Thesis/Dissertation on

THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN SUB-CONTINENT WITH SPECIAL REFERENCE TO PAKISTAN PARTICULARLY IN ENERGY SECTOR

by

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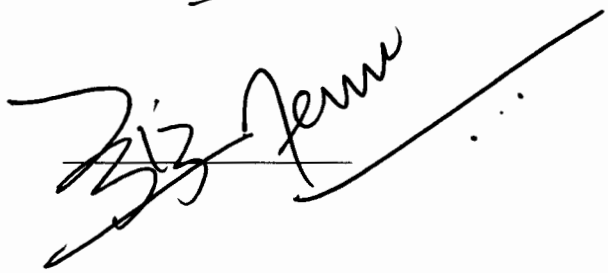
SUPERVISOR: 

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List of Abbreviations

AAA	American Arbitration Association
AD	Anno Domini
ADB	Asian Development Bank
ADR	Alternate dispute resolution
APC	Arbitration (Protocol & Convention) Act
BIT	Bilateral Investment Treaty
CPP	Capacity Purchase Price
DP	Dabhol Project
EAA	English Arbitration Act
EC	European Convention
ECAs	Export Credit Agencies
ELS	Equivalent Legal Standard
ECT	Energy Charter Treaty
EPP	Energy Purchase Price
FDI	Foreign direct investment
FSA	Fuel Supply Agreement
GBHP	Ghazi Barotha Hydro Power Project
GOP	Government of Pakistan
IA	Implementation Agreement
ICC	International Chamber of Commerce
ICSID	International Convention on the Settlement of Investment Dispute
ILA	International Law Association
IPP	Independent Power Producer
LCIA	London Court of International Arbitration
ISC	Indian Supreme Court
KESC	Karachi Electric Supply Corporation
MIGA	Multilateral Investment Guarantee Agency
MITs	Multilateral Investment Treaties
M/O W & P	Ministry of Water & Power

MW	Mega Watt
NEPRA	National Electric Power Regulatory Authority
NTPC	National Thermal Power Corporation
NYC	New York Convention
PAEC	Pakistan Atomic Energy Commission
PBUH	Peace be upon him
PCA	Permanent Court of Arbitration
PCGs	Partial Credit Guarantees
PEPCO	Pakistan Electric Power Company
PPA	Power Purchase Agreement
PPCs	Provincial Private Power Cell
PPIB	Private Power and Infrastructure Board
PRGs	Partial Risk Guarantees
PSO	Pakistan State Oil
SG	Sovereign Guarantee
SGS	Societe General De Surveillance
SIA	State Immunity Act
UN	United Nation
UNCITRAL	United Nation Commission on International Trade Law
WB	World Bank
WIPO	World Intellectual Property Organization
WAPDA	Water & Power Development Authority

Case Laws

1) Islamic Republic Of Iran Shipping Lines **v.** Hassan Ali & Co. Cotton (Pvt), 2006 CLD 153 (Karachi).
2) Travel Automation (Pvt) Ltd. V. Abacus International (Pvt) Ltd. and others, 2006 CLD 497.
3) Messrs Flame Maritime Limited v. Messrs Hassan Ali Rice Export, 2006 CLD 697 Karachi.
4) China National Machinery Import & Export Corporation **v.** Tufail Chemical Industries Ltd, 2005 CLD 1577 (Karachi).
5) Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3).
6) SGS **v.** Islamic Republic of Pakistan (ICSID Case No.ARB/01/13) 2002 SCMR 1694.
7) Hubco **v.** Wapda, PLD 2000 SC 841.
8) Hitachi **v.** Rupali, 1998 SCMR 1618.
9) National Thermal Power Corporation **v.** The Singer Company 80 AIR SC 998 (1993).
10) M/S Eckhardt & Co. **v.** Muhammad Hanif, PLD 1993 SC 42.
11) Lahore Stock Exchange **v.** Fredrick j Whyte Group Pakistan & Others, PLD 1990 SC 48
12) Yangtze (London) Ltd **v.** Barlos Bros (Karachi), PLD 1961 SC 573.

DEDICATION

This research work is dedicated to my parents, whose both moral and financial support has been supportive for me during the course of this research work, who gave me the will power and determination to concentrate on my research work. May Allah bestow upon them high blessings in this world.

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ABSTRACT

This dissertation identifies and discusses all the issues of enforcement of arbitration agreements and arbitral awards. The basic objective of selecting this topic is that the arbitration has got a pivotal role in the resolution of disputes all over the world. Traditionally, international commercial arbitration has been beset with many problems. This research work or dissertation will address all those issues and problems that are the main impediments in the way of foreign direct investment. There are many cultural, legal, institutional, and educational hurdles in subcontinent particularly in Pakistan that obstructs foreign investment and trade.

In Pakistan dispute settlement and enforcement of arbitral awards still remain a grave cause of concern for foreign investors as ever. In some instances, arbitral awards are denied enforcement on account of proper law dealing with international arbitration. Another reason is the serious lack of understanding of international arbitration rules and regulations. This is an era of modernization and globalization in which the whole world has tended to move towards internationalization of arbitration. We are witnessing these changes in sub-continent as well. India has accommodated international arbitration in its domestic litigation system. There still persist many difficulties in the enforcement of foreign arbitral awards in Pakistan that merit special consideration. These cultural and legal problems can be avoided if international commercial arbitration is tuned in the cultural needs and expectations. This research work highlights those issues and recent legal developments & trends in this regard.

Pakistan ratified the Convention on the recognition and enforcement of foreign arbitral awards (New York Convention of 1958) in the beginning of 2004 but it has still not been made part of domestic legislation. President of Pakistan has again promulgated Ordinance on the recognition and enforcement (arbitration agreement and foreign arbitral award) Ordinance (XIV) 2006 on 13 July 2006. The said Ordinance has been pending and needs to be enacted as an act of parliament. India has made major headways in the field of arbitration. It has promulgated the Arbitration and Conciliation Ordinance 1996 and is a contracting party to the New York Convention 1958. In Bangladesh Arbitration Act of 2001 is enacted but some

problems still persist in the enforcement of foreign arbitral awards. In India some amendments are being suggested in the said Ordinance 1996 to more accommodate foreign investors in its market.

States should consider inclusion of elements of public international law while carrying out training programme of judges in their states. Senior judges having administrative powers over their judicial organs should take proactive approach to familiarize existing judges with international law. Furthermore, they should include propositions of international law in the training of the upcoming judges. That way, we shall collectively prepare a human resource that would be having a more rationale, logical and solution oriented approach towards resolving international disagreements and disputes.

I have given an exposition of the mechanism as to how arbitration is conducted and the resulting awards are enforced. Whether it is in line with the international standards and norms or not? What has been the attitude of Pakistani courts in this regard? Whether our both substantive and procedural laws dealing with arbitration are in line with the international conventions and treaties. All these things have well been accommodated in this research work, starting from its history alongwith the brief analysis of the international conventions and the role of Sovereign Guarantee, the issues and problems of enforcement of arbitral awards, the treatment of arbitral awards in Pakistan and lastly some suggestions with short conclusion of the topic.

CHAPTER 1

INTRODUCTION

1.1 The Meaning of Arbitration

Arbitration is considered one of the oldest methods of settling disputes by a binding award. In most parts of the world, it is generally the accepted method of resolving international business disputes. International commercial arbitrations take place in different countries daily against different legal and cultural backgrounds. Because it takes place by agreement between the parties and is conducted in private. It has not been unusual for states to include an arbitral clause in treaties since 1899. In major international contracts an arbitral clause is inserted in case a dispute arises. Even the United Nation's Charter makes an explicit reference to arbitration. From time to time efforts were made to strengthen the institution of arbitration. The institution of arbitration has become even more stable in the wake of these efforts.

> "Arbitration, in the law, is a form of alternative dispute resolution specifically, a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third party (the arbitrator(s) or arbiter(s)) for resolution." [1]

According to Baron Samuel Pufendorf, arbitration is a mode by which the parties to a dispute bind themselves to stand by the award of an arbitrator. He gave this definition in his treatise on the Law of Nature and Nations published in 1672[2].

> "Arbitration is the process by which two adversarial parties submit their claims to an independent and unbiased mediator. The arbitrator then decides in favor of either claimant or declares a settlement that compromises between the two competing positions. As the two parties have agreed to abide by the arbitrator's ruling, there is typically no further action by either party once the ruling is made public. Although the result of an arbitration hearing may not please one or both parties that result is

[1] http://www.bambooweb.com/articles/a/r/Arbitration.html (Last visited date 20.06.2006).
[2] Samuel Pufendorf, The Classics of International Law: ed. James Brown Scott (London), p. 827.

usually preferable to continuing a strike or other action that in the long run benefits nobody."[3]

Finally we can say that arbitration is a method of alternative dispute resolution that allows the two parties to settle a dispute without going to court. A third neutral party issues a decision that is binding on both the parties or arbitration is the process by which a disagreement between two parties is resolved by two disinterested individuals called arbitrators. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

1.2 History and Development of Arbitration before and after Islam

- ***The Pre-Islamic Period***

Life in that period was based on personal whims. There was a lack of central power that could maintain law and order so as to protect the rights of individual. The pre-islamic Arabs did not dispose of (render) a true judicial power to settle disputes, have rights respected and put an end to anarchy. There was a tribal justice system administered by the chief of the tribe according to their elementary way of life instead of an organized judicial power. The Arabs of the pre-islamic period (Jahiliya) also knew arbitration because they always resorted to arbitration in order to settle their disputes. This arbitration consisted of an arbitration agreement that included the object of the dispute as well as the name of the arbitrators for the settlement of the dispute. The History of pre-islamic world repletes with such examples of arbitration and many arbitrators of that time became famous.[4]

Arbitration was optional and remained upto the willingness of the parties. Likewise arbitral awards were not legally enforceable and their enforcement was at the disposal of the arbitrators. That was why certain arbitrators used to take undertakings on behalf of the parties in order to be sure that their award would be accepted and enforced.[5] However, according to one of these arbitrators[6], the claimant must prove his claim and he

[3] http://www.pickalawyer.com/Alternative-Dispute-Resolution2.htm (Last visited date 20.06.2006).
[4] See Bulugh al Arab (vol.1, pp.308-344) Al-Midani (vol-1, p.35) and Al Ghani (vol. III, p.2).
[5] See Al Ghani (vol.2, p.286) and Bulugh al Arab (vol.1, p.288-291).
[6] Qass Ben Saida Al Ayadi.

who denies it must swear on oath.[7] Later on the Muslim Sharia adopted these rules. As the time passed these rules were made part of the legislation and are still found in numerous legislative work and laws. I further elaborate the said rule that if the claimant did not succeed in bringing the proof, he may request the defendant to swear that the claim is not true. This oath was very significant in resolving the disputes. Occasionally, it was made before the most prominent Idol "HABAL" that was expelled from the Qaaba. Many priests were arbitrators in pre-islamic era as well. When the light of Islam appeared and spread in the Arabian Peninsula, then the situation and circumstances were revolutionized.[8] Some fundamental and radical changes were brought due to the appearance of Islam. Arabia peninsula was a prominent place that was full of warlords. This state, later on, became the centre of Muslim (Islam) and was a geographical framework of a state that was governed by the prophet and then by the caliphs.

- ***Arbitration in Qur'an and in Sunnah***

The sanctity and validity of arbitration has been recognised in the Qur'an in this way:

> *"Allah doth command you to render back your trusts to those to whom they are due; And when ye judge with justice between man and man, That ye judge with justice: Verily how excellent is the teaching which He giveth you, For Allah is He Who heareth and seeth all things".*[9]

Hazrat Muhammad himself acted as an arbitrator in some cases and in many cases he delegated this power to someone else to be an arbitrator. The decision (award) was acceptable to all of the community. He acted as an arbitrator in the dispute between several Arab tribes regarding which of them will have the honour of lifting and placing the Blackstone after rebuilding the Qaaba. He put the Black Stone in his outer garment and gave judgment that every tribe chooses a representative who should carry the garment together to the place of the stone. He himself resorted to arbitration for the settlement of the dispute between himself and Bani Anbar.[10]

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[7] Al Midani vol.1, p.99.
[8] As-Suyyuti, note of Al-Jallaline Cairo (p.84).
[9] Verse 58 of Sura ul Nisa.
[10] Abi Abdullah Muhammad Ben Kharaj Al Maliki "The judgements of the prophet" edition 1978, (p.676).

The same practice was subsequently followed by the four Caliphs to settle the dispute among tribes. As has already been mentioned, the prophet Muhammad was appointed as an arbitrator before Islam by the Meccans, and after Islam by the treaty of Madina. He was confirmed by the Qur'an as the natural arbitrator in all disputes regarding Muslims. Following are the words of the Quran;

> *"But no, by thy Lord, they can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction".*[11]

He (PBUH) himself resorted to arbitration in his conflict with the tribe of Banu Qurayza.He even accepted the application of customary and Mosaic law instead of Islamic law in resolving the dispute with Banu Qurayza. Muslim rulers followed this practice on many occasions. The most famous of which was the arbitration agreement concluded between Hazrat Ali and Mu'awiya in the year 657 AD after the battle of Saffin.[12] Arbitration is legitimate in terms of disputes regarding political power. The first of which started after the death of Hazrat Usman (the 3rd Caliph). Hazrat Ali was appointed as fourth caliph after Hazrat Usman. Muawiya had then refused to accept the Ali bin Abi Taleb's right to the caliphate.[13] In the aftermath of this dispute, a Muslim civil war was started. The army of Muawiya and Hazrat Ali were face to face and started fighting at Saffin. Suddenly the corps of Muawiya brandished Quran on their lances. Hazrat Ali was then compelled to stop fighting. He sent messengers to ask Muawiya why his troops were brandishing Quran on their lances. Muawiya replied that I had desired to choose a man amongst yours for the settlement of the dispute between us. He, furthermore, said that the award (decision) of the arbitrators would be final and according to the provisions of the Holy Quran. The messengers brought this message back to Hazrat Ali. The majority of the followers of Ali accepted the proposal but minority rejected it forthwith. Hazrat Ali was in full agreement with the opinion of the majority. Two arbitrators were chosen in that regard that drafted arbitration agreement with the opinion of both the parties.[14]

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[11] Verse 65 of Sura of the women.
[12] Dr.Sobhi Mah Massani, Liamco v. Libya award of 12.04.1977, (1981) 6 yb comm.Arb.96.
[13] Muawiya was the governor of Damascus and raised objections to Ali's right of caliphate (succession).
[14] Abu Musa al Ash'ari for Ali ibn Abi Talib and Amru bin el'as for Muawiya.

Following the arbitration agreement, a serious dispute arose between Hazrat Ali and the Khawaregh. The Khawaregh labelled that Hazrat Ali was not entitled to resort to arbitration, which subsequently led to bloodshed. The irony of the situation was that the Khawaregh killed all those that had requested Ali to arbitration. They had gone to Abu Hanifa with the request to withdraw his words, otherwise he would be beaten up. Abu Hanifa requested them to discuss with their chief and the chief accepted it. On his acceptance, Abu Hanifa said that in case we did not agree, then what will we do? The chief replied that we would appoint an arbitrator. Abu Hanifa said that you had authorised arbitration. On this the Khawaregh withdrew their proposal of arbitration.[15] Hazrat Ali had not accepted the decision of arbitrator and opted for fighting with Muawiya.

Arbitration for family matters was legalized in the Quran in one of its verses:[16]

> *"If ye fear a breach between them twain (i.e. husband and wife), Appoint (two) arbiters, One from his family, And the other from hers; If they wish for peace, God will cause their reconciliation: For God hath full knowledge, And is acquainted with all things".*

This is an excellent plan for settling family disputes provided by Quran, without too much publicity or mud throwing, or resort to the chicaneries of law. The Latin countries recognise this plan in their legal systems. It is a pity that Muslims don't resort to it universally as they should. It should be made incumbent upon every Muslim to follow this practice of Quran for the settlement of disputes so that they could get justice. In this way the arbitrators from each family would know the idiosyncrasies or mode of behaviour of both of the parties and would be able to effect a real reconciliation with the help of God.

In another verse the same matter of arbitration has indirectly been discussed.

> *"But no, by thy Lord, they can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction".* [17]

[15] Dr Abdel Rehman al cherqavi, the ninth imam of fiqh.
[16] Verse 35 of Sura ul Nisa.
[17] Verse 65 of Sura ul Nisa , (Translation by Abdullah Yusuf Ali).

Arbitration is recognised and validated in the Sunnah as well.[18] The companions of the prophet gave it recognition and validity.[19] A Dispute arose between an ordinary man and Hazrat Umer in the era of 2nd caliph Hazrat Umer.[20] Both decided to settle the dispute by an arbitrator and went to see him. When they got at the house of an arbitrator. The arbitrator was surprised to see Hazrat Umer in his house. He asked the caliph why he had not requested him to come to you instead of your being here. The caliph answered to this that one must go to the arbitrator to seek justice. The arbitrator invited them to enter the house. He offered a cushion to the caliph. However the caliph refused to have cushion and passed remarks that this was the first act of bias (bigot) on the part of the arbitrator. One should infer from this that the arbitrator was requested to act like a judge by showing impartiality. The offer of cushion to the caliph was an act of injustice on the part of an arbitrator during the proceedings.

Idjma (consensus) that is the third source of Islamic law. The conduct and meaning of arbitration are more explicit in Idjma. The companions of the prophet had also used arbitration as a means for resolving disputes. Classical Muslim jurists had a debate over the concept of arbitration. According to one view, arbitration is a form of conciliation, close to amiable composition, which is not binding on the parties. The proponents of this view hold that the arbitrator's decision is neither binding nor final unless it is accepted by the parties. They quote the verse No.35 of Surah al Nisa that was quoted above. The second view is that shariah knew arbitration in its modern sense. This view is based on the following verse of the Quran:[21]

> *"Verily Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice"*[22].

According to this view the decision of the arbitrator is binding and final once it is made. The use of the word "HAKAM" in Islamic Law led to confusion and misunderstanding. In its strict sense, it refers to a person who is authorised in a specific

[18] The awards of the messengers of Allah by ibn tala.
[19] Mabsut: Imam Al Sarakhsi.
[20] Ordinary man was Abi bin Kaab and arbitrator was Zaid bin Thabit.
[21] http://www.gasandoil.com/ogel/samples/freearticles/article 63.htm 12.06.2006.
[22] Verse 58 of Surah al Nisa.

mission. In its broader sense, it refers to an authorised person to dispose of rights, to resolve differences between the rivals by issuing a binding decision to settle their dispute.

To make it a brief, it can be said that Quran does not give detailed arbitration rules. The Quran only laid down general rules. It is the duty of the Muslim jurist to elaborate and develop it in accordance with the needs of the society. Anyhow arbitration is validated and recognised by the four Islamic schools as an alternate dispute resolution mechanism. The viewpoints of each Islamic school are as under.

(a) *The Hanafi Doctrine*

The scholars of this school deem that arbitration is legal as the Quran, Sunnah, Idjma and Qiyas authorize it. They say that an arbitral award is lesser complex and has lesser force than a court's judgement.

(b) *The Shafi School*

This school has a close resemblance with the Hanafi's view. According to this school the arbitrator has a lesser status than the judge. Moreover it says that arbitration is significantly efficient when corruption is rampant amongst judges. This school justifies the legality of arbitration from the history of Islam when Muslims Chose Umer bin el Khattab as an arbitrator to settle the dispute.

(c) *The Maliki Doctrine*[23]

This school has a great trust in arbitration. It asserts that the decision of the arbitrator is binding unless it contains apparent injustice. According to this school the effect of the arbitration is limited to parties and it can have no effects in respect of third parties.

(d) *The Hanbali Doctrine*

The jurisconsults of this doctrine have the position that a decision made by an arbitrator has the same binding character as that made by the judge. Thus an award made by an

[23] Ibn Farhum: Tabsirat el Hakam"-Cairo 1958-Vol.1-p.55.

arbitrator, who must have the same aptitude as that of a judge, is imposed upon both parties who chose him.

The above-mentioned four schools of thought have accommodated arbitration as a mechanism for the settlement of mutual disputes. These different schools of Islamic Law produced a wealth of different opinions in abundance. Each has categorized the status of an arbitral award in terms of its enforcement as compared with the judgement of the court. Each has distinct views regarding the enforcement of an arbitral award. None of these opinions violates the express provisions of Quran and Sunna. This mode of settlement of disputes was continuously practiced during the regimes of these four Imams according to their respective thoughts and believes. The forthcoming generation adopted the same practice by following their respective imams. They amicably disposed of their disputes in the light of those principles and rules prescribed by the Shariah. This gives Islamic law the capacity to develop and adopt itself to the different circumstances of time and place.

