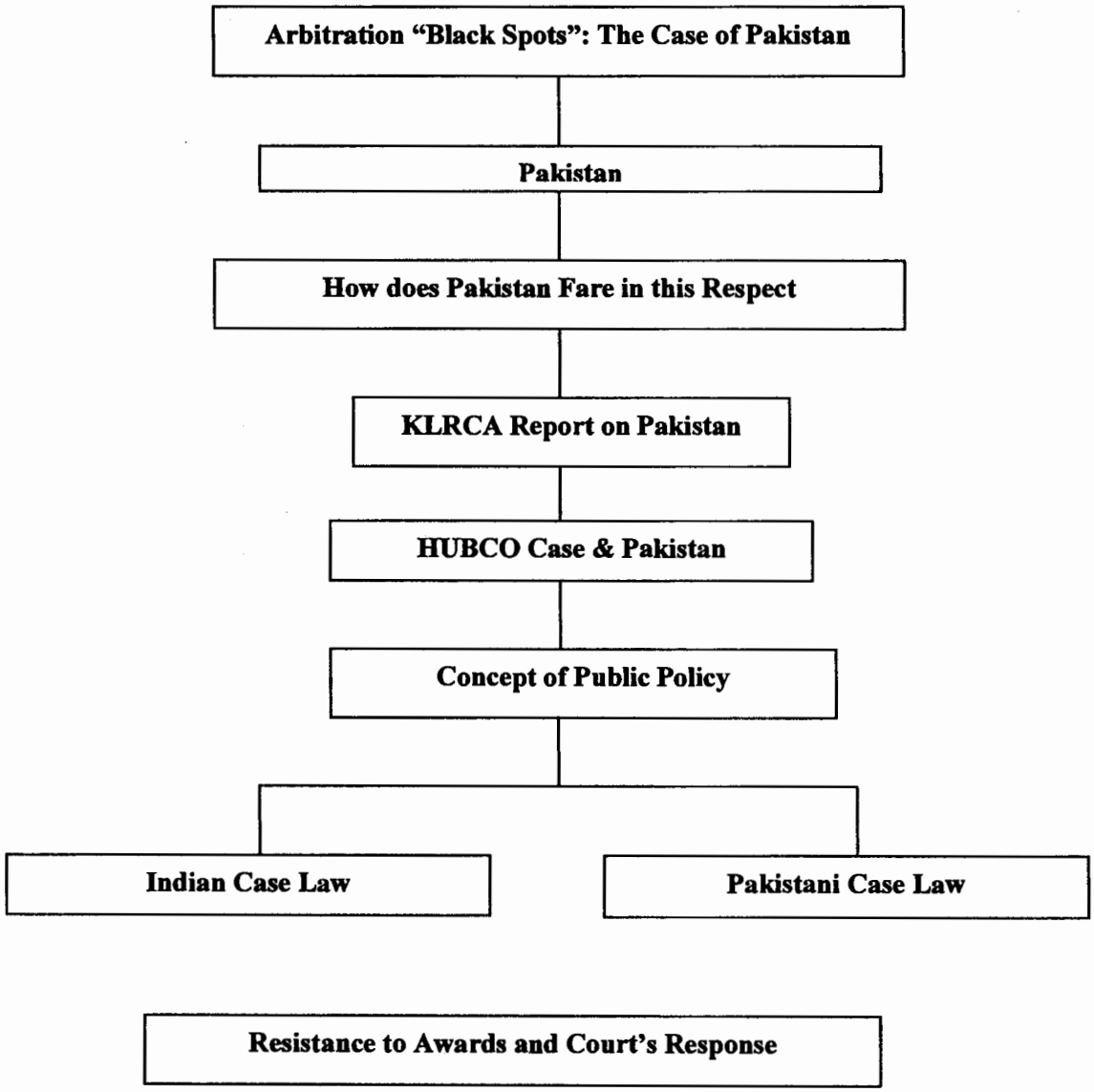
   (b). Banro American Resources, Inc. and Societe du Kivu et du Maniema S.A.R.L. Vs. Democratic Republic of the Congo (Case No: ARB/98/7).

   Excerpts from the Decision on Jurisdiction is available at ICSID website, www.worldbank.org/icsid/cases/awards.htm, lastly visited on 29.05.2009.

108. (a). F-W Oil Interests, Inc. Vs. Republic of Trindidad & Tobago (Case No:ARB/01/14);

   (b). PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi Vs. Republic of Turkey (Case No: ARB/02/5)

An Over View of Chapter-III



CHAPTER-III

(C) ARBITRATION "BLACKSPOTS": THE CASE OF PAKISTAN

For all the revolution and emerging international consensus, all is not well. There remain certain countries around the world that have earned the reputation as arbitration "blackspots", or countries where it is neither safe to locate an arbitration, nor safe to assume that a foreign arbitration will be respected and safeguarded from court interference. Some of these countries have failed to reform and update their arbitration laws in line with the prevailing norms described above. Others have made the necessary legislative reforms, and yet have failed to instill the new international approach in the hearts of their lawyers and judges. Either way, these are countries where the international process is not trusted, where it is still seen as inferior to the court and, in the field of foreign investment, as little more than a vehicle for the protection of foreign companies and governments, to the inevitable detriment of local interests.[109]

The Honorable Supreme Court of India had also expressed its concern over the delay in arbitration proceedings, in the following case titled as M/s Guru Nanak Foundation Vs M/s Rattan Singh, i.e., before the promulgation of new Act. (The Arbitration and Conciliation Act, 1996) (India):

> "However, the way in which the proceedings under the Act are conducted without an exception challenged in Courts has made lawyers laugh and legal philosophers weep....".[110]

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109. Paper on "International Arbitration & Pakistan State Responsibility" delivered by Mr. Toby T. Landau Essex Court Chambers London at Supreme Court Judicial Conference 2006.

110. M/s Guru Nanak Foundation Vs M/s Rattan Singh, AIR 1981 SC 2075 (at page 2076)

These jurisdictions are characterised by the ability to obstruct, undermine or avoid international arbitration by recourse to a local court. The form of recourse varies, but one may list a number of examples:[111]

(a) the obtaining of an "anti-arbitration" injunction from a local court preventing an international arbitration from proceeding – even if the arbitration in question is located abroad;

(b) the commencement and maintenance of a local action on the subject matter of the dispute, in breach of an arbitration agreement, and the refusal of a local court to stay its own process;

(c) the launch of a public interest writ petition by a third (but often sponsored) party, in order to bring the substance of the dispute before local courts;

(d) the raising of broad "public policy" concerns (*e.g.* allegations of bribery and corruption) as a basis for avoiding an international arbitration on grounds of "arbitrability";

(e) the challenge of an arbitration award before a local court, even if that award was rendered abroad, at a foreign seat with its own supervising court;

(f) the challenge of an international arbitration award, often with a reopening of the merits of the dispute.

The list continues. Furthermore, the slow court process also has made local arbitration lack any efficiency it promises. This also explains the unpopularity of arbitration process in Pakistan. Other legal systems, on the other hand, have greatly reduced the supervisory role of domestic courts.[112]

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111. Paper on "Alternative Dispute Resolution—An overview" read by Ch. Mustaq Masood, Senior Advocate, Supreme Court of Pakistan at National Judicial Conference, 2007 held at Islamabad.

112. See for example the Arbitration Act 1996 of Great Britain and the Arbitration and Conciliation Act 1996 of India.

The variety of techniques is a testament to the ingenuity of local lawyers in their endeavours to escape the consequence of an agreement to arbitrate. Each step directly contravenes a current international norm, and will inevitably attract strong criticism from the international community. Yet, in many of the jurisdictions concerned, these are steps that lawyers still consider as a matter of course, arbitration still being treated as nothing more than a precursor to court litigation, and the posture with respect to international arbitration remaining defensive. It is worth to mention here that the Judicial system is patently unable to address the demands made on it, leading to a situation where delays in hearing matters amounts to years rather than months.[113]

In event of a successful challenge the party seeking enforcement of award would, routinely, have to wait some five to six years before the matter would be determined conclusively. This entire prospect had undermined the entire basis for arbitration in India. As has been very well stated by Barwick CJ in cases titled as *Tuta Products Pty Ltd Vs Hutcherson Bros Pty Ltd*, reported as (1972) 127 C.L.R 253 at 258: "Finality in arbitration in the award of the lay arbitrator is more significant than legal propriety in all his process reaching that award."[114]

The law on arbitration in Pakistan is from before partition and does not follow the UNCITRAL Model Laws. The relevant Act is the Arbitration Act 1940, which since its promulgation has been amended, by inter alia, Arbitration Amendment Ordinances of 1977 and 1981.

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113. Paper on "International Arbitration & Pakistan" delivered by Taimur Altaf Malik Executive Director Research Society of International Law (RSIL) at National Judicial Conference 2007 held at Islamabad.

114. Tuta Products Pty Ltd Vs Hutcherson Bros Pty Ltd, (1972) 127 C.L.R 253 at 258.

Even in U.K which laid the foundations of the common law jurisdiction, there has been a wide spread dismay over court delays. Lord Woolf, the Chief Justice of England and Wales, in his report on "Judicial Reforms in U.K." voiced his concern in this regard and said:

> "2. Without effective judicial control, however, the adversarial process is likely to encourage an adversarial culture and to generate an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, question of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable.
> 3. This situation arises precisely because the conduct, pace and extent of litigation are left almost completely to the parties. There is no effective control of their worst excesses. Indeed, the complexity of the present rules facilitates the use of adversarial tactics and is considered by many to require it. As Lord Williams, a former Chairman of the Bar Council, said in responding to the announcement of this inquiry, the process of law has moved from being "servant to master" due to cost, length and uncertainty."

He made valuable suggestions which, inter alia, included reference to alternate dispute resolution (A.D.R). The relevant paragraph, in Chapter 4, is as under:-

> "The parties should:-
>
> (i) whenever it is reasonable for them to do so settle their disputes (either the whole dispute or individual issues comprised in dispute) before resorting to the courts'
> (ii) where it is not possible to resolve a dispute or an issue prior to proceedings, then they should do so as early a stage in the proceedings as is possible." [115]
>
> Where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they have made use of that mechanism."

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115. The Right Honourable the Lord Woolf, Access to Justice ('the Woolf Report') www.dca.gov.uk, lastly visited on 29.05.2009.

3.1 PAKISTAN

With growth of international trade and foreign investment in Pakistan, the interaction of foreign commercial elements with local business has increased rapidly. Inevitably the resulting international commercial relations look for dispute resolution mechanisms that are acceptable to both the foreign as well as the local parties. Consensual forms of dispute resolution engender confidence and reduce the risk profile in international business. How much mechanisms can function is a subject of private international law which contains certain agreed, shared and common principles whereby different states having sovereign municipal systems of law recognize and enforce rights conferred by the said mechanisms. However, the rules of private international law of one state may differ from another because for example, not all states are parties to the same international conventions or treaties. Yet on grounds of comity among nations, private international law and practice has witnessed the growth of a new field dealing specifically with the resolution of international commercial disputes. The jurisprudence in this area is evolving both in the developed and the developing commercial world under the generic title of international commercial arbitration. In the last two decades the courts in Pakistan have received a variety of international commercial disputes wherein the question has been whether and if so in what circumstances should a foreign arbitration clause agreed by the local party with its foreign contracting party, be disregarded.[116] Under afore said title I take the opportunity of addressing in a historical perspective the diminishing grounds of judicial intervention in Pakistan against arbitrability of international disputes.

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116. Paper on "Limitation on Arbitrability of International Commercial Disputes under Pakistani Law" delivered by Mr. Justice Umar Ata Bandial at Supreme Court Judicial Conference 2006.

HOW DOES PAKISTAN FARE IN THIS RESPECT?

Pakistan's record in international arbitration is marked by a number of "firsts", and a number of notable events.

In 1956, Pakistan's arbitration law reflected widespread norms, and was the same law (i.e. closely based upon the English 1889 Act) that was in force across the Commonwealth. On 30 December 1958, Pakistan signed the New York Convention, being amongst the first countries to do so. On 25 November 1956, Pakistan signed the world's first ever BIT, with Germany. At the time, it could justly be regarded as a leader in the field. In the fifty years that have passed, the situation has dramatically changed. Whilst the rest of the world developed and embraced the new international approach and norms, Pakistan has earned an international reputation as an unsafe jurisdiction for arbitration. The Arbitration Act 1940, now entirely outdated and long since repealed in many other countries, has yet to be reformed.[117] Until 2005, the New York Convention had remained un-ratified and un-implemented for 47 years. As for the Washington Convention, Pakistan signed, ratified and became bound by its terms in 1965. Article 69 of which provides as follows:

> "Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories." [118]

41 years later, this Convention has yet to be incorporated into Pakistan law.

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117. Paper on "A Wholly New Set-up for Redressal of Disputes" delivered by Chief Justice ® Saiduzzaman Siddiqui, Former Chief Justice of Pakistan at Workshop on ADR arranged by Institute of Cost & Management Accountants Pakistan on 09th April 2005 at Head Office Karachi

118. Article 69 of the Washington Convention 1965.

3.2. *KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION (KLRCA) REPORT ON PAKISTAN:*

KLRCA (i.e., Kuala Lumpur Regional Centre for Arbitration) reported on Pakistan's implementation of the United Nation Convention on the Recognition and Enforcement of Foreing Arbitral Awards 1958 ("New York Convention") in our September 2005 newsletter. I may take the liberty to quote here Ms. Mahnaz Malik on the subject:

> "The Pakistani Board of Investment reported a 19% increase in FDI from USD798 million in 2002-2003 to USD949 million in 2003-2004, of which US investment constituted 25% of total FDI (USD238 million). A recent press release indicates that FDI into Pakistan has crossed the USD1 billion mark. Pakistan hopes that a BIT with US will lead to increased US foreign direct investment (FDI) and greater access to the US market for Pakistani exports. US goods exported to Pakistan in 2003 totaled USD843 million, whereas Pakistan exported USD2.5 billion in the same year. To achieve the latter, Pakistan wants to sign a Free Trade Agreement (FTA) which it hopes will follow the BIT and lead to further increased exports to the US. However, complying with Article 34.7 of the proposed Model US BIT (upon which negotiations are to be based) require Pakistan to implement the New York Convention. Article 34.7 of the US BIT requires each party to the Treaty to provide for the enforcement of an arbitration award in this territory. Enforcing an arbitration award under the ICSID or New York Convention (as envisaged in the US BIT) would not be possible in Pakistan unless these Conventions are implemented as the Courts will not recognize these 'treaty rights' if they have not been implemented by Pakistani law (SGS v. Pakistan, ICSID Case No. ARB/01/13)." [119]

It is therefore important for courts to understand the New York Convention when faced with an application for the enforcement of foreign arbitral awards.

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119. Paper on "International Arbitration" delivered by Mr. Dato' Syed Ahmed Idid Director Kuala Lumpur Regional Centre for Arbitration at Supreme Court Judicial Conference 2006

3.3. *HUB POWER COMPANY LTD (HUBCO) CASE & PAKISTAN:*

The Arbitration proceedings in our country are governed under the Arbitration Act of 1940, which allows the frequent intervention of the local courts in the arbitral proceedings, as is self evident from the very high profile and widely criticised judgments in more recent years, in which the Courts of Pakistan have intervened - and in some cases undermined international arbitration. In the present context, an interesting case is of the 2000 decision of the Supreme Court in the case of *Hub Power Company Ltd. v Wapda.* Brief facts of which are as under:

> "The Hub Power Company (or Hubco) was supplying electrical power to Wapda, the public sector utility, under a Power Purchase Agreement. The agreement had an arbitration clause providing for ICC arbitration at London. Disputes arose between the parties, and Hubco wished to refer the matter to arbitration. WAPDA opposed this move on the ground that the issues raised by it, which were serious allegations of corruption, fraud and mala- fide, were not arbitrable. The matter was heard by a 5-member Bench of the Honorable Supreme Court, and by a bare majority, WAPDA's contention was upheld. However, the majority was careful to note expressly that the dispute raised was not commercial in nature. The matter primarily related to the very existence of a valid contract and not the dispute under such a contract. It was held that such matter, according to the public policy, required finding about the alleged criminality and was not referable to arbitration." [120]

In other words, according to the Supreme Court of Pakistan, public policy demanded that matters of corruption be assessed by the court and not be referred to arbitration.

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120. Hub Power Company Ltd. vs Wapda & other, PLD 2000 SC 841, reported internationally in: [2000] 16 Arbitration International 431; Mealey's International Arbitration Report, 2000 Vol 15, #7 at A.1

On the other hand, it could be submitted that the Court overlooked a fundamental principle of private international law i.e., "the independence of an arbitration clause". The Court refused to recognize the severability of the arbitration agreement from the contract as a whole. In English Law this is recognized as autonomy of an arbitration agreement, as envisaged under Section 7 of the Arbitration Act, 1996, which provides as:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because the other agreement is invalid or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement." [121]

In other words, it refused to make a distinction between the validity of a contract and the validity of an arbitration agreement. Although it was the arguments of the counsel representing Hubco but accepted by the minority, represented by the acting Chief Justice Muhammad Bashir Jehangiri. He noted that the allegations of ab initio invalidity was perfectly capable of being referred to arbitration.

Enforcement of foreign arbitral awards is of immense importance for the simple reason that investors, when looking at investment options, look at both the legal possibilities and the economic opportunities. Investors will not only enter into non-traditional markets, (such as Pakistan) and establish contractual relations if they feel confident. Thus, the court's intervention and refusal to stay its proceedings in Hubco Vs Wapda has turned out to be a disincentive for future investors.

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121. Section 7 of The Arbitration Act 1996.

Perhaps most noteworthy here was the decision in ***Hub Power Company vs WAPDA*** **(ibid),** i.e., a case which has now been reported (and criticised) worldwide, and has been the subject of discussion – and adverse comment – at numerous international conferences, as well as most of the major international textbooks in this field.[122]

SUMMARY OF HUBCO CASE

By way of very brief summary, the decision in this case is now widely accepted as:[123]

-- contrary to the basic scheme of, and obligations arising under, the New York Convention;

-- contrary to the basic principles embodied in the UNCITRAL Model Law;

-- An unlawful interference in an arbitration that was taking place in a foreign seat – with its own supervising court (England);

-- A misapplication of the doctrine of separability, and a breach of the basic principle of "*kompetenz-kompetenz*";[124]

-- A wholly unprincipled extension of the doctrine of "public policy";

-- Intervention in circumstances in which (i) it was accepted by all parties that the arbitration agreement in question was contained in a separate agreement that was not itself the subject of any allegations of bribery, corruption or invalidity; (ii) the allegations of bribery and corruption had merely been asserted, without more, and the arbitral tribunal remained entirely competent to investigate the same; (iii) the proper time for the courts of Pakistan to intervene could only have been if and when an award was brought to Pakistan for recognition or enforcement.