- **Arbitration in the Medjella**

The "Medjella" is the first codification of Muslim Shariah under the Ottoman Empire. A whole section of the Medjella is dedicated to arbitration[24]. According to the author, who interpreted the Medjella, an arbitral award has a lesser force than the judgement made by a judge. Because a judgement may set aside the award that would be contrary to his conviction whereas he has to enforce a judgement made by another judge. However this lesser force of award may not prevent the parties from enforcing it in compliance with the Shariah. It is, thus, binding between the parties just like a contract. There are numerous provisions for the confirmation and reinforcement of the contractual nature of arbitration that are as under[25]:

1. "If there is more than one arbitrator, they should make a unanimous award. Each arbitrator is supposed to have made his own award separately, which is against the will of the parties that had appointed the arbitrators so that they could judge together.

[24] Section 4 of "book of the Judicial Organization and of Procedure"(articles 1841 to 1851).
[25] Articles 1844,1847 and 1851 of the Medjella.

2. Each party may dismiss the arbitrator before the award is made. Anyhow, if the arbitrator is appointed by the parties and subsequently approved by the judge (who himself is appointed by the "Sultan") such arbitrator is deemed to be the representative of the judge and may not be dismissed.

3. An award made by an arbitrator, contrary to a judgement made by a judge, supposes the agreement of the parties.

4. An award, contrary to a judgement, may be set aside by a judge."

The system of arbitration dates back to pre-islamic period as described above. This mode of resolving disputes continued in the era of Hazrat Muhammad (PBUH) and continued even after his death. The Muslims all over the world continued to follow this practice within the same parameters provided by Quran and Sunnah. The concept of arbitration is not a Quranic one but a pre-Islamic concept authorised by Islam.

- **Pre-British Period**

The origin of arbitration could be traced back from the time of the Greek and the Romans. In the ancient times in Sub-Continent, there existed a system of arbitration. This was in the form of "Panchayats"[26] or the head of a family or chief of a community presided over by a Sarpanch.The word 'Panchayat' does not mean that there should be only five (5) judges. There are numerous instances where Panchayats have been composed of one (1) to eleven (11) judges. The criteria for the election of these Panches was according to the social standing, wealth, and influence in the community. They got suo motu power to deal with matters to be adjudicated upon by them. Their decision were enforced and implemented without hesitation. They got binding authority behind their decisions in the shape of the fear of excommunication from the community and from the religious services as well. It was because the Panchayats were incomplete without religious preachers. The system of arbitration was so prevalent in Indian sub-continent that Chief Justice Marten said:

> "It (arbitration) is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much

[26] An important form of village council in India. Even today Panchayat sometimes sits as a court of law.

> greater extent that is the case in England. To refer matters to a Panch is one of the natural ways of deciding many a dispute in India."[27]

- **Arbitration in Indian Sub-Continent**

Historically, the concept of arbitration in the Indian sub-continent dates back to mediaeval times (1000 AD to 1450 AD). Arbitration is considered as one of the striking features of sub-continent that is pervasive in all its ranks of life even more than in the west. But the modern history of arbitration begins from 1794 when Britain and the United States concluded the Treaty of friendship, Commerce and Navigation, called the Jay Treaty.[28] This Treaty enhanced the role of the institution of arbitration that was being mistreated in the eighteenth century. In the nineteenth century arbitration got a prominent place and played a pivotal role in settling international disputes. Because of this role of arbitration efforts were made to perfect the institution of arbitration in the twentieth century that led to the establishment of permanent court of arbitration (PCA) in 1899. Nevertheless, the present system of arbitration in both India and Pakistan is the product of the British that was introduced in the mid-nineteenth century. When the British came in India, they made regulations to revamp the judicial system in the country. Thus, regulations and Acts were passed to formulate arbitration system in India in consonance with British Jurisprudence. Bengal Regulations of 1772 and 1780 were passed in which a clause pertaining to arbitration was inserted. It stated that "in all cases of disputed accounts, it should be recommended to the parties to submit the decision of their cause to arbitration, the award of which shall become a decree of the court".

Sir Elijah Impey's regulation of 1781 provided that "the judges do recommend and as so far as he can prevail upon the parties to submit to the arbitration of one person to be mutually agreed upon by the parties without compulsion. Another provision of this regulation provided that, "no award of any arbitrator or arbitrators be set aside except upon full proof made by oath of two credible witnesses that the arbitrators had been guilty of gross corruption or partiality in the cause in which they had made their award".

[27] AIR 1927 Bom 565: 29 Bom LR 1254: 105 IC 516 (FB).
[28] John Jay had been the American Secretary of State.

Regulation of 1787 laid down rules for referring suits to arbitration with the consent of the parties. However there was no express provision for the regulation of the arbitration proceedings in the said regulation. Many provisions were made in the regulation XVI of 1793 for referring matters to arbitration and submitting them to the decision of the Nizam. Regulation XV of 1795 and Regulation XXI of 1893 brought certain changes in terms of procedure for reference of award and the setting aside of award. Certain criteria for appointment of arbitrators was also recommended. Arbitration in suits was allowed regarding rights in land and disputes in terms of forcible disposition of land by regulation VI of 1813. Regulation XXVII of 1814 gave permission to lawyers to act as arbitrators by removing an age old bar on their acting as such. Bengal Regulation VII of 1822 conferred upon Revenue Officers to refer rent and revenue disputes to arbitrators. The same duty was given to the Collectors to be performed by them. Reference of rent and revenue matters is regulated by State Legislations in sub-continent even today. The settlement officers were empowered to refer disputes to arbitrators and exercise control over them through Bengal Regulation IX of 1883. The Madras Presidency Regulation VII of 1816 authorised the District Munsifs to assemble District Panchayats for administration of civil suits for real or personal property. The Bombay Presidency Regulation VII of 1827 allowed reference of present and future disputes to arbitration by means of an agreement. All cognizable cases could be referred to arbitration by a civil court. It authorized the parties to name the arbitrator in the agreement itself. This regulation provided that an award could be made a rule of the court and in case of its breach, contempt of court proceedings could be initiated against the parties. Period of limitation was also applicable for the decision by the arbitrator.

Besides the above-mentioned regulations, Arbitration law was promulgated through Acts and certain provisions were made for the enforcement of arbitral awards. The Act IX of 1840 made amendments in law with respect to arbitration and its procedure. Sections 312 to 327 of the Act VII of 1859 were the relevant provisions for arbitration. Section 312 permitted references to arbitration in pending suits. Section 313 to 325 laid down procedure for arbitration. Sections 326 and 327 allowed arbitration without intervention of courts. This act was not made applicable to the Supreme Court or the Presidency Small Cause Courts or non-regulation provinces. The Act X of 1877 and

Act XIV of 1882 amended the Act of 1859 but some provisions were basically the same. The Privy Council in a case made an interesting decision[29]. The question involved in this case was whether a party could revoke its decision to refer the matter in dispute to arbitration at his sweet will under Section 323. The lordships were of the opinion that a proper construction of the Code provided that when persons agree to submit the matters in difference between them to the arbitration of one or more specified persons, no party to such an agreement could revoke the submission unless it was for a good cause. An arbitrary revocation of the authority of an arbitrator was not permitted. In Section 28 of the Contract Act IX of 1872, there are recognised two exceptions of the agreements in restraint of legal proceedings. The first exception is regarding the agreements to refer to arbitration any dispute, which may arise between the parties. If any party to such an agreement filed a suit in contraventions of the terms thereof, the other party was given the right to plead the existence of such a contract as a bar to the suit. The second exception relates to agreements to refer to arbitration any dispute that has already arisen between the parties. This Act, for the first time, recognised agreements to refer present as well as future disputes to arbitration. Specific Relief Act 1878 described in Section 21 that though future disputes could not be referred as per Code of Civil Procedure, but if a person entered into a contract to refer future disputes and subsequently tried to come out of it, by going to the courts in the same matter, then he would not be allowed to do so. Arbitration law was codified and consolidated with the enactment of Arbitration Act 1899 called the Act IX of 1899. This applied only to the proceedings in the presidency towns and to such other areas as were specified in provincial government notifications. It was applied to Karachi in 1899. The 1899 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. The arbitration proceedings in the rest of British India were governed by the Second Schedule to the Code of Civil Procedure 1908. It, however, did not make major changes to the Act of 1899. The Code of Civil Procedure 1908 dealt with arbitration that was outside the operation and scope of the 1899 Act[30]. The Arbitration Act 1899 and the relevant provisions of the Code of Civil Procedure were eventually

[29] Pestonjee Vs Manockjee 12 MIA 112.
[30] Ss.89-A and 104 (1) of the CPC also dealt with arbitration.

repealed by the Arbitration Act 1940 (the "Arbitration Act")[31]. This new Act extended to the whole of British India upto the date of partition of the country into India and Pakistan. This Act is the main legislation on the law of arbitration in Pakistan. Its main features are based on the English Acts of 1889 and 1934.

Despite being the main legislation on arbitration, the Arbitration Act is completely silent on the question of foreign arbitrations. The Arbitration (Protocol and Convention) Act 1937 is recognised by the courts as the only legislation dealing with foreign arbitration. This Act is still applicable in Pakistan and deals with particular class of foreign arbitration. This Act gives effect to the Geneva Protocol and the Geneva Convention on the execution of foreign arbitral awards. Arbitration and Conciliation Ordinance 1996 has been promulgated by the President of India to update the arbitration laws in consonance with the United Nations Commission on International Trade Law Model. Bangladesh Arbitration Act of 2001 is applicable to arbitration proceedings in Bangladesh. Pakistan ratified the Convention on the recognition and enforcement of foreign arbitral awards (New York Convention of 1958) in the beginning of 2004 but it has still not been made part of domestic legislation. President of Pakistan promulgated Ordinance on the recognition and enforcement (arbitration agreement and foreign arbitral award) Ordinance 2005 on 3 December 2005. The said Ordinance has been lapsing and needs to be enacted as an act of parliament.

1.3 Foreign Arbitral Awards

- **Definition**

The definition of foreign arbitral award has been given in the Arbitration (Protocol and Convention) Act, 1937 in the following manner;

1) "In the Arbitration (Protocol and Convention) Act 1937 "foreign award" means an award on differences relating to matters considered as commercial under the law in force in Pakistan made after the 28th day of July, 1924—

   a) In pursuance of an agreement for arbitration to which the protocol set forth in the First Schedule applies, and

[31] It came into operation on 1 July 1940.

b) Between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the official Gazette, declare to be parties to the convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the powers aforesaid, and

c. In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said convention applies, and for the purposes of this Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

2) For the removal of doubt it is hereby declared that any notification issued under this section by the late Government of India before the fifteenth day of August, 1947, and in force on that day for the purpose of enforcement of foreign awards in British India, declaring any power to be a party to the said convention or any territory to be the territory to which the convention applies, shall be deemed to be a notification issued by the federal Government for the purpose of foreign awards in Pakistan."

This definition requires that foreign award must fulfill the following conditions.

1. It must relate to:
   a. Commercial matters;
   b. Arbitration agreements to which the Geneva Protocol applies;
   c. Differences between persons who are subject of powers declared by notification to be parties to the Geneva Convention;
   d. Must relate to such territory as is declared by a notification to be a territory to which the Geneva Convention applies

No award can be considered to be a foreign award for the purposes of this Act unless it fulfils the above-mentioned conditions. That is why many foreign arbitral awards other than those given under the Geneva Convention remain legally unenforceable in Pakistan. The same problem arose in the case of Yangtze (London) Limited v. Barlas Brothers (Karachi)[32]. In this case the Supreme Court of Pakistan refused to enforce an award of the London Court of Arbitration because England at that time was not notified by the Government of Pakistan to be a party to the Geneva

[32] PLD 1961 SC 573.

Convention. Furthermore its territory was not notified as the one where the Convention applied.

Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance XIV of 2006 gives definition in Section 2(d) in this way:

> "foreign arbitral award means a foreign arbitral award made in a contracting State and such other State as may be notified by the Federal Government, in the official Gazette".

The said definition is similar to Section 2 (2) of the 1937 Act in terms of notification. In this definition Contracting State means any State, which is a party to the New York Convention of 1958. This is the main difference between two definitions.

1.3.1 Form and contents of the Award

In general the requirement of form and contents are dictated by:

- The arbitration agreement; and
- The law governing the arbitration (the lex arbitri)

It is necessary to examine whether the arbitration agreement specifies particular formalities for the award or not. For example the UNCITRAL Rules lay down the following requirements:

- "The award shall be made in writing and shall be signed by the arbitrators;
- The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30;

- The award shall state its date and the place of arbitration where it was made;
- After the award is made, a copy signed by the arbitrators shall be delivered to each party." [33]

The ICSID Rules specifies the following requirements that state[34]:

1) "The award shall be in writing and shall contain:

[33] Art 31 of the UNCITRAL Arbitration Rules.
[34] Rule 47 of the ICSID Arbitration Rules.

- A precise designation of each party;
- A statement that the tribunal was established under the Convention and a description of the method of its constitution;
- The names of the agents, counsel and advocates of the parties;
- The name of each member of the tribunal and identification of the appointing authority;
- The dates and place of the sittings of the tribunal along with a summary of the proceedings;
- The decision of the tribunal on every question submitted to it with the cost of the proceeding together with reasons of the decision.

2) The award shall be signed by the members of the tribunal who voted for it along with the date of the signature;

3) Any member of the tribunal may attach a statement of his dissent."

So far as the contents of the award are concerned, the arbitration agreements usually provide that award is to be final and binding upon the parties. However, the arbitration agreements rarely describe the contents of the award. Mostly the national system of states requires that the award should be unambiguous and dispositive. This position is similar where the award contains provisions that are inconsistent. An award must be dispositive in that it must constitute an effective determination of the issues in dispute. The Washington Convention calls for a reasoned award without any exception[35]. The American Arbitration Association's international rules require reasons to be given unless the parties agree otherwise[36]. The same approach is adopted by the European Convention of 1961 in terms of reasoned award.

There appears no provision in the Arbitration Act 1940 that the award is to be signed by the parties and for that reasons the award can't be said to be vitiated[37]. Section 26-A sets out reasons of the award. It makes incumbent upon the arbitrator or umpire to state reasons for the award in sufficient detail to enable the court to consider any question of law arising out of the award.

[35] Art.48 (3) of the Washington Convention.
[36] Art.27 (2) of the AAA's Rules.
[37] 2001 CLC 1216.

1.3.2 Kinds of award

Following are the categories of the awards:

- **Final or Binding Award**

An award is final in that it determines all issues in the arbitration and determines all those issues that remain outstanding. An award is final in the sense of being a complete decision without leaving the matters to be dealt by third party. The tribunal becomes functus officio the moment the award is made. The award is conclusive as to the issues with which it deals. An arbitral tribunal should not issue a final award until it is satisfied that its mission has actually been completed. If there are outstanding matters to be determined, then the arbitral tribunal should issue an award that is expressly designated as partial or interim award.

- **Partial or Interim Award**

An interim or partial award is made during the proceeding of the tribunal. It is an effecting way of determining matters that are likely to be dealt with during the course of the proceeding. Partial award saves considerable time of the tribunal. Furthermore, It may simplify the proceeding. The power of the court to issue an interim award may be derived from the arbitration agreement or from the applicable law. The UNCITRAL Rules, for instance, state that:

> " In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial award"[38].

The ICC Rules adopt a similar formula for the definition of interim award. Practically partial or interim awards are frequently made in ICC arbitration. In ad hoc arbitration, an express provision is made to issue interim awards for the arbitral tribunal. Where such power is not conferred expressly upon the arbitral tribunal by the agreement of the parties, then it may be conferred by operation of law.

[38] Art.26 (7) of the LCIA Arbitration Rules.

- **Consent or Agreed Award**

When the parties to an international arbitration arrive at a settlement of their dispute during the course of the proceeding as happens in litigation, then the parties may make a settlement agreement and revoke the powers of the arbitral tribunal. This means that the jurisdiction and powers, previously given to the arbitral tribunal by the parties, are terminated. This is called consent or agreed award.

- **Reasoned Award**

Reason award is one in which the tribunal sets out the reasons for its decision and these reasons form part of an award. It is also named as speaking award or a motivated award.

- **Domestic and Foreign Award**

If the arbitration agreement is governed by the laws of Pakistan, then notwithstanding that the award has been made abroad, it shall be considered as domestic award and shall as such be governed by the domestic law of Pakistan. The definition of foreign award has been described above at page 13.

- **Default Awards**

These are those awards in which one of the parties (usually the respondent) fails or refuses to take part in the proceeding. If one of the parties is not there to help, the arbitral tribunal must make the determination on its own and must give the award on its own findings. Such award is called a default award.

Majority award, Additional Award and convention Award are the kinds of awards as well.

1.4 Effects and Limits of awards rendered in International Commercial Transaction

An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on either the parties or any person claiming through them, unless otherwise

agreed by the parties. However, it is unlikely for the parties to agree that the award should neither be final nor binding. If the parties want to have an independent person to settle their dispute, then these are forms of ADR other than arbitration, which is quicker and less expensive. Once the award is enforced and the arbitration proceeding is completed, then an important objective of the arbitration i.e. self-contained finality is achieved. In principle the arbitral awards have effects from the moment they are rendered. The award can have a res judicata effect from the day on which it is made. The award is final from the moment of its communication. It must be kept in mind that an award, which is final and binding, can be denied recognition and enforcement by national courts on different grounds. In this respect arbitral awards can be compared with foreign courts judgement.

Institutional requirements or control can cause delay in the enforcement of the arbitral award. Non-observance of such control may be one of the grounds for refusal of recognition under article V (1)(d) of the New York convention 1958. Non-observance of such requirements may have more limited effects outside an award's home country. Home country is that within which an award is considered domestic. Thus, it is possible for an award to have two home countries, one where the award was made and the other under whose lex arbitri[39] award was rendered. In analyzing this question, it is important to consider country in which award is relied upon. Enforcement does not require confirmation by the country of origin. The New York Convention 1958 (Art V) does not allow refusal of recognition and enforcement on the ground of lack of confirmation. Recognition and enforcement can take place in all contracting states without the prior confirmation in the country of origin. However, Convention does not bestow effects on an award until recognition or leave to enforcement is granted by the court.

The position of the award in its country of origin depends on local procedural law. The possible options are:

a) The award must be confirmed by domestic courts to be enforceable and to have preclusive effects;

b) The award must be confirmed to be enforceable but it has preclusive effects without court scrutiny;

[39] The Procedural law of the arbitration.

i) after it is rendered,
ii) after it is communicated,
iii) after the time limit for beginning to set-aside proceeding has expired without action.

Many modern statutes have adopted various solutions. Where confirmation is needed, the lex arbitri may set a time limit within which it can be sought. Assuming that the award has preclusive effects but it is not enforceable without confirmation. The final and binding status of an award is significant where the enforcement of the award is sought. Enforcement of the award will not usually be granted until the award becomes final and binding. Under Art V.I (e) of the New York Convention, a ground for refusing to recognise and enforce an award is that: "The award has not yet become binding on the parties".

1.5 Time Limit for making the Award

A time limit may be imposed as to the time within which the arbitral tribunal must make its award. Such limits may be imposed on the arbitral tribunal by the rules of arbitral institution, by the relevant law, or by the agreement of the parties. The laws of different countries set different time limits within which an award must be made. In India, the 1996 arbitration law has dispensed with a time limit that was imposed by the old law of 1961. In England the Arbitration Act does not specifically provide a time limit for the making of an initial award where the parties have not agreed on it. In the United States the position varies from states to states. In some states the limit is 30 days from the date of the end of the proceedings. This time limit can be extended by mutual agreement of the parties or by the order of the court. Article 24 (1) of the rules of ICC International Court of Arbitration imposes the time limit of six (6) months within which award should be rendered. The court may extend this time limit on its own initiative or pursuant to a request from the arbitral tribunal. The court shall only extend time if it is satisfied that a substantial injustice would otherwise be done. Section 21 of Thailand Arbitration Act fixes a time limit of 180 days from the date of the appointment of its last arbitrator or umpire, unless otherwise agreed by the parties. A time limit for an arbitral award is enshrined in the arbitration agreement itself. But mostly the arbitration agreements are

silent about the time limits within which an arbitral award is to be rendered. Section 3 of the first schedule of the 1940 Act provides for a period of four (4) months for an arbitrator to make an award. On the other hand, Article 5 of the same schedule sets the time limit of two (2) months for an umpire to render an award upon entering on the reference. According to section 28 of the Arbitration Act 1940 the court can extend this time limit for the making of the award from time to time. However, it is pertinent to note that AAA's International Arbitration Rules and the WIPO Rules do not impose any time limit for delivery of the award. It is important to note that a fixed time limit for giving the award should not enable one of the parties to frustrate the arbitration. If a court does not have the power to intervene on the application of one party alone and the time limit is extended by only agreement of the parties, then a party might frustrate the proceedings simply by refusing to agree on the extension of time.