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122. See e.g. the strong critique in the leading textbook Redfern & Hunter, The Law and Practice of International Commercial Arbitration (4th ed., Sweet & Maxwell), at pages 7-33 to 7-38;

123. Paper on "ADR Pursuit and Practice" delivered by Justice Syed Zahid Hussain, Lahore High Court on National Judicial Conference 2006.

124. This principle originated from ruling rendered by a High Court of the former West Germany in 1995 & the UNCITRAL Arbitration Rules 1980, vide Art 21. Section 1, adopted the same which means "Arbitrators shall have the power to rule on the scope of arbitration agreement on which the authority of arbitrators is based".

The judgment in Habco Vs Wapda refered has also remained subject of comment and criticism at various juristic forums. Like Toby T. Landau of Essex Court Chambers London, in his presentation before the International Jurists Conference, Islamabad, found as: "Further still, as a more recent accolade, Pakistan has become the first country whose Supreme Court has issued an injunction against ICSID arbitration – a form of arbitration that by international convention (signed and ratified by Pakistan) may not be the subject of any interference by national courts".[125]

Art 26 of the Washington Convention also provides as follows:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."[126]

In this regard the observations of Judge Schwebel, former President of the International Court of Justice, are also of worth consideration, who says that:

> "...if a court of a State party to the Washington Convention were to issue an anti-suit injunction of an ICSID arbitral proceeding, it would place that State in violation of its international legal obligations under that Convention."[127]

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125. SGS v Govt of Pakistan (July 2002), reported internationally in: (2003) 19 Arbitration International 179. See the (adverse) commentary in Gaillard, supra

126. Article 26 of Washington Convention, 1965

127. Stephen M. Schwebel, Anti-Suit Injunctions in International Arbitration – An Overview, in Anti-Suit Injunctions in International Arbitration, IAI Series on International Arbitration No. 2 (E. Gaillard ed., 2005).

The settled law of Pakistan is that matters involving questions of criminality or public policy cannot be referred to arbitration: as held in cases reported as Ali Muhammad etc Vs Basheer Ahmad (1991 SCMR 1928)[128]; Manzoor Hussain etc. Vs Wali Muhammad etc. (PLD 1965 SC 425)[129].

3.4. *CONCEPT OF PUBLIC POLICY:*

A study of the precedent case law in which the concept of "Public Policy" was invoked would show that the concept is not exhaustive. According to Justice Burrough, the ground of Public Policy "is never argued at all, but when other points fail. For a defence of public policy to succeed a party needs to show that there is some element of illegality or that the enforcement of the award would be 'clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."[130]

"There is a distinction between domestic public policy and international public policy. Domestic public policy principles apply to challenges to domestic awards. International public policy principles apply when considering the enforcement of non-domestic awards. In Parsons and Whittemore v. Rakta, the court stated that an international public policy defence should be construed narrowly. This meant that: 'Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice."[131]

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128. Ali Muhammad etc Vs Basheer Ahmad, 1991 SCMR 1928.

129. Manzoor Hussain etc. Vs Wali Muhammad, etc, PLD 1965 SC 425.

130. Richardson v. Mellish (1824) 2 Bing 229, 252 as quoted in "Arbitration of Commercial Disputes, International & English Law & Practice" by Andrew Tweeddale: Para: 12.50.

131. Andrew Tweeddale on "Arbitration of Commercial Disputes, International & English Law & Practice" by OUP Publisher UK at Para: 12.51.

3.4.1. *INDIAN CASE LAW:*

The Supreme Court of India's Judgment in case titled as Oil & Natural Gas Corp Ltd Vs Saw Pipes Ltd reported in AIR 2003 SC 2629, while examining the term "Public Policy of India" held that there is "no necessity of giving a narrow meaning to the term Public Policy of India. On the contrary wider meaning is required to be given so that the patently illegal award passed by the arbitral tribunal could be set aside. The basis for such finding is stated plainly, that the term "Public Policy" is to be read "depending upon the object & purpose of the legislation. Hence the award which is passed in contravention of Section 24, 28 or 31 could be set aside.[132] This Judgment can be relied upon to encourage further litigation by the aggrieved party to arbitration, and in doing so diminish the benefits of arbitration as a mode of dispute resolution.

In another recent Supreme Court of India Judgment in case titled as M/s S.B.P & Co. Vs M/s Patel Engineering Ltd And Anr, reported in AIR 2006 SC 450, while over ruling the earlier view in case reported as 2000 AIR SCW 3908 it is held at citation (e):

> .....That the Stand adopted by some High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India is disapproved. Such an intervention by the High Courts is not permissible. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, under section 37 of the Act even at earlier stage"..... [133]

which shows the sentiments of the August Court about the un necessary interference of the Learned Courts in the Arbitral Proceedings.

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132. Oil & Natural Gas Corp Ltd Vs Saw Pipes Ltd, AIR 2003 SC 2629.

133. M/s S.B.P & Co. Vs M/s Patel Engineering Ltd And Anr, AIR 2006 SC 450 (e).

3.4.2. *PAKISTANI CASE LAW:*

On the other hand in a 1999 decision, it was observed by a learned Judge of the High Court of Sindh as, that:

> "...if Pakistan is to attain some respectability in the commercial world, it is necessary that trans-national commercial agreements must be honoured and judicial process must not be used merely to delay the implementation of such agreements or judicial or quasi judicial decisions passed in disputes arising from such agreements." [134]

The same learned Judge observed even more trenchantly in a subsequent case as, that:

> ".....Increasingly, it is seen that the parties who are involved in Transnational or International Agreements agree to an arbitration clause at the time of entering into [the] agreement but when as a result of that agreement an award is made against them they raise frivolous objections and deliberately refrain from seeking remedy of appeal available to them under the agreement or other rules and attempt to delay or avoid payment under the award by simply initiating proceedings in a Court in Pakistan.... I do believe this is tantamount to abuse of the process of the Court... [and] may lead Pakistan into becoming pariah in the commercial world. In order to curb such tendency Courts ought not to entertain objections to a foreign Award i.e. executable in Pakistan unless these strictly lie within the four corners of section 7 of Arbitration (Protocol and Convention) Act, 1937 and such assessment should be made from the Award itself. The Award should thus, be interfered with only if the error in it is apparent on the face of the award. Courts ought not to set themselves up as an Appellate Court or to go behind the award to reappraise the evidence. Additionally the Court should decline to entertain the objections to Foreign Awards unless all remedies available under the Arbitration Agreement or Rules, by which the parties are bound, are exhausted....." [135]

Hence, the aforesaid observation of the learned judge reflects the sentiments of the Courts towards the undue frequent interference of the local courts in arbitral awards.

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134. A. Meredith Janes Co. Ltd v Crescent Board Ltd, 1999 CLC 437, 441.

135. Conticotton S.A. v Farooq Corporation and others, 1999 CLC 1018, 1022-23.

Similarly the Hon'ble Supreme Court of Pakistan in another landmark case of Hitachi Ltd Vs. Rupali Polyester (1998 SCMR 1618) came across with an issue, in which on the strength of the governing law of the contract being Pakistani law, the Pakistani party to an international contract urged the courts in Pakistan to assume jurisdiction on the validity of the arbitral award made on the contractual dispute by an ICC tribunal in proceedings held in London and to exercise jurisdiction over the composition and actions of the said English Arbitral Tribunal. A plethora of international precedents were quoted before the Hon'ble Supreme Court by the two sides for and against on the foregoing propositions. In particular, the judgment of the Indian Supreme Court in National Thermal Power Corporation Vs. Singer Co. & others ([1992] 2 Comp. L.J. 256) , providing a reasoned but aggressive approach for judicial control of all aspects of foreign arbitration was relied by the local party. The Singer case held that the courts of the country whose substantive laws govern the contract including the arbitration agreement embedded therein "are the competent Courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the Courts of the seat of arbitration is merely concurrent and not exclusive, and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the Courts of the country whose laws govern the arbitration agreement."[136]

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136. Hitachi Ltd Vs. Rupali Polyester, 1998 SCMR 1618.

Our Supreme Court, however, declined to adopt the view taken in Singer and was instead persuaded by the theory propounded by chain of English Judgments to the effect that it the curial law of the arbitration, namely, the law of the seat of arbitration that governs the procedure and the proceedings of a foreign arbitration. As a result, it rejected the plaintiff's application under sections 5, 11 and 12 of the Arbitration Act, 1940 for the removal of the English arbitrators in the foreign arbitration. However, on the ground that the validity of the award was governed by the substantive law of the contract, that is Pakistani law, it was held that the courts of Pakistan had jurisdiction to determine a challenge to the award.[137]

Pakistan remains a jurisdiction in which arbitration avoidance strategies are still widespread. What this reflects, perhaps more importantly than all else, is that even if the arbitration law of Pakistan is reformed – as is currently intended, the New York Convention having now been ratified and implemented (i.e., by way of Recognition & Enforcement (Arbitral Agreements and Foreign Arbitral Awards) Ordinance 2005) – there is still a widespread distrust of the arbitral process amongst lawyers and judiciary. Indeed, the sentiments expressed by lawyers and judges in Pakistan in the course of the ***Hubco*** litigation could well have formed part of Justice Story's 1845 judgment in ***Tobey v County of Bristol.*** Current – if now somewhat sporadic – attempts to justify the decision in ***Hubco*** simply reinforce all the fears of the international arbitral community.[138]

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137. Paper on "Limitations on arbitrability of international commercial disputes under Pakistani law" delivered by Mr. Justice Umar Ata Bandial at Supreme Court Judicial Conference 2006.

138. Paper on "Delayed Justice and The Role of ADR" delivered by Mr. Tassaduq Hussain Jillani, Judge, Supreme Court of Pakistan on the topic at International Judicial Conference, 2006.

3.5. RESISTENCE TO AWARDS AND COURTS' RESPONSE:

There are however, two grounds under the New York Convention 1958 where the Court ex-officio can deny enforcement of an award i.e. (a). Non-arbitrable subject matter.[139] (b). On ground of Public policy.[140]

Defendants resisting international arbitral awards in the name of public policy have generally invoked two provisions i.e. (i). Article V 2(b) of the New York Convention 1958 and (ii). Article 34 & 36 of the UNICTRAL Model Law. The grounds raised have been the concept of "Public Policy" or the "International Public Policy". The courts have mostly shown bias in favour of enforcement of the awards. The courts have given a restricted meaning to the concept of "International Public Opinion" and have also taken up the view that the enforcement of an international arbitral award is imperative for promotion of foreign trade and world peace.[141] In several jurisdictions, however, the courts refused enforcement in the name of "Public Policy" and while doing so they have construed the concept to include "Corruption", "Fraud"[142], "Gambling"[143] (The court held that agreement to share in the profits of an illicit enterprise was contrary to the public policy), "Illegal or Immoral"[144], "Violation of Fundamental Law of the Land", "Derogation to the Law of Competition".

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139. Article V (2) (a) of the New York Convention, 1958.

140. Article V (2) (b) of the New York Convention, 1958.

141. (1997): as quoted in "Interim Report on Public Policy as a Bar to Enforcement of International Arbitration Award" prepared by the Committee on International Commercial Arbitration Shearson/American Express, Inc.-v-McMahon, 482 U.S. 220 appointed by the International Law Association London Conference, 2000.

142. S.68(2)(g) of the English Arbitration Act, 1996 as quoted in "Russell on Arbitration" by Sweet & Maxwell: Para 8-045

143. Soleimany vs Soleimany [1999] QB 785 as quoted in "Arbitration of Commercial Disputes, International & English Law & Practice" by Andrew Tweeddale: Para: 12.52.

144. Holman vs Johnson (1775) 1 Cowp 341, 343: as quoted in "Arbitration of Commercial Disputes, International & English Law & Practice" by Andrew Tweeddale: Para: 12.52.

That's why, in a paper read at the 17th LAWASIA Biennial Conference held at Christchurch, New Zealand in October, 2001, it was contended that the Judiciary (personified in the majority judgment of the Supreme Court of Pakistan) has apparently set its face against international commercial arbitration by invoking public policy and the development of the law has been diverted into barren lands where it can only wither away".[145] The Asian Development Bank also took the view that "the Supreme Court essentially restricted the freedom of investors to choose how to resolve disputes".[146] The situation with regard to International arbitration is not clear either. In the past many international arbitration clauses have been successfully challenged in courts. The general stance of courts can be seen from the case ECKHARDT Vs Muhammad Hanif, in which the high court refused to stay their proceedings, suggesting that it would be, "in convenient" and "unsafe" if the plaintiff were to be compelled to seek remedy at arbitration in London.[147] The reasons prevailed upon the honorable Division Bench was that the Act gives court discretion to refuse its proceedings. Secondly, the Bench was unable to substitute the opinion of the High Court because the "...learned Single Judge had used his discretion after relevant considerations". Lastly, that the High Court used its discretion under Section 34, of the Act which authorized to do so if there is sufficient justification based on sound reason.

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145. Paper on "Hubco v. Wapda: Allegations of Corruption Vitiate International Commercial Arbitration: The Pakistan Experience", read at the 17th Lawasia Biennial conference at Christchurch, New Zealand, 4-8 October, 2001. See also, "Control of jurisdiction by injunctions issued by national Court" by Dr. Jullian D.M. Lew, a report presented at ICCA Montreal 2006-International Arbitration 2006: Back to Basics? June 2006."

146. "Judicial Independence Over view and Country-Level Summaries", Asian Development Bank Judicial Independence Project RETA No. 5987, submitted by The Asia Foundation, October 2003.

147. Messrs ECKHARDT Vs Muhammad Hanif, PLD 1993 Supreme Court 42.

However the Supreme Court while overturn the decision said that the court should not stay its proceedings even if there are allegations of fraud unless the party alleged of fraud wants a public inquiry. However, if the party does not want..[to continue, at] the trial, the proceeding should be stayed.[148]

Finally the August Supreme Court went on by explaining its position on Sec-34 of the Arbitration Act 1940, stated that ".....unless there are compelling reasons , foreign arbitration clauses should be honoured as the other party to such arbitration disputes is, generally, a foreign party. With the development and growth of international trade and commerce and due to modernization of communication systems in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the court should not easily release the parties from their bargain follows from the sanctity which the court attaches to contracts; this must be applied with more vigour to a contract containing a foreign arbitration clause.[149]

Resultantly, at least as a matter of foreign perception, international arbitration in Pakistan remains unsafe. Whatever the black letter of the law may provide, it is the underlying legal and judicial mindset that is really the key to reform. For this, one must address the reasons why it is time for the Courts of Pakistan to join the international fold.

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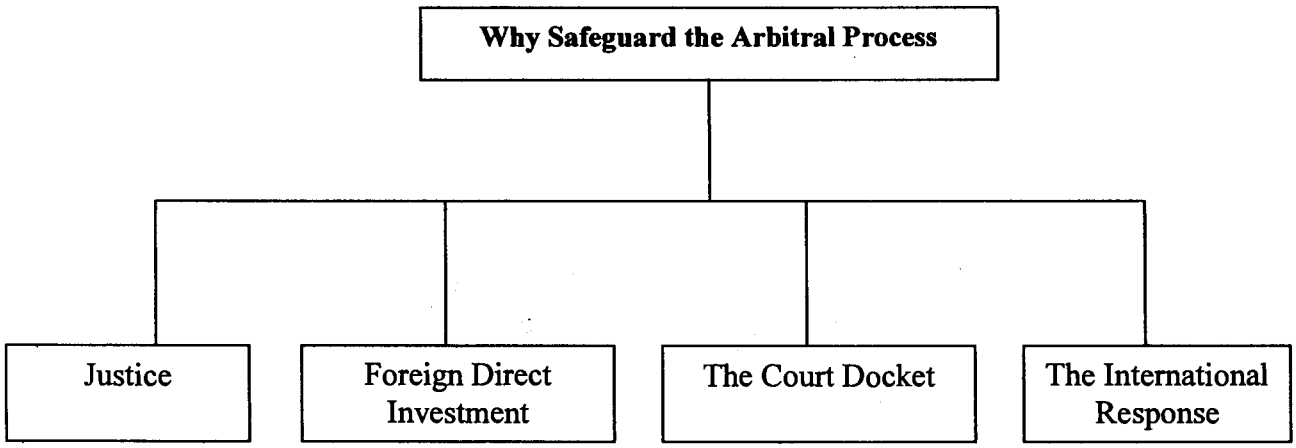
148. Messrs ECKHARDT Vs Muhammad Hanif, PLD 1993 Supreme Court 42: citing the judgment of Haji Soomar Haii Hajjan Vs Muhammad Amin Muhammad Bashir Ltd. 1981 SCMR 129, Page 49.

149. www.iclg.co.uk International arbitration 2006, Global Legal Group, lastly visited on 01.05.2009.

An Over View of Chapter-IV



Public International Law & State Responsibility

CHAPTER-IV

(D) WHY SAFEGUARD THE ARBITRAL PROCESS?

There are a number of reasons why, it is suggested, Pakistan must now realign itself with the prevailing norms in international arbitration. Five separate grounds are addressed below.

4.1. JUSTICE

Arbitration is a consensual process – it is dependent upon an arbitration agreement, and the nature of arbitration agreements is that as well as providing for an alternative system of dispute resolution, they also substantially exclude national courts. Arbitration agreements are simply contracts – like any other contract. The enforcement of an arbitration agreement, and thus the staying of competing court processes and the refusal to intervene in the arbitral process, is mandated by the most fundamental of legal principles common to all legal systems, whether of the East or West: *pacta sunt servanda*, or the honouring of commitments. As long as the agreement to arbitrate reflects true consent on the part of all sides, and that that consent is not vitiated by any relevant factor (all of which are catered for by contract law – such as mistake, misrepresentation, duress, undue influence, *etc*), then there can be no justification to treat this form of contract as somehow inferior to all other contracts, and refuse to enforce the objective expectations of the parties. Indeed, it is suggested that to do so is to undermine the integrity of the judicial system as a whole.[150]

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150. Paper on "Centuries-Old System That Works Successfully" delivered by Mr. Ejaz Ali Pirzada, Director General, Pakistan Revenue at Workshop on ADR arranged by Institute of Cost & Management Accountants Pakistan on 09th April 2005 at Head Office Karachi.