1.6 Arbitration in Energy Sector

The energy demand all over the world increases with the passage of time. Pakistan is one of those countries in which there is a huge demand of energy with the increase of population. Energy consists of natural gas, coal, nuclear power, thermal power and hydroelectric power etc. Development of the energy remains a high priority. Pakistan has faced chronic energy shortage and domestic energy demand has sometimes outstripped supply. The energy shortfall has been particularly acute in electricity generation. This has resulted in regular load shedding and forced many industries to develop their own alternative sources. In 1994, when there was an acute electricity shortage, then the Government of Pakistan announced a policy framework inviting the foreign/private sector to develop their power projects. Foreign investors want security and privileges to secure their investment in another country. If a dispute arises between the parties, in case one party is foreigner, then which law will govern the dispute? The applicability of law and the matter of jurisdiction are the issues that can beset a lot of problems in this regard. Pakistan has gone through such difficulties when a dispute arose between Hubco and Wapda in the mid nineties. In 1985, the Government of Pakistan invited the private sector to develop thermal power plants to generate and supply electricity to Wapda. In 1987, preliminary studies began on the Hub Power Project. The project involved a group of

foreign sponsors from five different countries, more than forty international and local banks as well as financial institutions. When the project was on the verge of completion, dispute arose regarding payment of money and such like other issues. The Supreme Court of Pakistan adjudicated upon the matter. The respondent Hubco was restrained from invoking an arbitration clause of the agreement on the grounds of public policy and corruption. Foreign direct investment (FDI) suffered huge loss due to this judgement. Foreign investors were frustrated and hesitant to invest in Pakistan because of lack of an alternate dispute resolution mechanism.

Another similar dispute erupted between Wapda and Impregilo regarding the Ghazi Barotha Hydropower Project (GBHP). The Government of Pakistan offered Italian firm Impregilo an out of court settlement in its dispute with Wapda over a US $450 million investment in the 1450 MW Ghazi Barotha Hydropower Project as claimed by Impregilo[40]. Impregilo took the matter to the International Centre for the Settlement of Investment Disputes (ICSID).

We do not have any particular law of arbitration relating to energy sector. We have the Arbitration Act 1940 that deals with domestic arbitration. The Arbitration (Protocol & Convention) Act 1937 is considered by courts as the only legislation in Pakistan dealing with particular class of arbitration with the aim of giving effect to Protocol on arbitration clauses i.e. Geneva Protocol & Convention on the Execution of Foreign Arbitral Awards i.e. Geneva Convention. This Act was enacted to facilitate international trade and attract the foreign investment. Pakistan ratified the Convention on the recognition and enforcement of foreign arbitral awards (New York Convention of 1958) in the beginning of 2004 but it has still not been made part of domestic legislation. President of Pakistan promulgated Ordinance on the recognition and enforcement (arbitration agreement and foreign arbitral award) Ordinance 2005 on 3 December 2005. The said Ordinance has been lapsed after the passage of four (4) months and another similar was promulgated on 18th of March 2006. This Ordinance has also been lapsed under Article 89 of the Constitution of Pakistan 1973 and the President has again promulgated on 14 July 2006 that still needs to be enacted as an act of parliament.

[40] http://www.dailytimes.com.pk/default.asp?page=story_25-9-2003_pg7_33. (Last visited dated 25.05.2006).

However, we need a huge investment in our public and private sector particularly in energy sector so that we could be able to generate energy to fulfill our requirements. Proper and suitable laws must be made to resolve the disputes. Energy Charter Treaty (ECT)[41] provides a back-up mechanism for both interstate arbitration and investor dispute settlement. Both India and Pakistan have yet not signed the treaty and have observer status. The treaty has a dispute settlement mechanism according to which initially the parties must resort to conciliation. If it fails, parties can start the international arbitration process. The final award would be enforceable against the defaulting country if it has ratified the New York Convention. I will not discuss it in detail because Pakistan is not a party to this treaty.

[41] The Energy Charter Treaty signed in Dec.17, 1994 (entered into force April 1998).

CHAPTER 2

SOVEREIGN GUARANTEE & INTERNATIONAL CONVENTIONS

To begin with the concept of Sovereign Guarantee, one has to be familiar with the basic concept of agreement. The foreign investors want security and protection for their investment. They want a congenial environment that is conducive to their investment. When a dispute arises regarding the implementation of an agreement, whether the courts will enforce that agreement or the Government will enforce that agreement through its Sovereign Guarantee. The Sovereign Guarantee is presumed to be the best alternate as compared with the court system. When a foreign investor comes to Pakistan, it has to execute three agreements that are the Implementation Agreement, Power Purchase Agreement and Fuel Supply Agreement. The detail of these agreements is as under:

2.1 Implementation Agreement (IA)

The GOP formulated a power policy in the year 2002 with collective wisdom of the key power sector players. In this power policy, the Government of Pakistan has given the security package for the project by which the project company shall enter into the Implementation Agreement (IA) with the Government of Pakistan. According to this policy, the term of the Implementation Agreement will be of 25 years. This agreement includes the GOP's Guarantee in terms of contractual obligations of its entities for the power purchaser as well as for the fuel supplier. The guarantee shall give the GOP's protection against specified political risks and protection against changes in the taxes and duties regime. The Government shall provide the requisite support for getting necessary consent that is required for the power project. The GOP shall make available the foreign currency to obtain the necessary payments of the projects including debt servicing and payment of dividends if that foreign currency is not available from normal commercial channels. Through this agreement, the company shall be permitted to import equipment and material for the construction, operation, completion, design and maintenance of the complex. The protection through this agreement is also extended against the specified

Force Majeure events. The company will be adequately compensated in the event of termination due to default of GOP or its specified entities. The Implementation Agreement shall determine international arbitration forum for the resolution of disputes. The governing law of the IA would be that of a neutral country. The agreement of HUBCO with WAPDA provided an undertaking on behalf of government to guarantee the obligations of WAPDA and PSO and of the State Bank of Pakistan regarding the provision of foreign exchange insurance cover for HUBCO's foreign currency financing costs.[1]

2.2 Power Purchase Agreement (PPA)

The investor makes this agreement with the purchaser of the power. In the case of Hubco, the WAPDA was the purchaser of the electricity generated by the HUBCO. In the policy of power generation projects 2002, many security packages were provided in the power purchase agreement. The duration of the PPA is the same as that of IA. Part tariff is allowed in terms of capacity and energy price that are Capacity Purchase Price (CPP) and the Energy Purchase Price (EPP). Indexation of specified tariff components based on variations in the exchange rate between the Pakistan Rupee and US Dollar. The local cost components of EPP and CPP would be indexed for inflation in Rupee. The power purchaser would assume the risk of fuel price variation. Any additional duty and tax over and above the one agreed in the assumptions of tariff would be treated as pass-through to the power purchaser. Like the IA, the PPA would provide protection against specified Force Majeure events. Dispatch flexibility would be given to the Power Purchaser subject to technical limits. However, in the Dabhol Project, the Government of India had provided counter-guarantee of the Maharashtra state obligations under the power purchase agreement.

2.3 Fuel Supply Agreement (FSA)

The investor makes this agreement with the company that will provide the fuel and the other necessary items. In this agreement, the GOP will provide Guarantee for the performance obligation of the fuel supplier. The fuel suppliers would provide fuel

[1] PLD 2000 Supreme Court 841, p 846.

according to the agreed terms and conditions. Variations in fuel price will be passed through to power purchaser. FSA would provide protection against specified Force Majeure events like the above two agreements. As said above, the GOP guarantees the performance obligation of its entities such as the power purchaser, fuel supplier, etc. and provinces. The GOP also provides protection to sponsors and lenders in case of termination of the project. The foreign investors feel secure and stable in case of Sovereign Guarantee. The Government provides guarantee that it would enforce the arbitration agreement and arbitral award. The attitude of the courts in Pakistan is not arbitration friendly and the granting of stay has become a common phenomenon when arbitral award is filed in the courts. This is the only tool in the hands of the courts to halt arbitration in Pakistan. The history of arbitration in Pakistan is replete with such precedents of courts. Contractual arrangements are made for the performance of Sovereign Guarantee because it is cheaper as compared to international arrangements. For instance, if an award is made abroad and its enforcement is to be made in Pakistan, then the award can be enforced through Sovereign Guarantee directly without making resort to the court for its enforcement. The above-mentioned agreements have been prepared for private power projects so as to eliminate the necessity of prolonged negotiations between the GOP and the Sponsors. The GOP provides guarantee for the performance of fuel under the fuel supply agreement provided that the fuel is to be supplied by a public sector organization. The GOP provides guarantee for the long term Power Purchase Agreements (for 15 to 30 years) with WAPDA/KESC for the performance obligations of power purchaser and fuel supplier. For private power projects, the Government provides protection against force majeure risk and protection against changes in certain taxes and duties. The agreement of HUBCO with WAPDA contained a guarantee by the Government of Pakistan for the performance of the obligations of the PSO under the fuel supply agreement.

The GOP announced the Policy for Power Generation Projects-2002, which provides a clear set of incentives, along with a regulatory regime, that effectively provides a road map to attract the much-needed investment in power generation at competitive prices. The policy has a clear focus and incentives for development of power projects based on local resources, i.e. hydel, coal and renewable resources. The GOP has

given many incentives, for power sector in Pakistan, one of those is a very attractive tariff package that guarantees the payment of all debts irrespective of the fact whether the project is dispatched or not. These incentives include the lack of restriction on local and foreign finance. The international arbitration is very expensive as compared to the sovereign guarantee. When a foreign award is to be enforced in another country, it may take a lot of time for its enforcement because of hick up in the courts. If this award is to be enforced by a government through a sovereign guarantee, it may save a lot of time Despite all the factors described above, [2] The Sovereign Guarantee may not be good for Pakistan on a number of grounds:

- it is a sleeping bomb in the sense that apparently the GOP will pay nothing but impliedly it will pay a lot in case of non-compliance of an agreement;
- if the liabilities are more than the guarantee provided, the GOP will face default;
- The Guarantee is provided till the financial close of the project;
- if there is an element of fraud and corruption in the procurement of agreement, then the GOP will be in trouble because the Government will have to come up with evidence to prove fraud and corruption.

State immunity or sovereign immunity has been one of the greatest defences against the enforcement of arbitral awards. It means that a sovereign state cannot be compelled to submit to the jurisdiction of another state. State immunity does not prevent a state from agreeing to submit to the authority of an arbitral tribunal. It is a well-established principle of international law that a sovereign is bound by an agreement to arbitrate contractual disputes.[3] State immunity exists at the level of jurisdiction as well as at the level execution. National courts in many countries have adopted the restricted theory of sovereign immunity. Some countries have even adopted it through legislation. In England, For instance, the State Immunity Act 1978 provides that where a state has agreed in writing to submit existing or future disputes to arbitration, the immunity is not granted to the state with respect to the arbitral proceedings in the courts of England.[4] Anyhow, this law differs from country to country.

[2] Nadir Altaf (L.L.M), Manager legal, Private Power & Infrastructure Board (PPIB).
[3] This principle of international law was noted in the U.N. General Assembly Resolution No. 1803, dated December 21,1962, which proclaims permanent sovereignty over natural resources confirms the obligation of states to respect arbitration agreement.
[4] Section 9 of the English State Immunity Act 1978.

Problems arise where a winning party wishes to enforce and execute its award against a state or its entity. The state may evade its obligation by claiming immunity from execution. The winning party would be in a better position where a forum state permits execution against the commercial assets of a foreign sovereign. This is the practice in countries such as Austria, England, Germany, and the United States etc. Execution is allowed against funds held by the defaulting state for commercial purposes. However, where execution against state assets is allowed, national courts have tended to show considerable respect for foreign states. Under the Washington Convention, an ICSID award must be treated as a final judgement of a court of a contracting state. However, it does not mean that it will be treated as overriding any immunity from execution that exists in the contracting states. It is surprising that in a convention that was intended to encourage investment, the state parties did not agree to waive their immunity from execution. The international convention establishes a sensible way that a state's waiver of immunity from jurisdiction necessarily carries with it a waiver of immunity from execution.

The principle of state immunity is waived and inapplicable in case of Sovereign Guarantee. There is a United Nations Convention on Jurisdictional Immunities.[5] The Article 19 of the State Immunity Convention prohibits execution of commercial arbitral awards against a state unless it has explicitly consented or unless the property subject to execution is "specifically in use or intended for use by the state for other than government non commercial purposes". Investors and states have many difficult issues to face regarding the execution of arbitral awards. States must consider that their assets may be the subject of a dispute over execution. States must consider the rules governing execution in the several arbitration conventions as well. Investors should be mindful of the creative approaches to execution issues such as seeking an express waiver of immunity from execution of certain states assets.

Besides the Government of Pakistan, there are other regional institutions that provide guarantees such as Private Power & Infrastructure Board (PPIB), Pakistan Atomic Energy Commission (PAEC), Karachi Electric Supply Corporation (KESC),

[5] On December 2, 2004, the UN General Assembly adopted this Convention and later opened it for signature by all states from January 17, 2005 until January 17, 2007, at the United Nations Headquarters in New York. It has 17 signatories till March 2006. This Convention is yet not in force.

Independent Power Producers (IPPs), Pakistan Electric Power Company (PEPCO), Provincial Private Power Cells (PPCs), Ministry of Water & Power (M/o W&P) and Water & Power Development Authority (WAPDA). The above mentioned are the main players of Pakistan Power Sector.

At the international level, the World Bank guarantees play a pivotal role particularly in international energy projects. These are the powerful instruments through which the different performance related risks of the government could be mitigated. The World Bank, because of its relationship with the government, may avert some of the risks that the private lenders may be unable to assume. When a government fails in the fulfillment of its obligation to a private or public project then the Bank guarantees ensure the payments to the lenders. The government, in whose jurisdiction the project is located, provides the World Bank with a counter guarantee. It is incumbent upon the government to repay the Bank if the guarantee is called and paid out. If the government fails in its obligation to do so, the World Bank may freeze all its financial operations in that country.

The Multilateral Investment Guarantee Agency (MIGA) is the new agency of the World Bank. It has 157 members and it has issued over 500 guarantees for various projects in 78 countries since 1998.[6] This agency offers guarantees against political risk to investors and lenders thereby promoting foreign direct investment into emerging economies.

The Bank has issued 18 guarantees till 2001, with outstanding exposure of approximately US$ 1.6 billion, covering 17 projects. Out of these, 7 guarantees were issued on a stand-alone basis and 11 guarantees were associated with Bank loans to the project.[7] The World Bank offers two types of guarantees namely the Partial Risk Guarantees (PRGs) and the Partial Credit Guarantees (PCGs).

The Partial Risk Guarantees (PRGs) identify the specific obligations of the government to a private project. The PRGs cover different risks such as the contractual payment obligations, changes in law, expropriation and nationalization, licenses, approvals and consents and non-payment of an arbitral award following a covered

[6] http://www.miga.org/screens/about/about.htm (Last date visited 12.07.2007).
[7] <http://www.worldbank.org/html/fpd/guarantees/assets/images/New_Guarantee_Brochure_January_2002.pdf>(Last date visited 12.07.2007).

default.[8] The involvement of the World Bank and the related government counter guarantee may play a significant role in attracting commercial financing for projects, particularly in the energy sector.

The Partial Credit Guarantees (PCGs) secure the private lenders against all risks during a specified duration of the financing term of debt for a public investment. The PCGs are mostly used for securing privately funded projects, improving their financial viability, and often result in a more affordable tariff in the case of infrastructure projects.[9]

2.4 Export Credit Agencies

Export credit agencies (ECAs) are the national financial agencies that provide loans, guarantees and insurance to domestic corporations and businesses for their foreign investment activities. The key objective of the ECAs is the promotion of exports and trade from their respective country. The role of ECAs as a source of private sector financing is continually growing, with the amounts having far outpaced official development assistance. "The export credits increased four-fold from $ 26 billion to $ 105 billion per year" from 1988 to 1996.[10]

2.5 An Overview of International Conventions

2.5.1 International Chamber of Commerce (ICC)

The International Chamber of Commerce was established in 1919 to serve world business by promoting trade and investment, open market for goods and services, and free flow of capital. The organization's international secretariat was established in Paris and the ICC's International Court of Arbitration was created in 1923. Although the International Court of Arbitration of the ICC does not specialise in investment and energy related disputes, but it is one of the most recognised arbitration forum that needs to be mentioned.

The ICC International Court of Arbitration has pioneered international commercial arbitration as it is known today.[11] Since its creation, the court has

[8] Ibid.
[9] Ibid.
[10] http://www.damsreport.org/docs/kbase/contrib/ins207.pdf. (Last date visited 09.07.2007).

[11] See http://www.iccwbo.org/court/english/intro_court/introduction.asp (Last visited date 27.06.2006).

administered over 10,000 cases involving parties and arbitrators from more than 170 countries. The cases are not brought before the ICC Court itself but before the arbitrators appointed under the ICC Rules. Being the ICC arbitration body, the Court ensures the application of the Rules of Arbitration of the International Chamber of Commerce.[12] The Court supervises the ICC arbitration process and inter alia, is responsible for:

- appointing arbitrator;
- confirming arbitrators nominated by the parties;
- deciding upon challenges of arbitrators;
- scrutinizing and approving all arbitrators' fees.[13]

Article 24 to 29 of the ICC Rules deal with the awards. Notification, deposit and enforceability of the award have been described in article 28 of the ICC Rules. According to ICC, many requests for arbitration are filed every year from different countries. Under the ICC Rules, arbitrators are appointed and confirmed from different nationalities.

2.5.2 UNCITRAL and Permanent Court of Arbitration Optional Rules

The United Nation Commission on International Trade Law (UNCITRAL) was established in 1966 by the General Assembly of the United Nations to promote unification and harmonization of international trade law.[14] The commission is composed of 36 member states chosen to represent the world's various geographic regions and its principal economic and legal systems. One of the main areas of the UNCITRAL's work is international commercial arbitration and conciliation. The UNCITRAL Arbitration Rules of 1976 are considered as a cornerstone of international arbitration, which are often chosen by the parties to govern their dispute resolution procedure. An Article 35 of the Model Law talks of the recognition and enforcement of arbitral awards. Grounds for refusing recognition and enforcement have been mentioned in article 36 as well. The Model Law has been adopted by many countries in their national legislation. For instance, India has adopted the Model law in its Arbitration and Conciliation Act 1996. So far as Pakistan is concerned, the newly promulgated Recognition and Enforcement

[12] See http://www.icewbo.org/court/english/rules.asp. (Last visited date 28.06.2006).
[13] See http://iccwbo.org/court/english/arbitration/introduction.asp. (Last visited date 28.06.2006).
[14] General Assembly Resolution 2205 (XXI) of December 17, 1966.

(Arbitration Agreements and Foreign Arbitral Awards) Ordinance (XIV), 2006 does not make mention of the Model Law in its text. Because it is based on the New York Convention of 1958. However, the provisions of the Model Law are similar to the New York Convention regarding the recognition and enforcement of arbitral awards because the former has taken effect from the latter.