In so far as there may be concerns as to the nature of the arbitral process itself, these are now entirely addressed by modern arbitration laws (such as the Model Law), which provide for supervision by a competent court. This supervision, however, is very carefully delineated and restricted, in order to support, not undermine, the process. This is accepted worldwide as an adequate balance between party autonomy and judicial control, and there is no reason why that balance ought not to apply in Pakistan as well – at the very least to international arbitration, even if there remain particular local difficulties or concerns with regard to domestic arbitration.[151]

4.2. FOREIGN DIRECT INVESTMENT

The attraction of foreign direct investment is a central policy of the Government of Pakistan – as with most governments. As already made clear, the link between an effective system of international arbitration and foreign investment is now beyond any doubt at all. Capital is free-flowing, and if investors lose confidence in the Pakistan legal system, and fear that their arbitration agreements will not be respected, the simple reality is that their capital will flow elsewhere, to safer destinations. This has now been recognised throughout the world. Indeed, it is somewhat telling that the ministry within the British Government that was given responsibility for reform of English arbitration law in 1996 was not the Lord Chancellor's Department (the English ministry of justice) – but rather the Department of Trade and Industry.[152]

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151. Paper on "System Requires Amendments" delivered by Mr. Muhammad Yunus Khan, Joint Chief Economist, Planning Commission Government of Pakistan at Workshop on ADR arranged by Institute of Cost & Management Accountants Pakistan on 09th April 2005 at Head Office Karachi.

152. Paper on "ADR in the N.W.F.P" delivered by Mr. Justice Shah Jehan Khan, Judge of the Peshawar High Court at National Judicial Conference 2007.

4.3. THE COURT DOCKET

An effective system of arbitration, which is properly insulated from undue interference by the courts, has one very important consequence: it releases significant pressure from the courts. Experience now shows that courts can dramatically reduce their case load by

(a). allowing matters to leave their docket and proceed in arbitration and

(b). restricting the number and type of applications that can then be made by parties who are in arbitration and wish to return to the court. To this end, safeguarding and improving the arbitration system is in the wider interests of the judicial system.

India being a vast subcontinent with diverse culture, religion, language and above all, economic disparity, all sorts of disputes are being brought before the Civil Courts, but of late, due to immense increase of the litigations which in other words "Docket Explosion," the existing adjudicative machinery has failed to take up the additional burden of settlement of disputes which necessitated for substitute methods.[153]

On the same premises the Government of Bangladesh also plans to introduce an arbitration mechanism to boil down ratio of money suits pending in its Courts by reducing the time of resolution of such cases from 10/12 years to 06/09 months for boosting up its national economy.[154]

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153. Hrudaya Ballav Das on "Alternative Dispute Resolution—Its Socio-Legal Dimension" Special Judge, C.B.I. AIR 2004 Journal Page 222

154. Nour Mohammad on "Enforcement of Foreign Arbitral Awards concerning Commercial disputes in Bangladesh, A brief view", BGC Trust University Bangladesh Chittagong, Emeral Law Journal, Humanonmics Vol: 24, No: 04, (2008) Published by Emerald Group Publishing Limited 0828-8666 DOJ 10.11.08/08288660810917150, at Page No: 277.

In the above premises, speaking about the pitfalls of Arbitration Act, 1940 enacted during British governance, the Supreme Court of India in the case of M/s. Guru Nanak Foundation Vs. M/s. Rattan Singh and Sons, had observed as follows:

> "....Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the Arbitration Act, 1940. However, the way in which the proceedings under this Act are conducted and without exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceeding under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary....." [155]

The Indian experience should be of special interest to all of us because of the system similarities. In October 1994, the former Chief Justice of India, Judge Ahmadi, commenced dramatic reforms in the handling of all matters pending the Supreme Court of India. A comprehensive computerization program was instituted; a uniform classification system, according to subject matter of cases field, was created; and filing, listing, classification and allocation tasks in the Indian Supreme Court Registry was computerized. These initiatives dramatically reduced the Supreme Court caseload from approximately 1,20,000 in October 1994 to 28,000 cases in September 1996. Encouraged by the success, he duplicated these efforts in the High Court and Subordinate courts.[156]

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155. M/s. Guru Nanak Foundation Vs. M/s. Rattan Singh and Sons, AIR 1981 SC 2075.

156. Hiram E. Chodosh, Stephen A. Mayo, A.M. Ahmadi & Abhishek M. Singhvi, "Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process", New York University Journal of International Law and Politics, Volume 30, Fall 1997-Winter 1998.

4.4. THE INTERNATIONAL RESPONSE

Such is the change in prevailing attitudes internationally in this field that many of the arbitration avoidance tactics deployed in "blackspot" jurisdictions

(a) no longer work, or

(b) even if they do work, have disastrous consequences for the country concerned.

Intervention by local courts in the international arbitration process is now frequently met with "anti-suit injunctions" rendered by foreign courts. These are interim measures which are designed to protect an arbitration, and which compel parties to withdraw from actions brought in local courts in breach of an arbitration agreement. Indeed, precisely because of the international condemnation of avoidance tactics, in a very recent amendment to the UNCITRAL Model Law on International Arbitration by way of Article 17, which reads as:

> "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such matter." [157]

The power to take steps to prevent a party from resorting to local courts has now also been given to international arbitral tribunals, in order to protect against any harm done "*to the arbitral process itself*".[158]

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157. Article 17 of the UNCITRAL Model Law on International Commercial Arbitration 1985

158. For an example of such an order issued by an international tribunal, see E-Systems v Iran (Iran-US Claims Tribunal): Award No. ITM 13-388-FT, 2 Iran-US C.T.R. at 51-57 (issued under Art 26 of UNCITRAL Arbitration Rules).

The "anti-arbitration" injunction itself (such as that granted by the Pakistan Supreme Court in **Hubco**) has been the subject of much scholarly analysis[159], the consensus now being that such a measure constitutes a breach of international law. Judge Schwebel, the former President of the International Court of Justice, has concluded as follows:

> "[the practice of enjoining international arbitration] appears to violate conventional and customary international law, international public policy and the accepted principles of international arbitration."..... [160]

Indeed, since Pakistan has now signed, ratified and implemented the New York Convention, the following passage from Judge Schwebel's analysis is of particular note:

> "... the issuance by a court of an anti-suit injunction that, far from recognizing and enforcing an agreement to arbitrate, prevents or immobilizes the arbitration that seeks to implement that agreement, is inconsistent with the obligations of the State under the New York Convention. It is blatantly inconsistent with the spirit of the Convention. It may be said to be inconsistent with the letter of the Convention as well, at any rate if the agreement to arbitrate provides for an arbitral award made in the territory of another State. There is room to conclude that an anti-suit injunction is inconsistent with the New York Convention even when the arbitration takes place or is to take place within the territory of the Contracting State provided that one of the parties to the contract containing the arbitration clause is foreign or its subject matter involves international commerce."...

This analysis, and Judge Schwebel's conclusions, were recently endorsed by the English Court of Appeal in a very significant decision earlier this year.[161]

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159. "Anti-Suit Injunctions in International Arbitration", IAI Series on International Arbitration No. (E. Gaillard ed., 2005), a collection of essays on this topic by a wide range of leading international academics and practitioners - with frequent (adverse) citation of decisions of the Courts of Pakistan.

160. Stephen M. Schwebel, Anti-Suit Injunctions in International Arbitration – An Overview, in Anti-Suit Injunctions in International Arbitration, IAI Series on International Arbitration No. 2 (E. Gaillard ed., 2005)

161. Weissfisch v Julius & ors [2006] EWCA Civ 218.

The Court refused to issue an injunction against an arbitration which was taking place in Switzerland, on the basis that to do so would breach the international arbitration law regime. As an aside, it might be noted that in the course of argument, counsel for several of the parties who were resisting the injunction asked the Court of Appeal, rhetorically, whether it wished to align itself with the practice of certain foreign Courts in this area, which have been the subject of widespread international criticism - including the Courts of Pakistan. This being the international view, there has also developed a jurisprudence authorising international tribunals to continue their proceedings – notwithstanding (and often in breach of) anti-arbitration injunctions issued by local courts.[162]

In so far as one member of the arbitral tribunal may be personally bound by such an order (because of nationality or some other link to the jurisdiction concerned), the tribunal may continue as a "truncated tribunal", with one member missing.[163]

Further, in those situations where a contractual arbitration is the subject of local court interference, resort is now routinely made to treaty arbitration under a BIT, as a second and more powerful tier of dispute resolution. In short, many avoidance strategies now fail, and severely damage a country's international reputation.

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162. Salini v Ethiopia (7 December 2001), where an anti-arbitration injunction from the courts of the seat of arbitration was disregarded by the arbitral tribunal (excerpts in 21 ASA Bulletin 59 (2003)).

163. Schwebel, Three Salient Problems, for an exhaustive analysis of the legal justification for this procedure. For an example, see Himpurna v Indonesia, *infra*.

4.5. PUBLIC INTERNATIONAL LAW AND STATE RESPONSIBILITY

The international response described above has recently taken a very different, but very important turn. It is now established that decisions of national Courts which impinge upon or in any way undermine arbitration agreements may give rise to an action by an individual for breach of international law against the State whose courts are concerned. In short, as a matter of public international law, the State of Pakistan is responsible for the judgments of its Courts. This is no longer a purely domestic issue.