The Permanent Court of Arbitration (PCA) was founded on July 29, 1899, during the first Hague Peace Conference. The prevention of war was the main objective of the Convention and resultantly the resort to international commercial arbitration was made to achieve this purpose. The PCA has been entrusted by the UNCITRAL Arbitration Rules to appoint members of the arbitration tribunal and to perform other functions in the UNCITRAL arbitration process.[15] In June 2001, the Permanent Court of Arbitration (PCA) has adopted a set of Optional Rules for Arbitration of Disputes regarding Natural Resources and the Environment (Optional Rules), based upon the UNCITRAL arbitration procedures.[16] This was done in order to adapt the widely used UNCITRAL Rules to the specific of natural resources dispute resolution thereby facilitating the procedure for the interested parties. The PCA consists of a panel of arbitrators from whom the states may choose their arbitrators, if they wish so, after having failed to settle their dispute. The Optional Rules have a wide scope of application because they are open for all parties who have agreed to use them. The tribunal treats the parties with equality and each party is given the full opportunity of presenting its case at any stage of the proceedings. The Rules stipulate that a party can bring a case before the tribunal regarding any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation to which, the dispute arises.[17] In addition to the final award, the tribunal is empowered to make interim, interlocutory, or partial awards that are final and binding for the parties. Such awards may be made public only with the consent of all the parties to the dispute.[18] The parties are free to

[15] The PCA is an independent intergovernmental organization having 97 members besides its having strong procedural link with the UNCITRAL. It is not a United Nations agency.
[16] http://pca-cpa.org/ENGLISH/UNCITRAL/. (Last visited date 30.06.2006).
[17] Art. 3(3(a)) of the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes regarding Natural Resources and/or Environmental (June 19,2001),
[18] Art. 32 of the PCA Optional Rules.

agree on a settlement at any points before the tribunal makes the final award whereby the tribunal issues an award on the terms settled by the parties.[19]

2.5.3 International Convention for the Settlement of Investment Disputes (ICSID)

The World Bank plays a key role in the global development and investment scenario. The World Bank is the most significant international economic development institution. The Bank is far beyond the influence of the UN or the EU not only in terms of funding volume but also in terms of leadership with respect to ideas, policies and programme orientation.[20]

ICSID is the World Bank organization and is considered one of the pillars of the World Bank. ICSID is one of the main international arbitration institutions and is devoted to facilitate investment dispute resolution between governments and foreign investors. The new centre was established to create an impartial and reliable venue for the arbitration of disputes between direct foreign investors and host governments. In addition to providing the facilities, the infrastructure and the procedure for dispute resolution, the ICSID convention also makes sure that all of its members recognise and enforce the ICSID awards, whether they are party to the dispute or not. It is now open to its more than 153 members and is also offering its additional facility to the few states and nationals of states that are not yet not parties to the ICSID convention. However, it is significant to note that the convention only covers investment that has already been made and not the stage of entry into a market.[21] The administrative Council of the Centre has adopted additional Facility Rules that allow ICSID to administrator certain categories of proceedings between states and nationals of other states, which otherwise fall outside the scope of the ICSID Convention. Moreover, provisional measures (interim, protective, conservatory measures), which are a common feature in national as well as international adjudication and arbitration, have been allowed in the provisions of the ICSID

[19] Ibid., Art. 34 (1).
[20] T.W. Walde, International Energy Law: Concepts, Context and Players 73 (October 2001).
[21] Art.25 (1) of the ICSID Convention.

Convention. These have been drafted on the model of Article 41 of the Statute of the International Court of Justice.[22]

International arbitration through ICSID is an easy accessed option and since its establishment in 1966 upto now, ICSID has rendered more than 70 decisions and many cases are still pending. Several factors have contributed to motivate parties to turn to ICSID for investment dispute resolution and among them is the high flexibility of the arbitration procedure. The parties are given the option on many points to leave the default provisions set by the convention. For instance, among such decisions is the choice of arbitration rules under which the proceedings have to be conducted or the choice whether to extend the tribunal's authority to determine different cases arising out of the subject matter of the dispute. One of the prominent characteristics of the ICSID is the confidentiality of the tribunal decisions. Furthermore, it is upto the parties to authorise ICSID to publish the issued arbitral award.[23] Another advantage of the ICSID is that its centre offers expertise bank through which each contacting state may designate upto four (4) persons to the panel of arbitrators.[24] All of these experts must have a high moral character and must have a distinctive competence in the fields of law, commerce; industry and finance, who may be relied upon to exercise independent judgement. Particularly, an arbitrator must have expertise in the field of law.

ICSID Convention sets out certain requirements for the arbitration cases. It says that there should be a legal dispute arising out of an investment between a contracting state and a national of another contracting state. Furthermore, it demands written consent of the parties for the submission of the dispute to the centre.[25] The tribunal makes decisions by a majority vote and issues an arbitral award in writing. The award deals with every question submitted by the parties and sets out the reasons for such decision.[26] The said award can be annulled on many grounds set out in the Convention. The issued arbitral awards are not appealable and are binding on the parties. It is the obligation of each contracting state to recognise and enforce the ICSID awards in the same manner as it would enforce the final judgements of its national courts. The party seeking recognition

[22] Art. 47 of the ICSID Convention read with Rule 39(5) of the ICSID Rules.
[23] See Arts. 44, 46, and 48 (5) of the ICSID Convention.
[24] These persons may be nationals of any state.
[25] Art. 21(1) of the ICSID.
[26] Art. 48 of the ICSID Convention.

and enforcement of the arbitral award submits it to the competent authority after which the contracting state shall execute the award according to its national laws regarding the execution of judgements.[27]

Pakistan has ratified the ICSID Convention (Washington Convention) 1965 but unfortunately it has not made proper legislation for the enactment of the Convention into its municipal law. The Convention's awards are unenforceable due to lack of proper legislation.

2.5.4 The New York Convention of 1958

Although a lot of space will be given to the New York Convention in the next chapters, but because of its importance in terms of enforcement of arbitral awards, a brief analysis is given in this chapter. The New York Convention is regarded as one of the cornerstone of international arbitration. It is applicable to any arbitral award irrespective of whether it is recognised as domestic award or not under the legislation of the state where the recognition and enforcement is sought as well as whether the award is made by appointed arbitrators or permanent arbitral bodies.[28] The principle feature of the Convention is that it permits a party to enforce the arbitral award against another party not only in the country of the seat of arbitration but in countries where it has assets as well.[29] Thus, New York Convention plays a key role in attracting investment. It protects the host government's interests where a state involves an investor to arbitration. So far 138 states have joined the New York Convention and UAE is the latest country that has joined the Convention. The fact that so many states have acceded to the Convention clearly demonstrates that foreign arbitral awards may almost be enforced everywhere in the world. The New York Convention is a treaty that promotes the mutual recognition and enforcement of foreign arbitral awards rather than domestic awards. A detailed commentary on the New York Convention is discussed in the coming chapters.

[27] Art. 54 of the Convention.
[28] Art. 1(1; 2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made at New York on 10 June 1958 and entered into force 7 June 1959.
[29] Ibid., Art. 1.

2.6 The Arbitration (Protocol and Convention) Act, 1937

The 1937 Act was applicable to both Pakistan and India until the India enacted its own Arbitration Act in 1961 and then Arbitration and conciliation Ordinance 1996. The Act is applicable to Pakistan only in terms of foreign arbitral awards and this is still the only legislation that deals with foreign arbitral awards. The 1937 Act, in terms of which much of the litigation has been occurred in Pakistan. It contains two substantive provisions one of which is regarding the institution of legal proceedings in Pakistan notwithstanding an arbitration agreement and the second is about how a foreign award has to be enforced in Pakistan. Before making any commentary on these provisions, it is necessary to note section 9 of the Act, which provided that the Act did not have any application to an award made on an arbitration agreement governed by the laws of Pakistan. A foreign award was defined in the Act as being an award made on differences relating to matters considered as commercial under the laws of Pakistan. The Act was made applicable to those arbitration agreements to which the 1923 Geneva Protocol was applied. So far as Pakistan was concerned, the Protocol applied only to arbitration agreements regarding commercial matters.

Section 3 of the Act provided that if any party to an arbitration agreement to which the Act applied commenced legal proceedings in any court in Pakistan, then the other party had the right to apply for a stay of such proceedings that would have the effect of forcing the matter to be referred to arbitration. Similar provision was inserted in Section 34 of the 1940 Act. However, there was a significant difference between the two. So it was possible for the court to allow the legal proceedings to continue in terms of both these sections. In the case of 1937 Act, this was only if any one of three specified contingencies arose namely that the arbitration agreement or the arbitration itself had become inoperative or that there was infact no dispute between the parties regarding the matters agreed to be referred to arbitration. Whereas under section 34 of the 1940 Act, the court could allow the legal proceedings to continue if satisfied that there existed any sufficient reason why the matter should not be referred to arbitration. The scope of section 3 was thus narrower than the discretion conferred by section 34. The High Court of Sindh, in some cases, made emphasis upon a residual discretion to let the legal

proceedings continue even none of the contingencies specified in section 3 were attracted.

Another important provision of the 1937 Act related to the enforcement of foreign arbitral awards. A foreign award could be filed in any Court in Pakistan having jurisdiction over the subject matter of the award.[30] Section 4 provided that a foreign award was enforceable in Pakistan as if it were an award made on a matter referred to arbitration in Pakistan. The foreign award was placed on the same footing as a domestic award for the purpose of enforcement. Furthermore, if the award survived a challenge to its enforcement, then the Court was bound to pronounce judgment according to the award, and upon a judgment so pronounced, a decree was to follow in terms of the award.[31] Section 7 of the Act specified the grounds on which the enforcement of the foreign award could be challenged. This provision particularly incorporated the relevant articles of the Geneva Convention and some challenges to foreign awards have been successful regarding this provision. The section itself contained three sub-sections, the first two of which were in mandatory form and the third is in permissive form. Section 7 contained an elaborate mechanism and there were a fair number of different grounds on the basis of which a foreign award could not be enforced in Pakistan. However, the courts have taken a strong and robust view of the validity of foreign awards. Many grounds were dismissed as mere technicalities and others were rejected as being matters that could or ought to have been taken in the arbitration proceedings.

The Sindh High Court in Cogetex, S.A. v Mayfair Spinning Mills Ltd.[32], took every conceivable objection, including those relating to a violation of the Court's rules of procedure, jurisdiction, limitation as well as objections on the merits of the award. The foreign party was the beneficiary of the award. The short analysis of the 1937 Act shows that Pakistani Courts have not been reluctant in upholding and enforcing Pakistan's international obligations regarding arbitration agreement having an international flavour and foreign awards in terms of the principles enunciated by the courts.

[30] Section 5 of the 1937 Act.
[31] Ibid., Section 6.
[32] 2004 CLD 1023.

2.7 Arbitration and Conciliation Act 1996 (the "1996 Act")

India has been the member of international conventions starting from the Geneva Protocol on Arbitration Clauses 1923 to the New York Convention of 1958. India became member of these conventions through the Arbitration (Protocol and Convention) Act, 1937. India had enacted its own Act in 1961 called the Foreign Awards (Recognition and Enforcement) Act 1961. Presently, India has made its own act called the Arbitration and Conciliation Act 1996 (the 1996 Act). This Act is based on the UNCITRAL Model Law that is applicable to both international and domestic awards in India.

Part II of the 1996 Act is devoted to the arbitration. Definition of international commercial arbitration has been given in part II.[33] Section 28 of part 1 of the 1996 Act is a provision that deals with international commercial arbitration. This section is similar to Article 28 of the UNCITRAL Model Law. It is applicable where the place of arbitration is in India. Furthermore, it deals with the law applicable to the substance of the dispute and incorporates the principle of party autonomy. Conflicts of law rule particularly the proper law doctrine has been enumerated in section 28 (1) (b) regarding the international commercial arbitration. Section 28 (2) talks of the principles of equity and fair play through which an arbitral tribunal must decide according to what is just and good. Section 28 (3) deals with the general trade practices of the legal regime of international commercial arbitration in India.[34]

Section 9(b) of both the 1937 Act and the 1961 Act has been omitted from the Arbitration and Conciliation Act 1996. The said section was the main basis of the decision in Singer company case. Part I of the 1996 Act deals with the foreign arbitration. Section 36 of the 1996 Act will be applicable to the enforcement of arbitral awards. Finally, the 1996 Act is in the process of being amended. The Indian Ministry of Law has suggested some recommendations regarding foreign arbitrations. These proposals and the draft Bill are still under consideration.[35] While repealing both the 1937 and 1961 Acts, it retains the existing law. India continues to be a party to the Conventions. However, it

[33] Section 2 (1) (f) of part 1 of the 1996 Act.
[34] Idea was taken from the Article International Commercial Arbitration (Recent Development in Indian Law) by Lakshmi Jambholkar appeared on 2002 Kluwer Law International (given by Aziz Ur Rehman, Assistant Professor, Faculty of Shariah and Law).
[35] Ibid.

deletes the old irritant, which provided that the 1961 Act will not apply to an award arising from an arbitration agreement governed by the law of India. This will rectify the alarm generated by the Supreme Court of India decision in National Thermal Power Corporation v Singer Co. in which it was held that an award made outside of India will still be an award on an arbitration agreement governed by the law of India, if the substantive law of the contract is Indian law.

2.8 Bilateral Investment Treaties (BITs)

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. Arbitration directly against a state under a BIT places dispute resolution at the level of public international law in the hands of individuals. This is an extremely powerful political weapon that 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 that is the subject of political and diplomatic pressure. Initially, BITs were concluded between developed countries on the one side and the developing countries on the other side. The developed country's interest was to introduce additional investment protection guarantees whereas the developing country saw bilateral investment treaties as a means of attracting foreign investments.

Particularly, Pakistan has already signed 47 BITs of which 23 were in force till 2005.[36] On 25 November 1956, Pakistan signed the world's first ever BIT with Germany.[37] The BITs provide for the settlement of disputes between the investor Pakistan has signed and ratified the Washington Convention as well. It has also been the subject of a number of major international arbitration brought by foreign investors under BITs.[38] Contracting parties to BITs are required to settle their disputes amicably through

[36] See: www.unctad.org. (Last visited date 10.07.2006).
[37] The BIT came into force on 28 April 1962.
[38] Notably: SGS v Pakistan (Swiss/Pakistan BIT); Impregilo v Pakistan (Italian/Pakistan BIT); and currently Bayinder v Pakistan (Turkish/Pakistan BIT).

diplomatic channels failing which they may resort to arbitration before an ad hoc arbitral tribunal. The rapid development of BITs is evident with the emergence of many newly economical independent countries that are actively getting involved in the international investment markets. Approximately all modern BITs include provisions that deal with disputes between a host state and investors having the nationality of another state.

CHAPTER 3

ISSUES AND PROBLEMS

3.1 Introduction

In this chapter, certain problems afflicting arbitration will be identified by citing references from the decisions and judgements of the courts of law. These problems are so acute in nature that they are still looming large in Pakistan with respect to the enforcement of foreign arbitral awards because of the issue of conflict of laws or private international law. All over the world the efforts are underway to keep the domestic law in line with the requirement of international law. Because the foreign investors feel shy of investing in an atmosphere that does not give them the security in case the dispute arises. All the hurdles in the way of enforcement of arbitral awards are due to the applicability of laws and the matters of jurisdiction. What will be the case if the law of one country is to be applied in another country in case there are two parties belonging to two different countries? Which law will govern the issue in dispute? How the arbitration agreement will be enforced? Furthermore, the Doctrine of public policy, principle of Arbitrability and separability, principle of waiver and estoppel are the subject matters of this chapter. Lastly, I will elaborate that the lack of expertise and gaps in legal education are one of the major impediments in the enforcement of foreign arbitral awards in Pakistan.

3.2 Issue of Applicable Law, Jurisdiction and formal requirements

Many disputes, which are referred to arbitration, are determined by arbitral tribunals with particular reference to the law. They give decisions on matters of fact as well. A lot of complex issues are involved while deciding the case or rendering an award. When a joint agreement is made for the production and development of a project and on the contrary each party asserts that the other one has been unable to fulfill its part of contractual obligations. In such a case the task of the tribunal is to resolve the issues of facts. Once it has done so, it will be able to make its award even without reference to any system of law or to any legal document other than the agreement between the parties. Similarly as an

arbitral tribunal may reach its decision on the merits of the dispute without much reference to the law applicable to the merits, so it may pay little or no attention to the law that governs its own existence and proceedings as an arbitral tribunal.

Having said all that, we cannot overrule the necessity of law that is to be applied to the proceedings. No arbitration is conducted in a legal vacuum and it would be wrong to deduce from the above that international commercial arbitration exists in a legal vacuum. It would be tantamount to suggest that there is no need for a law of contract because parties to a contract make their own law. The rights, duties and obligations of the contracting parties are founded upon the principles of law. This law is often termed as "the proper law of the contract", or the "substantive law", or the "applicable law". This applicable law is relevant to questions concerning the validity of the contract, its breach and the level of damages. Like a contract, arbitration does not exist without reference to the applicable law. Arbitration is itself governed by the rules of arbitration and by the law of the place of arbitration. The applicable law does not need to be the same as the law that governs the arbitration[1]. This peculiarity of international arbitration is not found in domestic arbitration in which the parties will be concerned with only one law. So far as international contracts are concerned, there can be four or five or more different legal systems relevant to the arbitration. Two parties from separate countries may make contract to build a bridge in Pakistan under the laws of Pakistan. However, neither party may want a dispute to be heard in the country where one of them is resident because of different factors. The parties may, therefore, decide to have their disputes heard by an independent third party in a neutral country. If they choose England as the seat of the arbitration then the laws governing the conduct of the arbitration will be English. In the late 1990s, there has been tendency both, nationally and internationally, to give more weight to the will of the parties to adopt the rules of particular arbitral institution or the UNCITRAL Rules as in the case of Pakistan and India that both the countries have chosen to adopt UNCITRAL Model Rules in their legislation. The Indian arbitration and Conciliation Act 1996 is based on the UNCITRAL Model Law, which has harmonized the common law and civil law concepts on arbitration, and is applicable to both

[1] The procedural law of the arbitration or lex arbitri.

international and domestic arbitration in India[2]. By doing this the parties choose a private code to regulate their arbitration.

Nevertheless, rules must always be backed up by law if they are to be effective. In this context relevant law is the law of the place or the seat of the arbitration i.e. curial law or lex arbitri. According to the Geneva Protocol of 1923, an arbitration is governed both by the will of the parties and by the law of the country in whose territory the arbitration is conducted[3]. The New York Convention of 1958 provides that an award may be set aside if "the arbitral proceeding was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"[4].

Unlike domestic arbitration, international commercial arbitration usually involves more than one system of law or of legal rules. This is a very broad area in which a lot of system of laws are involved one of which is the law, or the relevant legal rules, governing the substantive issues in dispute generally described as the "applicable law", the "governing law", "the proper law of the contract", or "the substantive law".

3.3 The Law Governing The Arbitration And Its Application to the Substance

The international commercial arbitration has this peculiarity that it takes place in a country that is neutral in the sense that neither has a place of business or residence here. Practically it means that the law of the place of arbitration, lex arbitri, will often be different from the law that governs the substantive matters in dispute. For example, an arbitral tribunal having its seat in Pakistan may be required to apply the law of England, or the state of New York, or some other law as the case may be, to the substantive issues between the parties. However its own proceedings will be governed by the relevant Pakistani law on international arbitration i.e. The Arbitration (Protocol and Convention) Act 1937. This difference between the lex arbitri and the law governing the substance of the dispute is well established in international commercial arbitration. Where parties to international arbitration agreement choose a seat of arbitration for themselves, they often choose a neutral place that has no connection with either themselves or their commercial

[2] Lakshmi Jambholkar, Recent Development in Indian Law.
[3] Art. 2 of the Geneva Protocol of 1923.
[4] Art. V (I) (d) of the New York Convention.

relationship. By doing so, it is not incumbent upon them to have the law of that place to govern their relationship. They may select a different governing law that has no connection with that place.

If the parties do not make an express choice of law in the arbitration agreement, then the choice will be made for them either by the arbitral tribunal itself or by a designated arbitral institution. For instance, the UNCITRAL Rules state:

> "Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration".[5]

The ICC Rules leave the choice to the ICC's own court of arbitration:

> "The place of arbitration shall be fixed by the court unless agreed upon by the parties".[6] If the ICC is called upon to have a place of arbitration under this provision of the rules, it will generally select the country of the sole or presiding arbitrator, who will usually be of a different nationality from that of the parties.[7]

In Hitachi V. Rupali Polyester[8] It was observed that there are three laws that may be relevant in international arbitration that are:

1) "the proper law of the contract;
2) the proper law of the arbitration agreement;
3) the curial law."

It would be convenient to reproduce the following extract from page 1650 of the Hitachi V. Rupali case that was quoted from the treatise under title "The Law and Practice of Commercial Arbitration in England" (Second Edition) by Sir Michael J. Mustill and Stewart C. Boyd.

1) "The proper law of the arbitration agreement governs the validity of the arbitration, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

[5] Art. 16 (1) of the UNCITRAL Arbitration Rules.
[6] Art.14(1) of the ICC Arbitration Rules.
[7] Ibid., Art. 9.5.
[8] 1998 SCMR 1618.

2) The curial law governs: the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator questions of evidence; the determination of the proper law of the contract.

3) The proper law of the reference governs: the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute."

3.4 The seat theory

The concept of the forum or the law of the place of arbitration is well established in both the theory and practice of international arbitration. It has been the well-recognised principle of international conventions starting from the Geneva Protocol of 1923 to the New York Convention of 1958. The Geneva Protocol states:

> "The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place".[9]

The New York Convention maintains the reference to the law of the country where the arbitration took place as said above in this chapter.

European Convention on International Commercial Arbitration states as following:

1) "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.
2) The arbitrators shall act as amiables compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration". [10]

The International Chamber of Commerce Rules describe it as under:

1) "The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.
2) In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.

[9] Art. 2 of the Geneva Protocol of 1923.
[10] Art. VII of the European (Geneva) Convention 1961 on international commercial arbitration.