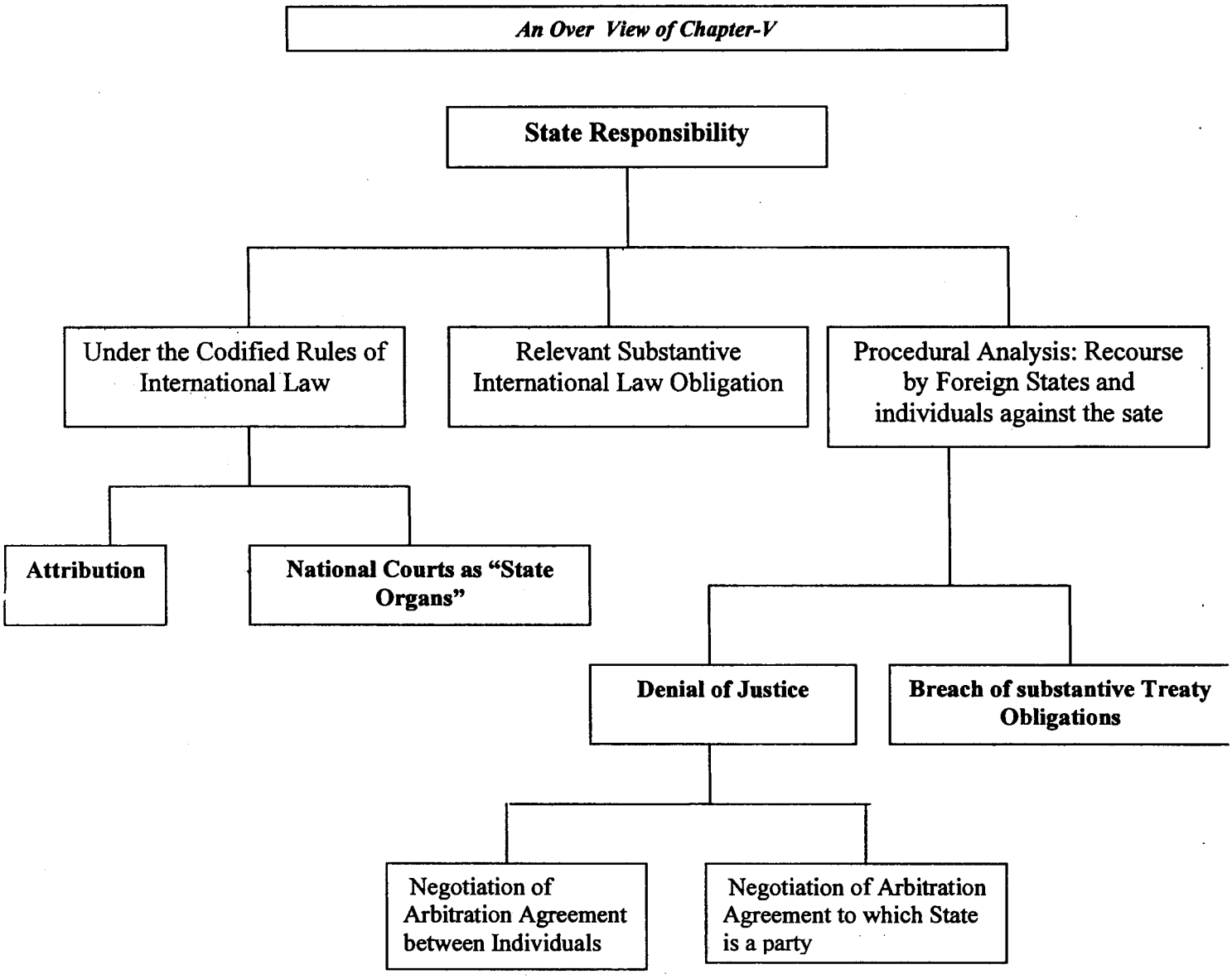
This conclusion rests upon three different propositions that require separate elaboration;

(i) The international law doctrine of "State Responsibility", and the associated rules of "attribution", whereby a State may be held liable for the decisions of its national Courts;

(ii) The substantive international law obligations owed by the State of Pakistan and its national Courts;

(iii) The procedural mechanism whereby an individual (or foreign State) might bring an action for breach of international law against the State of Pakistan.

Each of these elements is addressed in Chapter V, turning below.


An Over View of Chapter-V
State Responsibility
Under the Codified Rules of International Law
Relevant Substantive International Law Obligation
Procedural Analysis: Recourse by Foreign States and individuals against the sate
Attribution
National Courts as "State Organs"
Denial of Justice
Breach of substantive Treaty Obligations
Negotiation of Arbitration Agreement between Individuals
Negotiation of Arbitration Agreement to which State is a party

CHAPTER-V

E. STATE RESPONSIBILITY

Primary rules of international law define the content of the substantive rights and obligations of States. In contrast, secondary rules, of which the doctrine of "State Responsibility" forms part, address (a) the general conditions under international law whereby a State will be deemed liable for wrongful acts and omissions, and (b) rules as to the legal consequences which flow there from.

5.1. UNDER THE CODIFIED RULES OF INTERNATIONAL LAW:

These secondary rules have recently been codified by the International Law Commission ("ILC") in its "Articles on State Responsibility", which were approved by the United Nations General Assembly in 2001.[164] Articles 1-3 provide as follows:

"CHAPTER I

GENERAL PRINCIPLES

Article 1
Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.[165]

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164 Adopted by the International Law Commission on 9 August 2001, A/56/10, p 43 *et seq* and noted and commended to Governments by the United Nations General Assembly in Resolution 56/83 on 12 December 2001. For the text of the articles and a commentary, see J Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, 2002), and the earlier work of S Rosenne, The International Law Commission's Draft Articles on State Responsibility (Dordrecht, 1991).

165. Art 1 to the International Law Commission (ILC) "Articles on State Responsibility" of 2001

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:[166]

(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."[167]

Two Key Elements: As set out in Article 2, two elements are required for a State to be held liable for breach of international law: (a) "attribution" of the conduct in question to the State and (b) the breach of a substantive international law obligation.

5.1.1. ***"Attribution":*** As for (a), governments, like corporations, are legal entities and therefore can only act through agents. The doctrine of "attribution" is the international law mechanism that identifies the type of entity for whose conduct a State may be responsible. There are, of course, many different types of entity whose conduct might be attributed to the State, but the simplest and most obvious is a "State organ". It has long been recognised as a matter of public international law that a State is responsible for the acts and omissions of its own organs.

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166. Supra note 165 Art 2 to (ILC) 2001.

167. Supra note 165 Art 3 to (ILC) 2001.

In 1871, Umpire Lieber stated as follows in the **Moses** case:

> "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority." [168]

In the intervening years, there have been numerous statements of this principle. More recently, the rule was confirmed by the International Court of Justice in the ***Cumaraswamy*** case as a rule of customary international law:

> "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character ..."[169]

5.1.2. National Courts as "State Organs": It is now beyond any doubt that national courts – at whatever level in a national judicial hierarchy, whether local district court or Supreme Court – are as much organs of a State as its parliament, executive government and armed forces. As such, their actions are imputable to the State. The fact that, as a matter of national law, a national judiciary may be "independent" of the State makes no difference at all from an international perspective. As Professor Dupuis wrote in 1924:

> "[the state is] no more entitled to disavow the law of nations by using judicial authority than by a fancy of Parliament or by outrageous conduct of the government". [170]

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168. Moore, International Arbitrations, vol III, p.3127 (1871), published by Harper's Magzine uk at p.3129.

169. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports, 1999, p.62 & p.87 (para 62).

170. C. Dupuis, Liberté des voies de communication et les Relations internationals (1924) Recueil des Cours, vol I, 129, at 354, as translated and cited by Jan Paulsson in Denial of Justice in International Law (Cambridge, 2005), at p.38.

This must be so, for courts are bound by local legislation, and if that legislation is violative of international law, the breach cannot be neutralised by being applied through the mechanism of a court judgment. A judiciary is one component element of a Sate, whose authority emanates from the State. Thus, in the **Salvador Commercial Company** case, the Tribunal stated that:

> "...a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity" [171]

Similarly, the Permanent Court of International Justice stated as follows in **Certain German Interests in Polish Upper Silesia (Merits)**:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures." [172]

Indeed, the State "organ" with which the ICJ was concerned in the ***Cumaraswamy*** case was a national Court. Hence, Article 4 of the ILC Articles on State Responsibility now codifies this rule as follows:

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171. United Nations, Reports of International Arbitral Awards, vol. XV, p.455 (1902), at p.477.

172. 1926, P.C.I.J. Collection of Judgments, Series A, No 7, at p.19.

"CHAPTER II
ATTRIBUTION OF CONDUCT TO A STATE

Article 4
Conduct of organs of a State

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State...."[173]

It will be noted that Article 4 of the ILC Articles expressly refers to the exercise of "*judicial*" functions. As noted in the Commentary to the ILC Articles:

> "... the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. ..."[174]

Hence, it is now beyond doubt that a State may be held responsible for a violation of international law incurred as a result of a decision of one of its national courts – whether the lower or the highest court.[175]

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173. Supra note 165 Art 4 to (ILC) 2001.