3) The Arbitral Tribunal shall assume the powers of an amiable compositeurs or decide ex aequo et bono only if the parties have agreed to give it such powers". [11]

According to UNCITRAL Model Law, the position with regard to the applicable law is as under:

1) "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.
2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeurs only if the parties have expressly authorised it to do so.
4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction". [12]

I have reproduced above the 1961 Geneva Convention on International Commercial Arbitration, Article VII, the 1998 ICC Rules of Arbitration Article 17, and Article 28 of the UNCITRAL Model Law. It is evident from the above rules that they represent the prevailing concept regarding the applicable substantive law in international commercial arbitration. At least as a matter of theory, the problem of selecting the rules applicable to the substance of the dispute is more complicated in international commercial arbitration than it is for a domestic court or an arbitral tribunal in a purely domestic arbitration. In domestic arbitration, there is generally a single set of choice of law rules that govern the choice. Whereas in an international commercial arbitration, the tribunal is not bound to apply the conflicting rules of the place of arbitration and no single body of substantive law or rules will necessarily be the choice of law.

Now here the question arises as to what are the differences there in the provisions on the applicable law in the 1961 Geneva Convention, in article 17 of the ICC rules, and in article 28 of the UNCITRAL Model Law? The answer is that the article 17 of the 1998 ICC Rules would apply if the parties specifically choose ICC arbitration. The UNCITRAL Rules would function in the same way. On the other hand, the Model Law

[11] Art. 17 of the 1998 ICC Rules of arbitration.
[12] Art. 28 of The UNCITRAL Model Law on international commercial arbitration 1985.

was intended to act as national law in countries seeking a modern law supportive of international arbitration. This law, in fact, has been adopted by a number of countries.

It was held in the case of National Thermal Power Corporation V. The Singer Company and Others[13] that the overriding principle is that the courts of the country, whose substantive laws govern the arbitration agreement, 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 and that all other matters in respect of the arbitration agreement fall within the exclusive competence of the country whose laws govern the arbitration agreement. This view of the Indian Supreme Court was also discussed in the Hitachi Rupali Case that the courts of the seat of arbitration have limited jurisdiction to procedural matters covered by the curial law[14]. On the above mentioned dictum in the Singer Company Case the award was rendered as domestic award by the Indian Supreme Court because the Indian law was applicable to the said award and the appeal was allowed on the above-mentioned basis. It would be an appropriate to quote a paragraph from the judgement of Indian Supreme Court.

> "All substantive rights arising under the agreement including that which is contained in the arbitration clause are, in our view, governed by the laws of India. In respect of the actual conduct of arbitration, the procedural law of England may be applicable to the extent that the ICC Rules are insufficient or repugnant to the public policy or other mandatory provisions of the laws in force in England. Nevertheless, the jurisdiction exercisable by the English Courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian Courts and the operation of Indian law in all matters concerning arbitration in so far as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India".[15]

The both above-mentioned judgements are identical in the sense that in both the domestic law was made applicable to the proceedings and domestic courts were competent to

[13] 80 AIR SC 998 (1993).
[14] 1998 SCMR Page 1684.
[15] 80 AIR SC 998 (1993), p 1014.

resolve the disputes. The matter of jurisdiction was also dilated upon by the Supreme Court of Pakistan in the Hitachi Rupali case that:

> "The principle of common law or equity and good conscience can not confer jurisdiction on the courts in Pakistan which has not been vested in them by law. In this regard reference may be made to clause (2) of Article 175 of the Constitution of Pakistan, which provides that no court shall have any jurisdiction save as is or may be conferred on it by the constitution or by or under any law. The High Courts derive their jurisdiction under the constitution and the statutes. In view of the above constitutional provision the principle of English common law or equity or good conscience cannot be pressed into service in Pakistan as having statutory force. But a court may adopt a procedure, which is not prohibited by law, if the dictates of justice so demand".[16]

In the Société Générale De Surveillance S.A (SGS) VS. The Pakistan[17], a reference was made regarding the jurisdiction and applicability of law from the book of Russell on Arbitration, Twenty First Edition which is as following: -

> "The venue and jurisdiction is often referred to as the 'seat' of an arbitration. If the parties expressly choose a seat, but make no express choice of the law which is to govern the performance obligations under the contract, that choice of the seat was capable of being determinative of the choice of the governing law of the performance obligations."

The Supreme Court of Pakistan overruled the contention of the SGS to take the matter to ICSID on the basis of the arbitration clause No.11.1 of the contract. It was provided in the arbitration clause that all the disputes shall be settled by arbitration in accordance with the Arbitration Act of the Pakistan and the place of the arbitration shall be Islamabad, Pakistan. So it is evident from the above that the matter of jurisdiction and applicability of law varies from situation to situation and is very perplexing one.

3.5 Choice of Foreign Procedural Law

It is customary for the parties to select a system of law to determine the merits of the dispute. Thus, for example, arbitration would be held in Pakistan but, by agreement between the parties, would be subject to the procedural law of India. This seems to be

[16] 1998 SCMR P 1645.
[17] 2002 SCMR 1694.

very complicated issue when two procedural laws would be involved. The chosen procedural law would be of India and that of Pakistan to the extent that the provisions of Pakistani law are mandatory. If it becomes necessary to have recourse to the courts during the course of the arbitration in case one of the arbitrators is challenged. To which court would the complainant go? The Pakistani court would supposedly be reluctant to give a ruling on Indian procedural law and in the same way the Indian court would be unwilling to give ruling on the procedural matter that it could not directly enforce, since the arbitration was not held within its territorial jurisdiction. So these are very perplexing issues to be faced by the parties when the foreign procedural laws are applicable. It would be easy for the parties to locate their arbitration in a particular country whose procedural law is either so attractive or so familiar to the parties that they want to resort to it. But this happens in rare cases.

It is mostly mentioned in the arbitration agreement that the law of the particular country would be applicable to the proceedings and the choice of selection of law is upto the contracting parties. The parties are given freedom to choose not only the law governing the substantive matters in dispute (proper law) but also the law governing the arbitration (lex arbitri) irrespective of the fact where the arbitration took place. So the rules of different countries are contrary to one another regarding the applicability of laws when international commercial arbitration is involved. The autonomy of the parties to choose a particular law is well recognised in international conventions and the model rules on international commercial arbitration. The Washington Convention[18], The European Convention, and The UNCITRAL Rules are the clear evidence of this choice of selection of laws. But the point is worth mentioning that the arbitration is excluded from the scope of the Brussels and Lugano Conventions on jurisdiction and enforcement of judgement in civil and commercial matters. The Conventions also do not apply to court proceedings ancillary to arbitration proceedings[19].

In the case of IMPREGILO S.p.A. (Claimant) V. ISLAMIC REPUBLIC OF PAKISTAN (Respondent)[20], the matter on jurisdiction was considered as well. The IMPREGLIO requested to the International Centre for Settlement of Investment Disputes

[18] Art. 42 of the Washington Convention.
[19] Russell on arbitration, David St.John Sutton, John Kendall, Judith Gill, twenty first edition, page 77.
[20] ICSID Case No. ARB/03/3.

(ICSID) for the arbitration on 21.01.2003. The Arbitral Tribunal was constituted under the auspices of the ICSID that consisted of three arbitrators including the president of the tribunal. Pakistan objected to the jurisdiction of the tribunal on the basis that the matter should be resolved in Pakistan. The final decision was announced on 22.04.2005 by the Tribunal which is under[21]: -

a) "That it has jurisdiction ratione personae over Impreglio's claims only in so far as such claims concern Impreglio's own alleged loss, being (at most) proportionate to its pro rata participation in the Joint Venture.
b) That it has no jurisdiction ratione materiae over Impreglio's claims based on the alleged breaches of the contracts.
c) That alleged breaches of the contracts may however constitute breaches of Articles 2(2) and/or 5 of the BIT if they meet the criteria defined in Section V.B (v).
d) That it has no jurisdiction ratione materiae to entertain the claims relating to the unforeseen geological conditions encountered during the implementation of the contracts, which were the subjects of DRB Recommendation 14.
e) That with respect to the other Treaty Claims, including the Treaty Claims relating to the frustration of the dispute resolution mechanism, the tribunal will determine its jurisdiction when considering the merits.
f) That the provisions of the BIT do not bind Pakistan in relation to any act that took place, or any situation that ceased to exist, before 22 June 2001 and the jurisdiction of the Tribunal ratione temporis is limited accordingly.
g) To make the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41 (4).
h) To reserve all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination."

The decision of the Tribunal was accepted by both the parties and the matter has amicably been resolved. Because both (Pakistan and Italy) the parties are the members of the ICSID Convention and in this sense the decision is binding upon the parties.

The Washington Convention states that the arbitral tribunal must apply the law of the contracting state which is a party to the dispute together with such rules of international law as may be applicable when the parties do not disclose the choice of applicable law in the contract[22]. This Convention is necessarily concerned with the states or state entities and therefore lays emphasis on the law of the state party to a contract.

[21] http://www.worldbank.org/icsid/cases/conclude.htm (Last visited 20 July 2006).
[22] Art. 42 (1) of the Washington Convention.

Other conventions leave the choice to the arbitral tribunal. For instance, the European Convention of 1961 and the UNCITRAL Model Law adopt the same approach and give the power to the arbitral tribunal to apply the proper law under the rules of conflict that the arbitrators deem applicable if the choice of applicable law has not been mentioned in the arbitration agreement by the parties.

3.6 Enforcement of Arbitration Agreement and its Procedure & Execution

The agreement to arbitrate is the foundation stone of international commercial arbitration. It proves to the consent of the parties to submit to arbitration. The consent is inevitable to any process of dispute resolution outside national courts and hence is the basis of a voluntary system of international commercial arbitration. The arbitral process cannot be initiated without the incorporation of the arbitration agreement that must be in writing. An oral agreement to arbitrate is of no legal effect. The arbitration Act 1940 defines the arbitration agreement as under: -

- "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."[23]

Under the Contract Act of Pakistan an agreement, whether oral or written, is equally binding upon the parties to the agreement. But an arbitration agreement is one of the exceptions to this general rule. It has to be in writing because it has so been defined in the Arbitration Act. According to this an oral agreement is no agreement. Now question arises as to whether such written arbitration agreement must necessarily be signed by the parties. The courts of law held divergent views on this issue. But now it is a settled principle that the signature of the parties is not the requirement of law and an arbitration agreement is effective and binding on the parties without the signing of the parties. The arbitration agreement should also be explicit and certain and should clearly specify the nature of disputes referable to arbitration if it is to be effective in law. In the case of Sheikh Aziz Ullah v. Haji Qismat Khan[24] a division bench of the Supreme Court of Pakistan observed that the arbitration agreement should fulfill the requirements of section 2-A. The Supreme Court of Pakistan referred to two judgements from the Indian

[23] Section 2 (a) of the Arbitration Act 1940.
[24] PLD 1996 SC 831.

jurisdiction[25] upholding this proposition. Arbitration agreement, which is not specific as to its scope, is no agreement. The arbitration agreement would be meaningless without the mentioning of the nature of disputes. Where the parties have once agreed to a submission to arbitration, the agreement is binding and enforceable and can not be annulled except for some reasons as that the agreement had been obtained by fraud, coercion or undue influence. The Allahabad enunciated the principle that:

> "Agreement to refer to arbitration can not be revoked except for good and sufficient cause".[26]

Another problem in the enforcement of arbitration agreement is the interpretation of arbitration clauses that has often been the boat of contention among the parties. In the case of Great American Insurance Co. Ltd v. Bodh Raj[27], it was observed as follows:

> "In the concluding sentence of the arbitration clause it is stated that it shall be a condition precedent to any right of action or suit upon the policy that the award by such arbitrator/arbitrators or umpire of the amount of the loss or damage if dispute shall be first obtained".

It is evident from the concluding sentence of the arbitration clause that no suit upon the policy shall be instituted unless the arbitrator has ascertained the amount of the loss or damage, if disputed. Refusal by the Insurance Company to admit or deny a specific claim, put forward by the assured, was deemed to be a dispute that was within the scope of the identically worded arbitration clause. Section 6(1) of the English Arbitration Act 1996 defines arbitration agreement as "an agreement to submit to arbitration present or future disputes (whether they are contractual or not). The arbitration agreement must be made in writing and need not to be confined to contractual matters. Tortial claims may be included in the agreement and the dispute must be arbitrable one. In this Act, there is no prescribed method for the drafting of an arbitration agreement. The parties may specify a procedure for the arbitration in their agreement or simply refer to an administered arbitration scheme. The arbitration agreement may be contained in an underlying contract between the parties from which the dispute arises, or it may be

[25] AIR 1955 Nagpur 116 (Sheodutte v. Pandit Vishnudatta) and AIR 1960 Patna 201.
[26] AIR 1914 Allahabad 314.
[27] AIR 1953 Pb 50.

contained in a separate contract[28]. Alternatively, the parties may incorporate a set of terms and conditions that contain an arbitration clause into a contract. This will constitute a valid arbitration agreement if the effect is to make the arbitration clause part of the contract. The validity of the arbitration agreement is dependant on whether there is a binding agreement between the parties and whether its terms are certain. In addition, for the arbitration clause to be valid the substance of the dispute must be capable of settlement by arbitration. Part 1 of the Arbitration Act 1996 deals with the form of the arbitration agreement. The agreement must be in writing and need not to be signed[29]. The enforcement of arbitration agreement is dealt with under New York Convention. It lays down the criteria for the enforcement of a valid arbitration agreement and the parties are thereby compelled to make resort to arbitration. The relevant article states that:

> "The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[30]

The provision of this convention is broader and clearer than the Geneva Convention that merely compelled the courts to refer the parties to arbitration whenever an agreement was held to be valid according to article I of the convention. The New York Convention lays down the four positive requirements of a valid arbitration agreement that are as following[31]:

- the agreement is in writing;
- it deals with existing or future disputes;
- these disputes arise in respect of a defined legal relationship, whether contractual or no; and
- they concern a subject matter capable of settlement by arbitration[32].

Another two requirements are added by the provisions of Article V.1 (a), which stipulates that recognition or enforcement of an award may be refused if the party requesting refusal

[28] Section 6 (2) of the Arbitration Act 1996.
[29] Ibid., Section 5 (1) and 5 (2a).
[30] Art. II (3) of the New York Convention, 1958.
[31] Ibid., Article II (1).
[32] The first three are also included in the Model Law, Art. 7(1) and the fourth in Arts 34(2)(b) and 36 (2) (b) (i).

is able to prove that the arbitration agreement was made by a person under incapacity, or the agreement was invalid under the applicable law. If these requirements are expressed positively, they give additional requirements to the effect that;

- the parties to the arbitration agreement must have legal capacity under the law applicable to them;
- the arbitration agreement must be valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

All the international conventions on arbitration including the Model Law require that the arbitration agreement must be in writing. The reason of this requirement is that it excludes the jurisdiction of the national courts and resort is made to a private method of dispute resolution, namely arbitration. Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute or a future dispute. The latter type of agreement is presently not given full effect under certain national laws. Oral arbitration agreements are found in practice and are recognized by some national laws. Article 7(2) of the UNCITRAL Model Law follows the New York Convention of 1958 in requiring the written form of an arbitration agreement. Articles 8 and 9 of the Model Law deal with two important aspects of the arbitration agreement and resort to courts. Like article II (3) of the New York Convention, article 8(1) of the model law obliges any court to refer the parties to arbitration if seized with the claim on the same subject matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The request should be made by a party for the referral of the matter to the arbitration. Furthermore, this request should be made not later than when it submitted its first statement on the substance of the dispute. This provision is of universal recognition and gives effect to international commercial arbitration agreements. Article 9 lays down the principle that interim measures of protection, which may be obtained from courts under their procedural law, are compatible with an arbitration agreement.

One of the most significant problems in the enforcement of arbitration agreement is that the arbitration clauses are defective one. These principle defects are those of inconsistency, uncertainty and inoperability. These defects are likely to be raised where a

party takes action in a national court in relation to a dispute and defendant seeks stay of the proceedings on the basis of the existence of the arbitration clause. In such situation, the application for stay may be opposed on the basis that the arbitration agreement was "inoperative or incapable of being performed".[33] These problems are made more complex and acute in terms of the law governing the arbitration agreement. For this purpose, a submission clause should preferably contain a choice of law clause or clauses, to govern both the matters in disputes and the submission agreement itself. In this way the parties and the arbitral tribunal will come to know what system of law or rules should be taken into account if any question arises as to the validity or scope of the arbitration agreement as well as the Arbitrability of the matters in the dispute. If no choice of law is made, the arbitral tribunal must select the applicable law as mentioned above. Where an arbitration clause is embedded into a contract, it does not usually contain an express stipulation as to the law that governs the clause. For instance, the standard ICC Clause does not refer to any specific law governing the arbitration clause itself. The ICC clause makes mention of all disputes arising out of the present contract shall be settled under the ICC rules of arbitration by one or more arbitrators appointed in accordance with the rules. The London Court of International Arbitration (LCIA) Model Clauses describe the somewhat same conditions for the settlement of disputes by making resort to arbitration.

3.7 Separability of the Arbitration Clause

Other important aspects of the arbitration agreement are the Separability and Arbitrability of the agreement that, sometimes, create problems in the enforcement of an arbitral award particularly in Pakistan. Firstly, I will discuss the concept of Separability of the arbitration clause. The concept of the Separability of the arbitration clause, which is now widely accepted, is both interesting in theory and useful in practice. It means that the arbitration clause is a discrete and separate contract from the underlying contract in which it is contained and, as such, survives the termination of that contract. Separability thus ensures that if one party claims that there has been a total breach of contract by the other, the contract is not destroyed for all purposes.

[33] These words are used in the New York Convention, Art II.3 and in the Model Law, Art, 8 (1).

The doctrine of Separability is endorsed and recognised by the institutional and international rules of arbitration. The UNCITRAL Model Law states that:

> "an arbitration clause which forms part of a contract and which provides for arbitration under the rules shall be treated as an agreement independent of the other terms of the contract."[34]

The main purpose of the arbitration clause is to confer jurisdiction upon an arbitral tribunal. In line with the provisions of the UNCITRAL Rules, the Model Law provides that:

> "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."[35]

Similar provision was inserted in the article 23.1 of the LCIA Rules. In the Prima Paint case[36], the United States Supreme Court recognised the Separability of the arbitration clause and modern laws on arbitration confirm this concept. The effect of the doctrine of Separability is that it greatly increases the scope of all arbitration clauses.[37] In Hubco v. Pakistan Wapda[38], the Chief Justice Muhammad Bashir Jehangiri observed that:

> "Under English and Pakistan law, Arbitration Clauses contained in contracts are treated as separate and self contained contracts in that if it were not so, arbitration clauses would not at all survive and attack on the main contract which is known as the doctrine of "separability".

Actually the chief justice remarked that an issue of separability is irrelevant in this case because the respondent (Wapda) accepted the validity of the arbitration agreement. The judge upheld that scope of the arbitration clause covered the issues in question and recognised the separability of the arbitration clauses. The issue of separability in this case

[34] Art. 21 (2) of the UNCITRAL Arbitration Rules.
[35] Art.16 (1) of the Model Law.
[36] Prima Paint Co. v. Flood & Conklin Manufacturing Corp, 338 U.S. 395 at 402 (1967).
[37] Russell on Arbitration by David St. John Sutton, Twenty First Edition, page 57.
[38] PLD 2000 Supreme Court 841 at 857.

was relied upon the case of Harbour Assurance v. Kansa (1993) 1 Lloyd's Rep. 455). It was held in Hitachi v. Rupali case[39]:

> "That while the law of an arbitration agreement usually follows the proper law of the main contract, an arbitration agreement is separatable from the main contract between the parties and arbitration agreement may have a different law which may be provided within the arbitration agreement".

It is evident from the above-mentioned judgements that Pakistan courts have recognised the validity of the arbitration clauses and have given effect to it.

3.8 Arbitrability

Arbitrability means that which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts. Both the New York Convention and the Model Law are limited to disputes that are capable of settlement by arbitration[40]. National laws establish the domain of arbitration, as opposed to that of the national courts. Each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy. The legislators and courts in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of disputes. At international level, the interests of promoting international trade as well as international comity have proved important factors in persuading the courts to treat certain kinds of dispute as arbitrable.

In the case of Heyman and others v. Darwins Ltd.,[41] Viscount Simon, L.C speaking for the House of Lords distinguished the differences between the parties that are arbitrable or not under the arbitration clauses. The House of Lords observed that:

> "An arbitration clause is a written submission, agreed to by the parties to the contract, and other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made."