174. Commentary on the ILC Articles, *supra*, at pp.95-6.

175. See: Professor Christopher Greenwood CMG, QC, State Responsibility for the Decisions of National Courts in Issues of State Responsibility Before International Judicial Institutions, The Clifford Chance Lectures, Vol VII (ed. Fitzmaurice & Sarooshi, Hart, 2004), at page 55-74.

The next question, then, is what international law obligations might be breached by the decision of a national court?[176]

5.2. RELEVANT SUBSTANTIVE INTERNATIONAL LAW OBLIGATIONS

Here, two different elements must be considered: (a) the public international law delict of "*Denial of Justice*" and (b) the specific substantive obligations that may be offered by a State by treaty.

5.2.1. DENIAL OF JUSTICE

The concept of "denial of justice" as a wrongful act in international law has been well established for well over 150 years,[177] but has recently undergone something of a renaissance.[178] It is a substantive rule of customary international law, which provides that no State may deny justice to aliens. Such a denial has been held to exist when the judicial system of a State has fallen short of international standards, whether by virtue of (a) discrimination against a foreign litigant or (b) some failure

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176. As a general observation, it may be noted that the doctrine of State Responsibility embodies a concept of "objective responsibility" – that is, a relatively strict liability, which obviates the need to establish either subjective fault or intention. See: Professor Ian Brownlie CBE, QC in State Responsibility and the ICJ, in Issues of State Responsibility Before International Judicial Institutions, The Clifford Chance Lectures, Vol VII (ed. Fitzmaurice & Sarooshi, Hart, 2004), at 11-18.

177. See: Professor Christopher Greenwood CMG, QC, State Responsibility for the Decisions of National Courts in Issues of State Responsibility Before International Judicial Institutions, The Clifford Chance Lectures, Vol VII (ed. Fitzmaurice & Sarooshi, Hart, 2004), at 55-74.

178. As noted by Jan Paulsson, infra: "Investment arbitrations ... have proliferated under the multitude of bilateral investment treaties now extant, and ... claimants in such cases have rediscovered the grievance of denial of justice and pursued it with vigour." (p.9).

in the judicial system itself. The failure to administer justice is itself an international legal wrong. There are many different articulations of the standard to be applied, such as a requirement of "manifest injustice" or "gross unfairness"[179] or "flagrant and inexcusable violations" of international norms.[180] There is also some debate as to whether the flawed decision of a lower court might amount to a denial of justice, in circumstances where it might still be corrected upon appeal, or where the error is "one-off" and does not reflect any systemic bias or failing.[181]

5.2.1.1. NEGATION OF ARBITRATION AGREEMENT BETWEEN INDIVIDUALS: Whatever the precise standard (the subject of extensive discussion, well beyond the scope of this paper[182]), there remains the possibility that a foreign party whose arbitration clause has been annulled, impeded or undermined by a decision of a Pakistani Court may assert a breach of international law, on the basis that the activity of the Pakistani Courts in enjoining and negating international arbitration reflects a bias against foreign parties, in favour of Pakistani parties who have routinely used their local courts as a means of escaping an international process. As such, it constitutes a systemic failure, and thus a denial of justice. In so far as the

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179. Per J Garner, International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice, 10 British Yearbook of International Law (1929), p.181, at p.183.

180. Per J de Arechaga, International Law in the Past Third of a Century, 159 Recueil des Cours (1978), p.282.

181. See the discussion in Greenwood, *supra*. Note that the (analytically distinct) rule requiring a litigant to exhaust local remedies often has the effect that all appeal options must first be pursued in any event, before recourse may be had to international law. This rule has little or no application in the context of BITs, however, most of which contain a waiver of this requirement.

182. See generally: See: Jan Paulsson, Denial of Justice in International Law (Cambridge, 2005).

intervention may be by a decision of the Supreme Court from which no appeal lies, the likelihood of an allegation of denial of justice is that much stronger.

It has been suggested by some that the law of Pakistan has permitted the Pakistani Courts to intervene in foreign arbitrations, to negate arbitration agreements, and to accede to the requests of Pakistani parties who wished to be relieved from their obligations to arbitrate. As such, there could be no complaint that the Courts were acting unfairly. This, however, misses the point, for the question whether international law has been infringed is a matter for international law, and "the rule of law does not allow the very party whose compliance is in question to determine whether it is a transgressor".[183] International law judges the system from the outside, by reference to international, not national, legal standards.

Even if this argument were sustainable as an explanation of the approach of the Pakistani Courts and a defence to an allegation of denial of justice, it could no longer hold true. The Pakistan Recognition & Enforcement (Arbitral Agreements and Foreign Arbitral Awards) Ordinance 2005 has repealed the offending parts of the 1937 Arbitration Act, and the common law that had developed in this area. The position now is simple: if a Pakistani Court accedes to a request to intervene upon or annul arbitration, there is a strong likelihood that it will be acting in breach of Pakistani law. In so far as it is also a substantial deviation from

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183. Jan Paulsson, *supra*, at p.4 (citing abundant authority for this proposition).

international law, a denial of an alien's procedural rights or a manifestation of discrimination, it may also amount to a breach of international law.

5.2.1.2. NEGATION OF ARBITRATION AGREEMENT TO WHICH THE STATE IS A PARTY: Where the Government itself is a party to, or bound by, an arbitration agreement, the situation is even clearer. Governmental negation of such an agreement – even if by the order of a national Court – itself constitutes a denial of justice, and so a breach of international law.[184] There are, sadly, many recent examples in which States have sought to avoid their commitments to arbitrate, most often by recourse to their own courts. ***Hubco*** has already been addressed. ***Himpurna v Indonesia*** is another, now infamous, example.[185]

This was arbitration under the UNCITRAL Rules, which arose out of an alleged governmental guarantee of the performance of the Indonesian national electricity company, PLN, under a power supply agreement. The guarantee had been given to Himpurna as a foreign investor, in connection with the establishment of a major electricity generating plant in Indonesia. The Indonesian government had confirmed its undertaking to arbitrate any dispute with Himpurna in formal Terms of Appointment executed at a time when PLN's liability had not been established. After PLN had been found in breach of contract, and had failed to pay the substantial damages awarded, the Indonesian government took a number of

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184. See generally: Stephen Schwebel, Denial of Justice by Governmental Negation of Arbitration, in International Arbitration: Three Salient Problems.

185. Himpurna California Energy Ltd v Indonesia, interim award, 26 September 1999; final award, 16 October 1999, extracts in (2000) XXV Yearbook Commercial Arbitration 109.

steps to try to avoid its obligation to arbitrate. One such step[186] was an application on behalf of the Indonesian government before the Indonesian Courts to enjoin the arbitration from proceeding. The injunction was granted (together with a penal notice by which the arbitral tribunal was to be liable for US$ 1 million for every day that they continued the arbitration in breach of the Order).

The Tribunal continued the arbitration (as a truncated tribunal, one member of panel having been forced to withdraw). The question before it was whether or not it was bound to suspend or terminate the proceedings because of the Order. It found that the initiative of the Indonesian municipal Court was attributable to the State, and that:

> "it is a denial of justice for the courts of a State to prevent a foreign party from pursuing its remedies before a forum to the authority of which the State consented, and on the availability of which the foreigner relied in making investments explicitly envisaged by that State." [187]

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186. One of the other steps attracted more international attention – namely the kidnap of the Indonesian Government's appointed arbitrator (Professor Priyatna) at Amsterdam airport, and his forced repatriation to Indonesia, whilst he was en route to attend a hearing in The Hague. This may qualify as the most extreme of arbitration avoidance techniques. See his own account in: They Said I was Going to be Kidnapped, in 18(6) Mealey's International Arbitration Report 29. The Arbitral Tribunal continued notwithstanding, as a truncated tribunal. See also: V.V.Veeder, The Natural Limits to the Truncated Tribunal: The German Case of the Soviet Eggs and the Dutch Abduction of the Indonesian Arbitrator, in R.Briner, L.Y. Fortier, K.P.Berger and J.Bredow (eds.) Law of International Business and Dispute Settlement in the 21st Century – Liber Amicorum Karl-Heinz Böckstiegel (Cologne: Bredow, 2001).

187. (2000) XXV Yearbook Commercial Arbitration 109, at pp.182-3.

Judge Schwebel has commented on the ***Himpurna*** awards in the following terms:

> "The holdings of these Tribunals that a State commits a denial of justice under international law when its courts lend themselves to interdiction and frustration of international arbitral processes are particularly significant. In classical international law, a State denies justice when its courts are closed to foreign nationals or render judgments against foreign nationals that are arbitrary. In modern international law, a State denies justice no less when it refuses or fails to arbitrate with a foreign national when it is legally bound to do so, or when it, whether by executive, legislative or judicial action, frustrates or endeavours to frustrate international arbitral processes in which it is bound to participate. These cases are of exceptional importance in recognizing and applying this cardinal principle."[188]

There are, of course, manifest parallels with the decisions of the Courts of Pakistan that have already been addressed above.

5.2.2. BREACH OF SUBSTANTIVE TREATY OBLIGATIONS

Aside from the doctrine of "denial of justice", which focuses upon the rights of aliens to particular standards of justice, it is now uncontroversial that the decision of a national Court might itself breach a State's substantive international law obligations. For example, as a matter of customary international law, no State is entitled to expropriate the rights of an alien, without appropriate compensation. This obligation may well be breached by the decision of a national Court. Hence in the ***Oil Field of Texas*** case, the Iran-US Claims Tribunal held that a judicial decision (of the Islamic Court of Ahwaz – a lower court) amounted to a measure of expropriation.