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[39] PLD 1998 SCMR 1618 at 1658, at number 10(viii).
[40] Art. II.1 and Art. V.2 (a) of the New York Convention; Art.34 (2)(b)(i) and Art. 36 (1) (b) (i) of the Model Law.
[41] (1942) 1 All England Law Reports 337.

The dispute would be non arbitrable in the following cases:

- If the dispute is whether the contract that contains the clause has ever been entered into at all, the issue can not go to arbitration under the clause because the party denies that it ever entered into the contract;
- Likewise, if one party alleges that the contract is void ab initio[42], the arbitration clause cannot operate.

The disputes are arbitrable if the contract has been discharged by breach or by frustration. If the issue of Arbitrability arises, it is necessary to make resort to the relevant laws of the different states. These are likely to include the law governing the party concerned, where the agreement is with a state; the law governing the arbitration agreement; the law of the seat of the arbitration; and the law of the place of enforcement of the award. However, it is a matter of public policy to determine whether a particular dispute is arbitrable or not under a given law. Public policy differs from country to country and from time to time.

3.9 Public Policy

Application of the doctrine of public policy is of paramount significance in resolving the disputes that are referred to arbitration. So it is necessary to define the term "public policy" and particularly to distinguish between public policy, international public policy and transnational public policy. Public policy consists of those moral, social or economic considerations that are recognised by the courts as a valid ground for the refusal of the enforcement of arbitral awards whether that is domestic award or foreign award.

3.10 International Public Policy

Whereas the international public policy is that public policy that is applied by the national courts to foreign arbitral awards instead of domestic awards. International public policy is considered to be narrower than the domestic public policy. International public policy is specific and subjective to each state.

[42] The party asserts that the making of such a contract is illegal.

3.11 Transnational or Truly International Public Policy

By this, I mean those principles that represent an international consensus regarding universal standards and accepted norms of conduct that must always apply. This concept consists of fundamental rules of natural law, principles of universal justice, jus cogens[43] in public international law, and the general principles of morality accepted by what are referred to as civilized nations.

Doctrine of public policy has been one of the major grounds against the enforcement of foreign arbitral awards and hence, has got a pivotal place in the field of arbitration. Recognition and enforcement of arbitral award may be refused if it is contrary to the public policy of the enforcement state[44]. However, the drafting committee observed in its report that it intended to limit the application of the public policy provision to cases in which recognition or enforcement would be expressly contrary to the basic principles of the legal system of the country where the award is to be enforced. Thus it tried to narrow down the scope of public policy. It is understandable that the state may wish to have the right to refuse to recognise and enforce an arbitration award that will jeopardize its own notions of public policy. It is clear that the public policy referred to in the New York Convention is the public policy of the enforcement state.[45] The real question is whether that public policy makes difference between international awards and purely domestic awards. As the doctrine of public policy was applied in the Hubco v. Wapda case and the majority concluded the judgement by saying that:

> "The allegation of corruption in support of which the above mentioned circumstances do provide prima facie basis for further probe into matter judicially and, if proved, would render these documents as void, therefore, we are of the considered view that according to the public policy such matters, which require finding about alleged criminality, are not referable to Arbitration. "[46]

Criminal acts were perpetrated and acts of bribe and kick-backs were committed in Hubco case, which were against the cultural and legal norms of Pakistan. The Hubco

[43] A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another. [Bryan A. Garner, Black Law Dictionary, p 864].
[44] Art. V (2) (b) of the New York Convention.
[45] It is clear from the text of Art. V (2).
[46] PLD 2000 Supreme Court 841 at 867.

was restrained from invoking the arbitration clause of the agreement on the basis of the issue of public policy and the appeal was dismissed. A broader application of the doctrine of public policy was made in this case. The New York District court in a well-known case of Parsons & Whittemore Overseas Co. Inc. v Societe Generale de l' Industrie du Papier (RAKTA)[47] was faced by an argument that recognition and enforcement of an award should be refused on the grounds that diplomatic relations between Egypt (the defendant's state) and the United States had been severed. The court rejected this argument on the basis of the New York Convention. It held that Convention's public policy defence should be construed narrowly. Furthermore, it observed that the enforcement of foreign arbitral awards should only be denied on this basis where enforcement would violate the forum state's most basic notions of morality and justice. Courts in other countries while applying their own public policy to Convention awards have also recognised that they should give it an international dimension instead of domestic dimention. In India, the Supreme Court said:

> "This raises the question of whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law. The court held that the narrower view should prevail and that enforcement would be refused on the public policy ground if such enforcement would be contrary to the fundamental policy of Indian law or the interests of India as well as contrary to the justice and morality."[48]

The issue of public policy differs from country to country and has been made part of many national and international conventions. The Arbitration (Protocol and Convention) Act 1937[49] makes conditions for the enforcement of foreign arbitral award one of which is public policy. The APC Act 1937 says that the enforcement of foreign arbitral award should not be contrary to the public policy or law of Pakistan. The Panama Convention of 1975 makes mention of public policy. The 1979 Montevideo Convention makes reference to public policy in article 2(h). The 1983 Riyadh Convention states that the enforcement of an award may be refused if it is contrary to the Moslem Sharia, public policy and good

[47] Parsons & Whittemore Overseas Co. Inc. v Societe Generale de *l'* Industrie du Papier (RAKTA) 508 F 2d 969 (2d Cir. 1974).
[48] Renusagar Power Co. Ltd v. General Electric Co., AIR 1994 SC 860.
[49] Section 7 (1) (e) of The Arbitration (Protocol and Convention) Act, 1937.

morals of the contracting state where enforcement is to be made. The 1965 Washington Convention (ICSID)[50] does not refer to the public policy explicitly. It lays down various grounds for annulment including the corruption, serious departure from the fundamental rule of procedure and failure to state the reasons on which the award is made.

The UNCITRAL Model Law makes reference to the public policy as a ground for the setting aside an award by the courts at the seat of arbitration.[51] An article 31 of the OHADA Uniform Act[52] sets out that the recognition and enforcement shall be refused if the award is manifestly contrary to a rule of international public policy of the member states. Majority of the countries of the world like France, Portugal, Algeria, and Lebanon have made international public policy part of their legislation. Public policy is a well-recognised principal of international legislation. Some courts have approved transnational public policy but this has not received widespread acceptance. Common law countries have also restricted the scope of public policy but have not submitted to transnational public policy.

Final report on public policy, given by International Law Association (ILA) at New Delhi Conference held in 2002, sanctioned some recommendations in terms of public policy.[53] The ILA recommended the application of international public policy and identified the various categories of international public policy. The ILA noted that international public policy of any state includes the fundamental principles regarding justice or morality as well as the rules aimed at serving the essential political, social or economic interests of the state called public policy rules. It recommended that international public policy includes both substantive and procedural principles. Some substantive fundamental principles, such as prohibition against corruption, may fall into one or more of the other categories as well. The majority of the ILA concluded that public policy is of such importance for the uplift of the values of the state that the enforcement court should have the right to review the underlying evidence presented to the tribunal. The ILA further concluded that if the party failed to raise fundamental

[50] Art. 52 of The Washington Convention.
[51] Art 34 (2) (b) (ii) and Art 36 (1) (b) (ii) of the UNCITRAL Model Law on International Commercial Arbitration 1985.
[52] L'Organisation pour l'Harmonisation en Afrique du Droit des Affairs (OHADA) was signed on 17 October 1993 in Port Louis.
[53] Cases & Materials on Arbitration by Hafiz Aziz ur Rehman Assistant Professor Faculty of Shariah & Law IIUI, at Pages 33 to 44.

principles as a ground for refusing enforcement before the tribunal, then the party may be considered to have waived its right to raise it again. Finally, the ILA recommended that any part of the award that offends public policy should be severed (if possible) and that part that does not should be recognised or enforced.

However, the uncertainties and inconsistencies regarding the interpretation and application of public policy by state courts encourage the losing party to rely on public policy to resist and to delay enforcement. Perhaps the only way to keep the "unruly horse" in control would be that an international court be established. The time has not yet come for the public policy to have a global standard but hopes loom large that the ILA recommendations represent a broad consensus. If these are applied timely, will bring about greater consistency in the interpretation and application of public policy as a bar to the enforcement of international arbitral awards.

The settled law of Pakistan is that matters involving questions of criminality or public policy can't be referred to arbitration as has been held in the cases of Ali Muhammad etc. Vs Basheer Ahmed[54] and Muhammad Ismail etc. Vs. Mst. Mussarat Zamani[55]. Indeed, such disputes involve illegality or violation of public law, the effect of which is a matter to be adjudicated by a court of law and not by a private forum. In any event, illegal means employed to procure a contract infect the contract the contract with illegality and condemn it with the consequences provided by law. Therefore, notwithstanding the sound and fury of Hubco case, the prima facie factual inferences drawn by the majority judgment were based on a perusal of the record. As a sequel to the Hubco case, the foreign contracting party in *Societe Générale de Surveillance S.A.* Vs. Federation of Pakistan succeeded to get an order from the Hon'ble Supreme Court precluding the respondent from filing any claim based on allegations of criminality in the contractual arbitration initiated by the respondent. The courts apply mandatory procedural safeguards in public contracts as a matter of public policy of the law of Pakistan. Indeed the violation of public policy is not a commercial dispute under the contract but beyond the scope of such contract. The best judge in a matter involving public policy is a court of law.

[54] 1991 SCMR 1928.
[55] PLD 1985 SC 86.

3.12 Waiver and Estoppel

Defenses of waiver and estoppel have been one of the problems in the enforcement of arbitral awards not only in Pakistan but all over the world as well. According to the principle of estoppel, the parties are precluded in subsequent proceedings from contesting the contrary of what has been decided. Issue estoppel is a form of res judicata. Waiver in this context means that if a party fails to challenge an award on some grounds, it will be deemed to have waived its right of challenging the award subsequently. Both the principles were discussed in SGS v. Pakistan case[56]. When the SGS instituted the suit in the French court instead of making resort to ICSID for arbitration. The issue was raised before the supreme court of Pakistan when the judges observed that the appellant had not only waived the right to have ICSID arbitration but even the principle of estoppel by conduct is also applicable in the present case.

> "Waiver of arbitration occurs more often when a party institutes a court action in violation of the arbitration agreement. This appears clearly as a manifestation of an intention not to arbitrate."[57]

> "The right to arbitrate given by a contract may be waived, even in those jurisdictions where a contract for arbitration is irrevocable. Such a waiver of arbitration may come before as well as after the commencement of the litigation. The waiver may be either by express words or by necessary implication. Thus where one party brings suit, he waives his right to arbitration; his conduct is clearly inconsistent with a claim that the parties were obligated to settle their differences by arbitration."[58]

So these points were considered by Supreme Court of Pakistan in SGS v. Pakistan case. Issues of waiver and estoppel were the focal points of consideration on the basis of which the judgement was delivered.

3.13 Lack of expertise in Arbitration and Gaps in Legal Education

Foreign investors are reluctant to invest in Pakistan on a number of grounds one of which is the non-arbitral attitude of the courts as well as lack of proper environment conducive

[56] 2002 SCMR 1694.
[57] Ibid., 1729.
[58] Ibid., 1730.

to the settlement of dispute particularly in arbitration. The local project participants and government agencies prefer to take the disputed matter to the local courts whereas the foreign project participants and investors make resort to settle the dispute at international level by invoking the jurisdiction of international conventions on foreign arbitral awards. The problem is complicated where these laws conflict with each other. The local courts take the plea that the foreign award is unenforceable because the contract was made through corruption, fraud and with mala fide intention. The examples of such court orders are the Hubco project in Pakistan and the Dabhol project in India. The alternate dispute resolution mechanism (ADR) has never been encouraged in Pakistan. This may be attributed to the lack of understanding of international arbitration rules and conventions by the local courts. I would like to identify the problems put by Dr. AFM Maniruzzaman in his article to which I got access on Internet.[59] He says that the pertinent issue that haunts international commercial arbitration is the lack of expertise in arbitration either at the bar or on the bench. Legal education is not made up to date to this particular specialization; insufficient resources are accommodated to educate and train professionals in this field. Without modernizing the domestic laws with international arbitration laws, the goal of a viable and thriving atmosphere for international arbitration cannot be attained. If the effective measures are not taken timely, these problems will go on halting international commercial arbitration. Pakistan signed on the New York Convention of 1958 from the very outset but ratified it in 2005 by promulgating the Ordinance on recognition and enforcement (arbitration agreements and foreign arbitral awards) Ordinance 2005 on 3 December 2005. But still it has not been ratified by the parliament. In his article, Dr AFM Maniruzzaman made reference of the case of Supreme Court of Bangladesh in Saipem SpA v. Bangladesh Oil Gas and Mineral Corporation[60]. In this case the Supreme Court while acting under section 5 of the Arbitration Act 1940 revoked the authority of an ICC arbitral tribunal constituted under the ICC Rules[61] at the request of one of the parties. The Appellate Division of the Supreme Court upheld the decision of the lower court, which said that the proceedings of the tribunal were conducted in manifest disregard of law and were likely to result in a miscarriage of

[59] http://www.thedailystar.net/law/2005/08/04/index.htm (last date visited 20.01.2006).
[60] MLR (2000) (AD) 245.
[61] ICC Arbitration Case No. 7934/CK).

justice. This decision was criticized at international level. So all the above-mentioned problems are occurring due to the lack of expertise in arbitration and certain gaps in legal education.

CHAPTER 4

TREATMENT OF INTERNATIONAL ARBITRAL AWARDS IN PAKISTAN

4.1 Recognition and Enforcement of Arbitral Awards

Award is no more than a piece of paper and the successful party intends the award to be enforced without delay. The enforcement of an award can only be done through national courts. Therefore, the enforcing party must request that the court, where the other party has its assets, has to make an order for the seizure of the assets to the value of the award. The court in which an enforcing party has to make an application for enforcement will often be in a country other than that where the arbitration has its seat. At this point, it is necessary to identify the difference between recognition and enforcement. Because the terms are often used as if they are interchangeably linked. Recognition and enforcement are, infact, two different concepts. An award may be recognised without being enforced. Recognition indicates that the award is accepted by the courts of the country as having been validly made. Enforcement is a positive action to claim whatever the award has ordered. A party may only wish that the award be recognised in one jurisdiction so that the losing party could not relitigate the matters already decided in the arbitration. However, if the losing party has no assets in that jurisdiction then the successful party will have no reason to enforce the award in that jurisdiction. It is a prerequisite in many countries for the enforcement of the award that it should be recognised in that country. It is the recognition of the award that gives it legal validity and permits it to be enforced. The recognition and enforcement of the award is the final process in the arbitration procedure. It is not something that the arbitral tribunal is involved with directly. The tribunal becomes *functus officio* after the making of the award. It is the function of the courts of the state to give effect to the award where the enforcement or recognition is sought. Therefore, the role of the arbitral tribunal is secondary one in an action to enforce. The International Chamber of Commerce (ICC) Rules of Arbitration recognize this. The ICC Rules recognize that the prerequisites for the enforcement of arbitral award

vary from country to country as well. The ICC Rules of Arbitration therefore oblige the arbitral tribunal to take reasonable steps for the enforcement of arbitral award. For instance, a country may require that a party should produce the original or a certified copy of the award prior to the enforcement of an award. It may also require the production of the arbitration agreement and the statements sworn regarding the validity of the award by the arbitral tribunal. When enforcement is sought in a country whose language is different to that of the award then a certified translation of the award and arbitration agreement may also be required. So in short the formal requirements of the most of the countries are contrary to one another.

Enforcement of the award will be sought in a country where the unsuccessful party has assets. If a party has assets in a number of different jurisdictions then enforcement may be sought in a number of countries. The successful party will also want to ascertain which jurisdictions will permit recognition and enforcement of the award. If one jurisdiction recognizes or enforces the award, the successful party will be forced to proceed in that jurisdiction. The relationship between the country of enforcement and the seat or place of the arbitration is important in the sense that how the award can be enforced. The successful party must consider the following matters for the enforcement of award that are as following:

- Whether there are any reciprocal treaties or conventions between the seat of the arbitration and the place where the enforcement is sought;
- If there are no reciprocal treaties or conventions, the views of the courts where enforcement is sought to the enforcement of foreign awards;
- If the unsuccessful party is a state or state entity, the laws of that country in relation to state immunity.

Although the enforcement of an international arbitral award may be complex, but its enforcement is easier than the enforcement of foreign judgement.[1] Time limits for the enforcement of arbitral awards have already been mentioned in the 1st chapter.

[1] Because there are many more international treaties that permit enforcement of foreign arbitral awards than the treaties that permit the enforcement of foreign judgements.

4.2 The Procedure for the Recognition and Enforcement of Arbitral Award

The method of recognition and enforcement of arbitral award depends on the place where the award was made. It also depends on the relevant provisions of the law of the forum state where the enforcement is to be sought. An advice of experienced lawyers is of paramount importance in this regard. Local formalities are bound to be involved whether one of the international conventions is applicable or not.

According to the Arbitration (Protocol and Convention) Act 1937, there are certain conditions[2] for the enforcement of foreign award that are to be fulfilled prior to its enforcement.[3] Those conditions are as under:

1) "In order that a foreign award may be enforceable under this Act it must have:

    a) been made in pursuance of an agreement of arbitration which was valid under the law by which it was governed,

    b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

    c) been made in conformity with the law governing the arbitration procedure,

    d) become final in the country in which it was made,

    e) been in respect of a matter which may lawfully be referred to arbitration under the law of Pakistan, and the enforcement thereof must not be contrary to the public policy or the law of Pakistan.

2) A foreign award shall not be enforceable under this Act if the court dealing with case is satisfied that—

    a) That award has been annulled in the country in which it was made, or

    b) The party against whom it is sough to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

    c) The award does not deal with all the questions referred or contains decisions on matter beyond the scope of the agreement for arbitration:

[2] Section VII (1) of the Arbitration (Protocol and Convention) Act 1937.
[3] Ibid., Section VI.

3) Provided that if the award does not deal with all questions referred the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit."

The above-mentioned conditions are the prerequisites for the enforcement of foreign arbitral awards in Pakistan. Pakistan as well as India has adopted the Geneva Convention of 1927 through the Arbitration (Protocol & Convention) Act 1937. An arbitration award can only be enforced when an order is made by the courts of the country where enforcement is sought. In the case of Islamic Republic of Iran Shipping Lines v. Hassan Ali & Co. Cotton (Pvt.) Ltd.[4], the award of the sole arbitrator under the English Arbitration Act 1996 was filed in Karachi High Court for its enforcement in Pakistan. The Justice Gulzar Ahmed held that "the award in question is a foreign award and is enforceable in Pakistan."[5] The decision of the judge was based on section 7 of the Arbitration (Protocol and Convention) Act 1937. In his concluding words, the judge held that:

> "For the foregoing reasons, I find no merits in the objection of the defendant. There is nothing to show that the award does not fulfill the conditions as provided in section 7(1) of the Act or there is anything to the satisfaction of the court in terms of section 7(2) of the Act that the award is not enforceable. The award is, therefore, made rule of the court."[6]

In another judgement of the same High Court in the case of Messrs Flame Maritime Limited v. Messrs Hassan Ali Rice Export, an award was made rule of the court. In this case one of the parties was from Valletta, Malta and the other one belongs to Pakistan. The award was announced in London under the English Arbitration Act 1996 by a sole arbitrator, which was filed in Sindh High Court under the Arbitration (Protocol and Convention) Act 1937 for its enforcement in Pakistan. In his judgement, Mrs. Justice Qaiser Iqbal observed that:

> "Section 7 of the Act, 1937 provides for the jurisdiction relating to a foreign award, which becomes enforceable if made in pursuance of an agreement for the arbitration, which will be valid under the law, upon which it was

[4] 2006 CLD 153 [Karachi].
[5] Ibid., 159.
[6] Ibid., 162.

> governed. The award was made in England in terms of the agreement between the parties, therefore it has attained finality in the country in which it was made. The defendant had a right to resist enforcement of foreign award, they were required to prove non-existence of the conditions laid down in subsection (2) of section 7."[7]

In his final words, the Judge held that:

> "Since award has become final in England, where it was made enforceable under the Act, 1937, the defendant had failed to make out any grounds to nullify the award, the objections raised by the defendants are hereby rejected. The award is made rule of the court excluding the interest."[8]

In India, foreign arbitration awards, in terms of enforcement, used to be governed by the Foreign Awards (Recognition and Enforcement) Act 1961 that gave effect to the New York Convention of 1958. India had made two reservations while ratifying the Convention that are as following:[9]

- that it would apply the Convention to the recognition and enforcement of an award only if it was made in the territory of another reciprocating contracting state; and

- that it would apply the Convention only to differences arising out of legal relationships which were considered as commercial under Indian law.