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188. Schwebel Injunction of Arbitral Proceeding and Truncation of the Tribunal (2003) 18(4) Mealey's International Arbitration Report 33, at p.38 – as cited in Paulsson, supra, at p.153.

The Tribunal ruled as follows:

> "The Court order did not only have temporary effect, but, as evidenced by NIOC's continued retention of the equipment, amounted to a permanent deprivation of its use. In these circumstances, and taking into account the Claimant's impossibility to challenge the Court order in Iran, there was a taking of the three blowout preventers for which the Government is responsible." [189]

This aspect has now become of critical importance, because of the substantive obligations that the Pakistan State (as with most other States) has now undertaken in its numerous Bilateral Investment Treaties.

In undertaking to foreign investors not to expropriate property or contractual rights, and in promising "fair and equitable treatment" – as Pakistan has done in 47 BITs–the State of Pakistan has undertaken not to interfere in any way with, amongst many other rights – the right to arbitrate.

Bringing all these strands together, it is now the position that a decision by any Court in Pakistan – including the Supreme Court – that undermines an arbitration agreement or an ongoing arbitral process, may be a breach of the State of Pakistan's affirmative obligations under a BIT, and give rise to a cause of action by an investor directly against the State.

This is not simply academic. Pakistan has already faced just such an allegation (in the BIT arbitration in **Impregilo v Pakistan**) – a US$ 850 million claim by foreign investors against the State of Pakistan, which settled last year. Part of the claim focused on the denial of a contractual right to arbitrate, by reason of allegedly adverse interference by the Courts of Pakistan.

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189. 12 Iran-US CTR, p.308, 318-9.

Other countries have also faced similar claims. Of particular note is the ***Dabhol*** dispute in India, which involved actions by the Indian Courts which were almost identical to those of the Courts of Pakistan in the ***Hubco*** case. As such, it serves as something of a warning for Pakistan. Although the ***Dabhol*** claim against the State of India (a US$ 5 billion claim) finally settled, various related insurance disputes continued. In one of these, ***Bechtel Enterprises International (Bermuda) Ltd et al v Overseas Private Investment Corporation*** [190], an international tribunal operating under the Rules of the American Arbitration Association held that the Indian courts and various entities controlled by or representing the Indian Government had:

> "enjoined and otherwise taken away Claimants' international arbitration remedies ... in violation of established principles of international law, in disregard of India's commitments under the UN [New York] Convention as well as the Indian Act".

Importantly, the Claimants were held entitled to recover under an insurance policy covering expropriation.[191]

5.3. PROCEDURAL ANALYSIS: RECOURSE BY FOREIGN STATES AND INDIVIDUALS AGAINST THE STATE

Finally, there is the question how, as a matter of procedure, an individual (or a foreign State) might bring such a cause of action against the State of Pakistan.

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190. Award of 3 September 2003 (2004) 16 World Trade and Arbitration Materials 417.

191. See also the decisions in Waste Management and Azinian v United Mexican States ICSID Case No ARB(AF)/97/2 (1 Nov 1999).

The advent of BITs, as described above, is the short answer. Most BITs contain a standing consent to international arbitration on the part of each State, which may be accepted by individuals. Hence, the substantive rights afforded by BITs are given procedural teeth. This direct access to the remedies of international law is a dramatic development, yet many have still to appreciate the breadth of its consequences.

(E) CONCLUSIONS: THE NEXT 50 YEARS

In Pakistan arbitration is governed by Arbitration Act, 1940 and foreign arbitrations are governed by Protocol Arbitration Act, 1937 but there are shortcomings in our law. The Arbitration Act is more rule related and connected with the Courts. The shortcomings in resorting to arbitration are as follows:-

i. SHORT COMINGS

(i) Control of Court on arbitration proceedings and arbitrator particularly on question of jurisdiction and appointment of arbitrator and confirmation of award which cause delay.

(ii) Cost is not less than Court litigation.

(iii) Absence of provision for mediation and conciliation in the statute nor there is any centre for mediation, conciliation and arbitration or training facility.

(iv) Appeal proceeding provided by Act takes not less than 3 to 4 years in urban centres. There is a growing feeling among the leading arbitration practitioners that in cases where the final award is made by a retired Judge of the Supreme Court or the High Court it may be treated as a decree to be executed by the Court having jurisdiction to execute such, decree is passed in a suit by a Court. All objections should be heard al that stage.

(v) Proceeding for appointment of Arbitrator raises complex issues and causes delay. In this regard UNCITRAL Model Law, viz. Articles 10 and 11 may be followed. In India. Arbitration Act, .1996 has followed it.

(vi) Under the Act arbitrator has no power to decide his own jurisdiction. It should be streamlined.

(vii) Under the Act arbitrator has no power to pass any interim order to restrain any party or to protect the property in dispute. Such power should be vested with the arbitrator. So is the provision in the UNCITRAL MODEL LAW.

(viii) In case where two arbitrators are appointed who nominate the Umpire or the third arbitrator provision should be made to make it compulsory that all the three arbitrators hear the case jointly. Normally unless provided in the agreement, only two arbitrators hear the case and if there is a difference of opinion the matter is referred to the Umpire which causes a lot of delay. By providing as suggested above much of the delay will be curtailed.

(ix) Under the Act time limit of four months has been fixed for making the award which is unrealistic. It should be fixed at 9 to 12 months.

ii. SUGGETIONS:

It is suggested that there are diverse and compelling reasons why Pakistan must regain the initiative it had in 1956, and redefine the approach of its Courts to international arbitration. This will require a number of different concrete steps, including:

(a) The enactment of a statute to replace the Ordinance that currently implements the New York Convention.

(b) The wholesale reform of the Arbitration Act 1940, which in turn will require much more than simply enacting the UNCITRAL Model Law, since a host of local juridical issues will need to be addressed.[192]

(c) The implementation of the Washington Convention.

(d) Sustained training of lawyers and arbitrators, in order (i) to improve the domestic arbitral process, and allow it to return to its original function as a reliable, truly cost effective, efficient and alternative means of dispute resolution and (ii) to build a body of arbitration experts in Pakistan who are properly equipped to participate in the international arena.

(e) Wide Spread publicity should be made to inculcate the faith towards conciliation and co-operation instead of hatred and spirit of litigation.

(f). Procedural aspect of arbitration should be made more easier specially in rural areas.

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192. This is a matter beyond the scope of this paper. For present purposes, the experience in India may be noted, where many consider that the simple adoption of the UNCITRAL Model Law in 1996 to replace the Indian Arbitration Act 1940 failed to counter the problems of the past – which have since reappeared through evolving case law. For this very reason, England chose to use the UNCITRAL Model Law as the basis for a wider and more detailed reform.

(g). Bar Councils should take up the task of arbitration on the pattern of legal aid and Lok Adalat System as prevailed in India.

(h). Social activists should come forward to increase the efficiency and popularity of the mode of dispute resolution.

(i). Community disputes should exclusively be assigned and settled by arbitration method and conciliation between the contending groups.

(j). Matters of family relations and customary rights should preferably be decided by such alternative mode of dispute resolution like conciliation, mediation and arbitration.

(k). Laws should be made to recognize private arbitral tribunals as supplement of judicial system like "Ivory clause" certain disputed matters must first be tried by arbitration.

(l). 'Arbitrators' and 'mediators' should be locally nominated or elected with their inbuilt sense of social service and moral approach.

(m). Judicial intervention should be minimized as much as possible during the course of arbitration proceedings. The mandatory provision of reference to arbitration should strictly be followed.

(n). Most importantly, and perhaps of most difficulty, the reform of legal and judicial attitudes to the process.

(m). The Pakistan Law Commission should prepare & issue a comprehensive instructional code for introducing ADR at the district level particularly in family & commercial cases.

iii. CONCLUSION:

As for item (n), this may only be achieved once Pakistan's defensive posture in this field is overcome. The more lawyers, academics and judges in Pakistan that actually become involved in the field of international arbitration, the sooner local distrust of the process may diminish. The perception that international arbitration is essentially unfair to local interests, and that Pakistani parties will lose in such a forum, may lie at the core of this issue. Like all perceptions, whether or not it is true is of no importance, as long as it exists. And it is here that the burden of education, training, and above all inclusion lies beyond Pakistan, squarely upon the shoulders of the international arbitration community. It is a fact that arbitration (and general legal) culture of Pakistan has not had much exposure to international investment and, therefore, international investment related disputes.

Countries such as China and India have attracted billions of dollars worth of FDI by inter alia making their arbitral awards in line with the international laws. Chinese reforms, initiated in the mid-nineties, promulgated modern arbitration laws. India introduced the Arbitration and Conciliation Act of 1996 that is set on the "model laws" of UNCITRAL. Both countries have attracted huge FDI from all over the world, with the arbitration laws being a major factor.

If Pakistan has to attract similar investment from around the world it will have to update its laws on arbitration and make them more in line with international requirements. Furthermore, Pakistan's legal culture will need to accept and promote this change if trade liberalization schemes are to have any success. The first step in this respect may be the enactment of a proper law implementing the United Nation Convention on the Recognition

and Enforcement of Foreign Arbitral Awards, 1958 and the establishment of a National Arbitration Centre.

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