In the first reservation, the principle of reciprocity has been applied which has also been described in the Arbitration (Protocol & Convention) Act 1937.[10] Foreign awards are enforceable in India on the grounds and in the same circumstances in which they are enforceable in England under the common law on the grounds of justice, equity and good conscience. The enforcement of foreign arbitral awards can normally take place on one of the following grounds:

- "unilateral action of the country where the enforcement is sought,
- bilateral convention providing for the reciprocal execution of arbitral awards,
- multilateral convention on the enforcement of foreign arbitral awards."[11]

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[7] 2006 CLD 697 [Karachi] at page 703.
[8] Ibid., 706.
[9] http://www.globallawreview.com/art4.html (last date visited 2.08.2006).
[10] Section II (b) (c) of the Arbitration (Protocol and Convention) Act 1937.
[11] Mohammad Ahsen Chaudhary, International arbitration in theory and practice, p. 49.

Now I would examine the role of different conventions and treaties in the enforcement of arbitral awards with reference to Pakistan beginning from the Geneva Convention upto the New York Convention. Both India and Pakistan are parties to the Geneva Convention of 1927 as well as New York Convention of 1958. But the Geneva Protocol of 1923 and the Geneva Convention of 1927 have largely been superseded by the New York Convention. Both contain characteristics that are also present in the New York Convention and in the Model Law. So far there are three multilateral international agreements regarding the enforcement of foreign arbitral awards that are as under:

- The Geneva Protocol of 1923;
- The Geneva Convention of 1927;
- The New York Convention of 1958.

Now the position of enforcement of arbitral awards under these conventions is discussed herein below.

4.3 The Geneva Treaties

- **The Geneva Protocol of 1923**

Despite being limited in its range and effect, the Geneva Protocol made a significant contribution to the international recognition and enforcement of international arbitration agreements and awards.[12] There were two objectives of the Geneva Protocol. Firstly, it sought to make arbitration agreements and particularly arbitration clauses enforceable internationally; Secondly, it sought to ensure awards made pursuant to such arbitration agreements would be enforced in the territory of the state in which they were made. The implied objective of the Protocol was to make sure whether the contracting parties to the protocol would support international commercial arbitration from the beginning to the end of the arbitral process. At the beginning of the process, it is the job of the contracting states to ensure that parties to an arbitration agreement settled their disputes by arbitration rather than resorting to the national courts.[13] Furthermore, at the end of the arbitral

[12]The contracting parties to the Protocol were mostly European states; but one Latin American country, Brazil became a party to the Protocol, as did Pakistan, India, Japan, New Zealand and Thailand.
[13]Art. (4) of the Geneva Protocol, 1923.

process, they would at least grant recognition and enforcement to awards made in their own country.[14]

- **The Geneva Convention of 1927**

The Geneva Convention of 1927 tries to address the problems that are still being faced in the enforcement of international arbitral awards in Pakistan. The Geneva Protocol provided for the domestic enforcement of Protocol awards i.e. enforcement of awards in the territory of the state in which they were made. Whereas the Geneva Convention of 1927 broadened the scope of the award by providing that the award would be recognised as binding and would be enforced internationally in the territory of any of the contracting states subject to certain conditions.[15] These conditions are the preliminary requirements for the recognition and enforcement of the award. Then certain additional requirements had to be fulfilled by the party seeking enforcement of the award. Although the Geneva Convention has no much significance in the present world of arbitration because almost all of the contracting states have become parties to the New York Convention of 1958, hence I think it appropriate to mention two of these requirements:

- "That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

- That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."[16]

The first condition apparently seems to be simple but it led to different problems of interpretation one of which is "double exequatur"[17]. In many countries, an award became final if the local court granted leave to enforce it whether by way of exequatur or

[14] Ibid., Art. (3).
[15] Conditions were; (1) that the award was made pursuant to an arbitration agreement to which Geneva Protocol applied; (2) that the award was made in the territory of one of the contracting states; (3) that the parties to the award were subject to the jurisdiction of one of the contracting states.
[16] Art. 1(d) and (e) of the Geneva Convention, 1927.
[17] Exequatur means a written official recognition and authorization of a consular officer, issued by the government to which the officer is accredited. [Bryan A.Garner, Black Law Dictionary, Seventh edition, 1999, p 594].

otherwise. The second requirement that the award should not be contrary to "the principles of the law of the country in which it is sought to be relied upon" caused problems as well. It meant that besides the public policy of the state, the award should not be against the basic legal principles of the forum state as well. The ground of public policy is clear for the refusal of enforcement of award because it is enshrined both in the New York Convention[18] and in the UNCITRAL model law[19]. But it is less clear that the principles of law of the forum state should also be considered. Neither it is present in the New York Convention nor it is found in the Model Law. Both are silent on the second requirement of the law of the forum state. After analyzing both the Geneva Protocol of 1923 and the Geneva Convention of 1927, I further proceed to discuss that what is the position of enforcement of foreign arbitral awards under the New York Convention of 1958.

4.4 The New York Convention

The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has practically replaced the above-mentioned two conventions among the parties to the conventions. This convention provides for a more simple and effective method of getting recognition and enforcement of foreign awards. The New York Convention gives more effectiveness and efficacy to the validity of arbitration agreements than that is given under the Geneva Protocol of 1923 and Geneva Convention of 1927. Many countries have become parties to the New York Convention that has been praised as the single most important pillar on which the edifice of the international arbitration stands. In fact this Convention has made a new history of international commercial arbitration in the present world.

The opening sentence of the New York Convention is the brilliant example for the enforcement of arbitral award, which is as under:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of

[18] Art. V (2) (b) of the New York Convention, 1958.
[19] Art. 36 (1) (b) (ii) of the UNCITRAL Model Law on international commercial arbitration, 1985.

differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[20]

If we concentrate on the opening words of this article, we will come to know that the award made in any state, being not a party to the New York Convention, would be recognised and enforced by any other state that was a party subject to the basic conditions of the Convention. So far as recognition is concerned, a member state of the convention undertakes to respect the binding effect of the award to which the Convention applies. Subsequently such awards may be relied upon through defence or set-off in any legal proceedings. As far as enforcement of award is concerned, a state that is a party to the Convention undertakes to enforce the award to which the convention applies according to its local procedural rules. The relevant article of the Convention is as following:

- "Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon, under the conditions laid down in the following articles. there shall not be imposed the substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[21]

The New York Convention imposes simple requirements for getting recognition and enforcement of awards to which this convention applies. The party seeking such recognition and enforcement is required to produce to the relevant court:

- The duly authenticated original award or a duly certified copy thereof.
- The original agreement referred to in article II or a duly certified copy thereof.[22]

Furthermore, if the language of the award and arbitration agreement is not the official language of the country in which the recognition and enforcement is relied upon, then certified translations are required from the party seeking to enforce the award.[23] The

[20] Art. 1 (1) of the New York Convention of 10 June, 1958.
[21] Ibid., Art. III.
[22] Ibid., Art. IV (1) (a) and (b).
[23] Ibid., Art. IV (2).

moment the necessary documents are provided to the court, it will grant recognition and enforcement subject to the conditions for refusal of enforcement are not present. The article III of the New York Convention is similar with the article 35 (1) of the UNCITRAL Model Law regarding the recognition and enforcement of arbitral awards that states:

> "An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

However, it is apparent from the above-mentioned provisions of the articles of the New York Convention and The UNCITRAL Model Law that the latter is intended to draw a greater distinction between recognition and enforcement than the former. A party may enforce an award only upon application whereas recognition is an abstract legal effect that can be obtained automatically without necessarily being requested by a party. According to this article any country, not being a contracting party to the Model Law, may file an application to the court for the enforcement of an award whereas article III of the New York Convention makes it incumbent upon the contracting state to recognise and enforce an award and is, therefore, limited in its effects as compared to the Model Law. So here the purpose is not to make the distinction between the two but to analyze the enforcement under the New York Convention.

4.5 Principle of Reciprocity

According to article 1.3 of the Convention, there have been stated two reservations for the contracting parties of the Convention. The first of these is the principle of reciprocity and the second one is the commercial reservation, which was also stated in the Geneva Protocol of 1923. The relevant article is reproduced hereby:

> "When signing, ratifying or acceding to the Convention, or notifying extension under article X hereof, any State may, on the basis of reciprocity, declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out

> of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."[24]

The first reservation has the effect of limiting the scope of the New York Convention to the Convention awards, that is an award made in a state which is a party to the New York Convention, instead of applying it to all foreign awards wherever they are made.[25] The member states of the New York Convention have agreed on the basis of reciprocity that they will only recognise convention awards. Reciprocity permits a state to refuse to enforce an award made in another state where that other state is not a party to the New York Convention. It applies between the states and not between the parties. A country that has acceded to the New York Convention, but which has not entered the reciprocity reservation, must enforce an award irrespective of the fact where the award was made. It is immaterial that it was made in a country that would not have enforced the award or that the parties are from the countries that have not acceded to the New York Convention. However, the New York Convention allows the enforcement of awards if there are more favourable rights provisions.[26] All those countries which have adopted the UNCITRAL Model Law and have not resorted to amend article 35 and 36 of the Model Law so as to limit the application of these provisions to countries that have reciprocal enforcement agreements, have effectively negated the reciprocity reservation made by that country when it acceded to the New York Convention.[27] When states have adhered to the reciprocity reservation then the parties are not required to have the award confirmed in the country in which it was made prior to its enforcement. It was not intended that the reciprocity reservation would keep the "double exequatur" requirement that existed under the Geneva Convention.

The reciprocity defence has been raised in numerous cases. However, it is rarely raised simply on the basis that a state is not a party to the New York Convention. It has often been suggested that the courts in the country, where the award was made, would not enforce the award if enforcement was sought in that country. However, these defenses

[24] Art. 1 (3) of The New York Convention of 1958.
[25] So far 138 countries are the members of this convention out of which majority had done so on the basis of reciprocity. England, for example, had entered the reciprocity reservation and previously had ratified the Geneva Protocol on the basis of reciprocity reservation.
[26] The New York Convention of 1958, Art. VII.
[27] A Asouzu, ' A threat to arbitral integrity' (1995) 12 Journal of International Arbitration (No.4), 145-62 at No. 58

have rarely been succeeded. In Fertilizer Corp of India v. IDI Management Inc[28] an arbitration award was made in India against IDI a United States company. Fertilizer Corp of India sought to enforce the award in the United States. IDI argued that an Indian court would not consider the dispute commercial and therefore would not enforce the award. IDI further argued that as an Indian court would not enforce the award and therefore a United States court should not enforce the award because it had entered into the reciprocity reservation. The District Court of the Southern District of Ohio rejected this argument and held that it is undisputed that India is a signatory to the Convention and therefore, the reciprocity of the first sentence in question is satisfied. It is equally undisputed that the contract between the parties is considered commercial under the laws of the United States. Hence, the requirement of the second sentence is met.

Principle of reciprocity has also been enshrined in the Arbitration (Protocol & Convention) Act, 1937 along with the reservation of notification.[29] Because if there exist reciprocal provisions among the states, then these have to be notified by the states in the official Gazette. In the case of Yangtze (London) Limited v. Barlas Brothers (Karachi)[30] the Supreme Court of Pakistan declined to enforce the award of London Court of Arbitration because of lack of the notification. England had actually ratified the Geneva Protocol and the Geneva Convention and the government of British India had also notified Great Britain and Northern Ireland in the Official Gazette for purposes of the Act 1937. But the Supreme Court declined to recognise the notification because it was issued prior to the Pakistan's independence on the ground that:

> "the Indian Independence (International Arrangements) Order, 1947 did not and, indeed could not, provide for the devolution of treaty rights and obligations which were not capable of being succeeded to by a part of country, which is severed from the parent state and established as an independent sovereign power according to the practice of states."[31]

The Government of Pakistan subsequently added subsection (2) in the definition of foreign awards through an Ordinance called Foreign Awards and Maintaince Orders Enforcement (Amendment) Ordinance 1962. The Yangtze case had initially come before

[28] 517 F Supp 948 (1981); (1982) VII Ybk Comm Arbn 382-92.
[29] Section 2 (b) & (c) of the Arbitration (Protocol and Convention) ACT, 1937.
[30] PLD 1961 SC 573.
[31] Ibid., 579.

the Karachi High Court.[32] The High Court decision was based on the reciprocity aspect that was subsequently affirmed by the Supreme Court on somewhat different grounds. The High Court dealt with the principle of reciprocity rather than the fact whether the country was notified under the Act or not. The court observed that Pakistan was not one of the countries notified by an Order in Council and hence an award, delivered in Pakistan between a Pakistani and an Englishman, will not be enforceable in England. Furthermore it held that:

> "if Pakistani awards are not enforceable in England, awards delivered in England would not be enforceable in Pakistan."[33]

The Supreme Court of Pakistan disagreed with this reasoning. It stated that it is sufficient for the purposes of the court to ascertain if the country involved was notified by the federal government. The Court observed that:

> "it is neither necessary nor proper for the national courts to enter upon any investigation as to whether reciprocal provisions have in fact been made in the country where the award sought to be filed was made for the enforcement of awards made in Pakistan. Thus if the notification contemplated under the Act had been issued the national Courts would have been bound to hold that the conditions prescribed for treating an award as a foreign award had been fulfilled and would not have been entitled to go behind the notification and investigate whether reciprocal provisions did in fact also exist in the notified country."

The Supreme Court affirmed the decision of the lower Court but on the ground of notification instead of principle of reciprocity. Now Pakistan has ratified the New York Convention of 1958 and the President of Pakistan has repromulgated the Ordinance on 14 July 2006 for the enforcement of arbitral awards under the New York Convention. The whole Convention has been made part of the said Ordinance. Therefore, Pakistan has acceded to the reciprocity reservation as enshrined in article 1(3) of the Convention.

However, it has been recognised that where a country will not enforce a New York Convention award because of its own domestic laws then another country may refuse to recognize an award made in that country on those grounds. In MGM

[32] Barlas Bros (Karachi) & Co. v. Yangtze (London) Limited PLD 1959 (W.P) Karachi 423.
[33] Ibid., 431.

Productions Group Inc v. Aeroflot Russian Airlines[34] the District Court of the Southern District of New York warned that the public policy arguments should be accepted with caution so as not to discourage the enforcement of United States arbitration awards by courts of other countries. It is, however, not only public policy issues that could afford a potential defence to enforcement under the reciprocity reservation but the issues of Arbitrability and capacity as well. Nevertheless, the limiting effect of the first reservation should not be exaggerated. An international network of many states for the recognition and enforcement of arbitral awards established by the New York Convention is growing year by year. The Convention now links the world's major trading nations of Arab, Asian and Latin American as well as the European and North American. As more countries become Convention countries, the reciprocity reservation becomes less significant because the award would be enforced in these countries without the reciprocity reservation.

4.6 The Commercial Reservation

The countries while acceding to the New York Convention were entitled to ratify the Convention subject to two reservations. The first condition has been elaborated above. Now I will elaborate the second reservation. According to this reservation, if a country entered the commercial reservation then it was allowed to refuse to enforce an international award if the dispute was not commercial in nature. The effect of this reservation like the reciprocity is to narrow down the scope of application of the New York Convention. The definition of 'commercial relationship' differs from country to country. This has led to the problems of interpretation within the same state as will be shown by the two cases that arose in India. In the first case,[35] the High Court of Bombay was asked to stay legal proceedings that had been commenced despite the existence of an arbitration agreement. The court was obliged to grant such a stay under the relevant Indian Legislation enacting the New York Convention so long as the arbitration agreement came within the Convention. The state of India while ratifying the New York

[34] 14 May 2003, United States District Court for the Southern District of New York, Digest by Jason R Abel, Debevoise & Plimpton, ITA Board of Reporters, International ADR.
[35] Indian Organic Chemical Limited v. Subsidiary 1 (U.S) Subsidiary 2 (U.S) and Chemtex Fibres Inc. (Parent Company) (U.S) (1979) IV Yearbook Commercial Arbitration 271.

Convention had entered the commercial reservation. The court held that, whilst the agreement under which the dispute arose was commercial in nature, it could not be considered as commercial under the law in force in India. The judge said:

> "In my opinion, in order to invoke the provisions of [the Convention], it is not enough to establish that an agreement is commercial. It must also be established that it is commercial by virtue of a provision of law or an operative legal principle in force in India."[36]

This decision has since been rejected by the High Court of Gujrat. In the second case, the plaintiffs moved for a stay of legal proceedings that had been initiated despite the existence of an arbitration agreement. The court granted this motion. On hearing the arguments as to whether the contract was commercial in nature, the judge said that:

> "the term commerce is a word of the largest import and takes in its sweep all the business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries."[37]

The judge has broadened the scope of the word "commerce" and included in it all types of business. The judge added another dictum to his judgement and remarked:

> "It should be noted that the view of the learned single judge of the Bombay High Court in Indian Organic Chemical Limited's case has not been approved by the Division Bench of the Bombay High Court. The Division Bench after setting out the view of [the judge] in the aforesaid decision, ultimately disagreed with it....".[38]

Both the above decisions are contradicting each other. In many civil law countries the distinction between commercial and non-commercial dispute is no longer relevant in relation to international arbitration. However, more than forty countries have signed the New York Convention with the commercial reservation. For instance China while acceding to the New York Convention made both the reciprocity reservation and the commercial reservation. What amounts to a commercial dispute is determined by the law of the country where enforcement of the award is sought or where the application to stay

[36] Ibid., 273.
[37] Union of India and Ors v. Lief Hoegh & Co. (Norway) and Ors, (1984) IX Yearbook Commercial Arbitration 405 at 407.
[38] Ibid., 408.

legal proceedings is made. In the case of Hubco v. Wapda[39] the majority judgement, inter alia, held that:

> "The disputes between the parties are not commercial disputes arising from an undisputed legally valid contract, or relatable to such a contract, for, according to the case of WAPDA on account of these criminal acts disputed documents did not bring into existence any legally binding contract between the parties, therefore, the dispute primarily relates to very existence of a valid contract and not a dispute under such a contract."[40]

Although there was a commercial relationship between the parties but the interpretation of the court termed it non-commercial dispute. But the court refrained from defining the word 'commercial' in its judgement. Hence the Arbitration (Protocol and Convention) Act was made inapplicable to the proceedings because the agreement was not commercial according to the article 2 of the Act.

4.7 Grounds For Refusal of Enforcement Under the New York Convention

Enforcement of arbitral award may be refused on different grounds under international conventions on arbitration. These grounds have been mentioned in the Arbitration (Protocol & Convention) Act, 1937 in Section 7 taking effect from the Geneva Convention of 1927. These grounds have been mentioned in the New York Convention of 1958 and the UNCITRAL Model Law on International Commercial Arbitration 1985 as well. The grounds of refusal mentioned in both the convention are comprehensive as well as exhaustive in the sense that these are the only grounds on the basis of which recognition and enforcement may be refused. The intention of the New York Convention as well as the model law is that the grounds for the refusal of recognition and enforcement of arbitral awards should be applied restrictively. One commentator on the Convention has stated:

> "As far as the grounds for refusal for enforcement of the award as enumerated in Article V are concerned, it means that they have to be construed narrowly."[41]

[39] PLD 2000 Supreme Court 841.
[40] Ibid., 868.
[41] Van den Berg, The New York Arbitration Convention of 1958 (Kluwer, 1981) pp. 267 and 268 (emphasis added).

Major national courts have recognised this dictum. Practitioners of international commercial arbitration are aware of the difficulties that may arise in seeking enforcement of an award under the New York Convention. Particularly the public policy exception discussed in the previous chapter enables some states to act at their own disposal. This is not the only problem being faced at international level. There are states that have ratified the convention, but have either not brought it into effect[42] or have brought it into effect inadequately. There are also oddities of legislation, such as those provisions of the law in India (now repealed) and in Pakistan, which stated that where the governing law was that of India or Pakistan as the case may be, the resulting award was deemed to be domestic award despite the fact the seat of the arbitration was in a foreign state. [43]

The grounds in the New York convention can be grouped into two distinct categories. The first category consists of grounds for refusal with respect to which the resisting party has the burden of proof. The second category is made up of grounds that the court may apply on its own initiative, without regard to burden of proof. I will not reproduce the grounds as mentioned in Article V of the New York Convention, The particulars of the grounds are as under:

a) the parties to the agreement were under some incapacity or the agreement is not valid;

b) a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was not able to present its case

c) the award deal with a matter without the reference to arbitration;

d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, if no agreement, in accordance with the law of the country where the arbitration took place;

e) the award has not yet become binding, or has been set aside or suspended;

f) the subject matter of the difference was not capable of settlement by arbitration in the country where enforcement is being sought

[42] Pakistan is among those countries that has ratified it on 14 July, 2005, but the legislation that will bring it into effect, is still pending and so far parliament has not ratified it.

[43] Such an award is normally regarded as a foreign award under The New York Convention of 1958.

g) the recognition and enforcement of award would be contrary to the public policy of the country where enforcement is being sought.

The first five grounds come under the first category on the basis of which recognition and enforcement may be refused at the request of the party against whom it is invoked. These grounds are also present in the UNCITRAL Model Law in the same shape and form. It is significant that under both the Convention and the Model law (that follows the Convention in this respect) the burden of proof is not upon the party seeking recognition and enforcement.[44] The remaining two grounds that concerns the Arbitrability of the dispute and the public policy of the place of enforcement and these are often invoked by the court of that place on its own motion If we concentrate on the language of the opening lines of article V, which says that enforcement "may be" refused. These don't say that it "must be" refused. So the language is permissive and not mandatory. The same is the case with the Model Law. I will elaborate the first category of grounds in detail. I have dilated upon the second category in the previous chapter that needs no space here.

4.7.1 Article V (1)

According to this Article, the burden of proof is on the party who asserts that the award is unenforceable. It is that party that must furnish evidence to the court regarding the existence of the ground or grounds for not enforcing the award. This is a heavy burden that a party must have to discharge. However, the party, which alleges that the Convention applies, has the burden of proving that the formalities for enforcing the award have been complied with. In a case of Vicere Livio v. Prodexport,[45] an Italian Supreme Court required the party seeking to enforce the arbitral award to prove the existence of the arbitration clause within the agreement. The award was not enforced because the enforcing party failed to prove that the formalities for enforcing the award had been met.

[44] It evidences a major change from the Geneva Convention of 1927
[45] (1982) VII Year book Commercial Arbitration at 345.

4.7.2 Article V (1) (a)

This Article permits that the award may be challenged on two grounds. Firstly, where one of the parties is under some incapacity; and secondly, where the agreement is invalid under the law chosen by the parties. If the parties have not chosen the law, then under the law of the country where the award was made. However, this ground is rarely used to resist the enforcement. Usually, the issues of capacity or validity are used from the outset of the arbitration. Because the parties have the fear that if they does not raise it from the outset, then afterwards they may be prevented from arguing this issue before the enforcing court. As far as the challenges for invalidity are concerned, a party must show that the constituent elements necessary to create the arbitration agreement do not exist.[46] The same issue was discussed in Hubco v. Wapda case. The Honourable judge observed that on the grounds of criminal acts, the disputed documents did not bring into existence any legally binding contract between the parties. The judge doubted the legality of the contract and hence directed the parties not to opt for international arbitration. Although this case is not relevant to be placed here, because Pakistan at that time had not ratified the Convention. However, a reference has been made to this case for the importance of the subject matter

4.7.3 Article V (1) (b)

This article deals with the failure to give a party proper notice of the appointment of the arbitral tribunal or where a party is not in a position to present its case. This is the most important ground for the refusal of enforcement under the New York Convention (and the Model Law). The point to notice is just a matter of formality. The main thrust of the provision is directed at two points. Whether the requirements of due process are observed and that the parties are given a fair hearing. It means that a party must be given the opportunity to be heard at a meaningful time in a meaningful manner. It equates the principle of audi alteram partem;[47] which is that each party is entitled to know the case that it has to meet and requires that there is a fundamentally fair hearing. It also requires

[46]Group v. Aeroimp (1998) XXIII Year book Commercial Arbitration at 745-9.
[47]No one should be condemned unheard. Hear the other side. [Bryan A. Garner, Black Law Dictionary, Seventh edition, 1999, p 1620].

that there is a proper notice given to the parties, a hearing on the evidence and an impartial decision by the arbitrators.

It is a fundamental principle of arbitration that there must be a fair resolution of the issues by an independent and impartial tribunal. When these principles are impeached, then this will give rise to a ground for refusing enforcement under the Convention. A failure to advise the parties of the names of the arbitral tribunal would be tantamount to the violation of this article. Likewise, where a letter is sent to the arbitral tribunal, which does not ensure that it is copied to the other party or where one party is unaware of the opposing party's arguments then any subsequent award may not be enforced. The adversarial nature of the arbitration requires that the parties have the opportunity to test all the evidence before the arbitral tribunal. In Paklito Investment Ltd v. Klockner (East Asia) Ltd.[48] Kaplan J, in the Supreme Court of Hong Kong, had to consider whether to enforce an award or not. Because the party had alleged that it had been unable to present its case. The arbitral tribunal appointed its own expert. The expert sent the report back to the arbitral tribunal with the copies of its report to the parties. Klockner requested permission to respond to the report. However, the arbitral tribunal proceeded to make its award without further representations in favour of Paklito. Paklito sought to enforce the award in Hong Kong. Klockner contended that the enforcement of the award should be refused relying upon the article V (1) (b) of the Convention. Paklito brought evidence that under Chinese law the arbitral tribunal was permitted to act inquisitorially[49] and the common law notion of cross-examination of witnesses was a concept totally absent in Chinese arbitration. Klockner brought evidence in rebuttal by stating that this was not the case and the parties ought to be allowed to comment on an expert report. Kaplan J held that the Klockner had the right to expect that it would be permitted to comment on the expert reports and this was a basic right in arbitration. Kaplan J, therefore, refused to enforce the arbitration award.

[48][1992] 2 HKLR 39.

[49]Inquisitorially is here used in an adverb form. Its meaning is that a person asks a lot of difficult question, especially in a way that makes one feel threatened (A S Hornby, Oxford Advanced Learner's Dictionary, Seventh edition, p 670).

4.7.4 Article V (1) (c)

This article deals with the excess of jurisdiction. It states that enforcement may be refused where the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. This article includes a proviso whereby if the award can be separated, then those parts that are within the jurisdiction of the arbitral tribunal should be enforced. The question of scope and excess of jurisdiction relates to the terms and scope of the arbitration agreement or submission to arbitration. The fact that an award deals with issues outside of the parties, pleaded case does not give a ground for challenge under this article unless the issue falls outside of the submission to arbitration as well. The irrelevant issues in the arbitration agreement that don't relate to the disputes are beyond the jurisdiction of the courts.

4.7.5 Article V (1) (d)

This article states that an award may not be enforced where there is an irregularity in the composition of the arbitral tribunal or where the procedure was not in accordance with the agreement of the parties. The Geneva Convention of 1927 provided that the enforcement of an award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance both with the agreement of the parties and the law of the place of arbitration. This double requirement that if arbitration was not held in strict compliance with the procedural law of the place of arbitration, the resultant award would not be enforced. In the New York Convention, the double requirement has been dropped. The agreement of the parties comes first. Only if there is no agreement, then the arbitration laws of the place of arbitration are to be considered. In the Supreme Court of Hong Kong in 1994, the same issue came before the Justice Kaplan where one of the parties argued that the composition of the tribunal was not in accordance with the agreement of the parties and hence sought the refusal of the enforcement of the award. The Justice Kaplan held:

> "It is clear therefore that the only grounds upon which enforcement can be refused are those specified... and that the burden of proving a ground is

> upon the defendant. Further, it is clear that even though a ground has been proved, the Court retains a residual discretion."[50]

Furthermore, the judge concluded:

> "I conclude therefore, somewhat reluctantly, that technically the arbitrators did not have jurisdiction to decide this dispute and that in all the circumstances of this case, the ground specified in the section has been made out. I say technically because the parties did agree to have a CIETAC Arbitration and that is what they got, even though it was held at a place within China not specified in the contract and by arbitrators who apparently were not on the Beijing list."[51]

Although the ground for refusal of enforcement had been made out, the judge allowed enforcement of the award to go ahead. The judge had done so on the basis that the party had knowingly participated in the arbitration with the knowledge that the arbitrators were not selected from the correct list. The learned judge considered the point of estoppel to other aspects of the New York convention as well.

4.7.6 Article V (1) (e)

Under this article, an enforcing court may refuse to enforce the award where the award has not yet become binding on the parties or has been set aside or suspended in the country in which the award was made. This article of the New York Convention has led to significant academic debate. Now the question arises that whether an award, which has been set aside in the country in which it was made, has any legal standing?

There are significant differences between the New York Convention and the Geneva Convention of 1927. Under the Geneva Convention, award was required to be final before its enforcement. Many courts interpreted it in this way that a party was required to have the award enforced or recognized in the country where the award was made as a prerequisite to enforcement in another country. This system of double recognition was known as double exequatur. The New York Convention does not require this prerequisite. There are so many other distinctions between the two conventions that

[50]China Nanhai Oil Joint Service Cpn v. Gee Tai Holdings Co. Ltd. Reported in (1995) XX Yearbook Commercial Arbitration 671.
[51]Ibid., 672.

are not required to be placed here. The purpose here is not to make the make comparison between the two.

The problem arises because the New York Convention does not restrict the grounds on which an award may be set aside or suspended by the court of the country in which, or under the law of which, that award was made.[52] Anyhow, this is a matter that is upto the domestic law of the country concerned that may impose local requirements that the judges and the lawyer would not regard as sufficient to impeach the validity of an international arbitral award. The courts in France, United States and elsewhere have accorded recognition and enforcement to arbitral awards even though these have been set aside by the courts at the seat of arbitration. This justification is given because of two reasons. Firstly the language of Article V of the New York Convention is permissive and not mandatory. Secondly, the New York Convention recognizes that there may be more favourable provisions under which an award may be recognised and enforced. The Convention contains the following provision in Article VII.1:

> "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

In this way, the Convention recognizes explicitly that there may be a local law in any given country that is more favourable to the recognition and enforcement of arbitral awards. The Convention proves to be a blessing in disguise to any party that wants to have benefit from this more favourable local law.

4.8 Effect of Ratification of New York Convention 1958

Pakistan has ratified the New York Convention on 14 July 2005 and on the same date the President promulgated the Foreign Awards Ordinance VII of 2005. After the lapse of four (4) month, the said Ordinance lapsed under Article 89 of the Constitution of Pakistan 1973. On 3rd December 2005, the President again promulgated the Recognition and

[52]Unlike the Model Law which, in Art. 34, sets out the limited grounds on which an award may be set aside.

Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 called Ordinance XX of 2005. This Ordinance was published through the Gazette of Pakistan.[53] The whole New York Convention has been made part of this Ordinance. After the lapse of this Ordinance, another was promulgated on 18th March, 2006.[54] This Ordinance got lapsed and the president has again promulgated the Ordinance on 14 July 2006 (Ordinance No. XIV)[55] giving effect to the previous one.

For various reasons, the Convention could not be incorporated into Pakistan's municipal law for a long time, and increasingly this deficiency was being felt acutely. It was not until 2005 that an Ordinance was finally promulgated to give effect to the Convention. Under our Constitution, an Ordinance has the same effect as an Act of Parliament, but lapses after four months. An Ordinance has yet not been passed by Parliament to give permanency to the Convention, and it appears to have been kept alive as part of the municipal law by means of a successive Ordinances issued from time to time. The last such Ordinance as available to me was promulgated on 14 July, 2006 and it is to be hoped that Parliament will take appropriate legislative action in the matter as soon as possible since otherwise the constitutionality of the law may remain under a cloud.

The first point to note about the Ordinance enforcing the New York convention is that subject to certain savings, it repeals the 1937 Act, Given the fact that all countries which were signatory to the Geneva Protocol and convention enforced through the 1937 Act are also party to the New York Convention, the intent behind the repeal is clear. The New York Convention, and hence the Ordinance, makes challenges to the enforcement of an award even more difficult that the position under the 1937 Act. The repeal of the 1937 Act therefore removed the possibility of any overlap or duality; all foreign awards and international arbitration agreements are placed on the same footing, and made the subject matter of the New York Convention. The second important feature of the Ordinance is that it confers exclusive jurisdiction with regard to its subject matter directly on the High Courts. In Pakistan, the High Courts, subject to a few exceptions, do not have any

[53] [Gazette of Pakistan, Extraordinary, Part 1, 3rd December, 2005] No.F.2 (1)/2005-Pub., dated 3.12.2005.
[54] Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2006, Ordinance III of 2006, reported at PLJ 2006 Federal Statutes 305.
[55] [Gazette of Pakistan, Extraordinary, Part 1, July 13, 2006] F. No.2 (1)/2006-Pub., dated 14.07.2006.

original civil jurisdiction. Legal proceedings are in general to be commenced in the civil, i.e. subordinate courts, and this was the position prevailing under the 1937 Act. By directly conferring jurisdiction on the High Courts, the Ordinance has eliminated altogether one level of legal proceedings and given the unfortunate delays that can plague the legal system in this country, thus greatly speeded up the enforcement of foreign awards. Thirdly, the Ordinance also contains a highly unconventional provision in its Section 8. The New York convention has been incorporated into the municipal law as a schedule to the ordinance, and section 8 expressly provided that in the event of any inconsistency between the convention on the one hand and the ordinance itself or any other law or any judgment of any Court or the other, the Convention shall prevail to the extent of the inconsistency. This is a most unusual provision. It is a well-established rule of the interpretation of statutes that in case of any conflict between the main part of a statute and any schedule thereto; it is the main provisions i.e. sections, which are to prevail. It is also well settled that any conflict between any treaty provision and municipal law is to be resolved in favour of the latter. Section 8 of the Ordinance thus reverses both these rules in favour of the New York Convention.

It will therefore be seen that an attempt has been made in promulgating the Ordinance to tilt the field in favour of the New York Convention and awards made there under. Original jurisdiction in civil matters is but sparingly conferred on the High Courts by the laws of Pakistan and there does not appear to be any other treaty, convention or other international obligations in respect of which such a jurisdiction has been conferred. Furthermore, by reversing rules of interpretation, which most Pakistani lawyers would regard as bedrock principles in favour of the convention, the ordinance has placed the convention on a footing well above other international treaties and obligations. Indeed, there does not seem to be any other law on the statute books in which a schedule is placed on a pedestal higher than the parent Act itself. While these provisions have yet to be judicially interpreted and applied, the legislative intent clearly points towards giving the Convention an unprecedented primacy with regard to its enforcement.

Like the 1937 Act, the Ordinance concerns itself with legal proceedings brought in Pakistan notwithstanding the existence of an international arbitration agreements and the enforcement of foreign awards in Pakistan. However, there are significant differences

in the language of the relevant provisions. With regard to the stay of legal proceedings, section 3 of the 1937 Act contained certain procedural restrictions. In fact, the section required that an application seeking a stay of the proceedings had to be made before the filing of the written statement or the taking of any other steps in the legal proceedings, and if not so made, the application was not maintainable, i.e., the legal proceedings would continue. This was fairly a technical requirement and had an equivalent provision in the 1940 Act around which a whole body of case law has been developed. Sometimes, it happens in such circumstances, the resultant position is neither wholly consistent nor satisfactory. The procedural restriction or requirement has been eliminated from the Ordinance[56] that is in line with paragraph 3 of Article II of the Convention. In principle, an application can, therefore, be made in a Convention case at any stage of the legal proceedings. Whereas, it is possible that the courts may not permit an application to be made at the eleventh hour. However, it is clear that the filing of an application for stay of proceedings has been freed from procedural restrictions and has been given a much more extended time frame.

Section 4 (2) of the Ordinance provides that if an application for stay of legal proceedings is made, then unless the arbitration agreement is null and void, inoperative or incapable of being performed, the Court shall refer the parties to arbitration, i.e., stay the legal proceedings. This provision was recently considered by the High Court of Sindh[57] and the Court held that under the Ordinance, the Court did not have any discretionary powers, but had to refer the matter to arbitration unless the limited exceptions just noted were applicable. In other words, the provision was held to be mandatory.

The enforcement of foreign awards has also been much simplified and the legal framework strengthened in favour of the award. The detailed provisions of section 7 of the 1937 Act have already been examined. The equivalent provision under the Ordinance[58] simply and succinctly states the enforcement of foreign awards "shall not be refused except in accordance with Article V of the Convention". Article V (discussed above) contains specific and expressly stated grounds on the basis of which enforcement of an award may be refused. Since the Ordinance does not, unlike section 7 (3) of the

[56] See section 4 (1).
[57] Travel Automation (Pvt) Ltd. V. Abacus International (Pvt) Ltd. and others 2006 CLD 497.
[58] See section 7 of the Ordinance No. XIV of 2006.

1937 Act, confer any residuary discretion on the Court to refuse enforcement. It follows that the grounds listed in Article V are exhaustive.

The Sindh High Court, in the case of Travel Automation (Pvt.) Ltd. V. Abacus International (Pvt.) Ltd.[59] announced the judgment for the enforcement of arbitration agreement on the basis of this Ordinance XX of 2005. The Honourable Judge Khilji Arif Hussain laid down the comparison between the relevant provisions of the Arbitration Act 1940 and the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005.

Actually the suit was filed by the Plaintiff for the enforcement of Distributorship Agreement that was dishonored by the Defendant. The defendant filed application under section 34 of the Arbitration Act, 1940 along with section 3 of the Arbitration (Protocol & Convention) Act, 1937 for staying the court proceedings. Relevant case law was quoted from both the sides. According to the Act 1940, the court used to exercise discretion whether to grant the stay or not. The said discretion has not been given to the courts under section 4 of this Ordinance. It would be an appropriate to reproduce the section for the sake of convenience. The section is about the "enforcement of arbitration agreements" that states:

1. "A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter.
2. On an application under subsection (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed."[60]

The language of the section is explicit and comprehensive. In this section a party to the agreement can file a suit for stay. No other person on his behalf can do so. The court has got no discretion in this regard. The court is bound to stay the proceeding subject to some conditions. These conditions have been enumerated in article 4 of the Ordinance. The court will not stay the proceedings if it finds that the arbitration agreement:

[59] 2006 CLD 494 [Karachi].
[60] Article 4 (1) (2) of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005 called Ordinance XX of 2005.

- is null and void;
- is inoperative; or
- incapable of being performed.

These conditions may give the court a little discretion while staying the matter. An agreement can be null and void on different grounds. According to the Contract Act (IX of 1872),[61] an agreement can be declared void if the object or consideration is unlawful. Different cases have been enumerated that render an agreement to be void one of those is the ground of public policy. Sections 20 & 56 were also discussed in this case. Section 20 says that an agreement is void if the parties under the agreement are under a mistake regarding the formation of contract. An agreement is incapable of being performed when the subsequent act in the agreement has become impossible to be performed or the contract has become frustrated. The list of void agreements has been given in the Pakistan Contract Act 1872.[62]

As said earlier, the section 4 (2) of the Ordinance 2005 has taken away the discretion of the court in the stay proceedings that it used to exercise under the Arbitration Act, 1940[63] and the Arbitration (Protocol & Convention) Act, 1937[64]. The section 4 of the Ordinance is based on article II of the New York Convention of 1958. In the case quoted above, Justice Khilji Arif Hussain granted order for the stay of the proceeding on the basis of the section 4 of the Ordinance XX of 2005. The Arbitration Clause of the agreement was restored and the defendants were thereby allowed to make resort to arbitration as per the Arbitration Clause of the Distributorship Agreement. It is stated that it is the only case, which has been decided under the provisions of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2005. So far as the ratification of the New York Convention is concerned, its effects and efficacy has well been demonstrated in this case.

Pakistan and the Courts of this country have come a long way since the days of the enactment of the 1937 and 1940 Acts. The Ordinance enforcing the New York

[61] Section 23 of the Contract Act (IX of 1872).
[62] Ibid., Section 24 to 30C deals with the void agreements. For details see The Contract Act (IX of 1872), Fifth Revised and Enlarged Edition 2000, by Shaukat Mehmood and Nadeem Shoukat.
[63] Section 34 of the Arbitration Act, 1940, This section deals with the stay of proceeding.
[64] Section 3 the Arbitration (Protocol & Convention) Act, 1937.

Convention marks a major and welcome addition to the development of international commercial arbitration and enforcement of foreign arbitral awards in Pakistan. In one sense, however, it is not a fundamental shift in the law. The reason is that the judicial principles and attitudes in this country have already evolved to a great extent in line with the international developments.

CHAPTER 5

SUGGESTIONS AND CONCLUSION

With the 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 have looked for dispute resolution mechanism that is acceptable to both the foreign and local parties. The establishment and effective functioning of such mechanisms is dealt by private international law on the basis of certain agreed, shared and common principles set by different states having foreign municipal system of law. However, the rules of private international law of one state may differ from the other because all the states are not parties to the same conventions or treaties. In the last two decades, the courts in Pakistan have received a variety of international arbitration matters for determination. Specialist arbitrators through a quick and often informal procedure commonly choose arbitration as a method of dispute resolution over traditional court proceedings because of the possibility of achieving a relatively economical final solution. For a long time international commercial arbitration was treated with apprehension in Pakistan. Efforts were made to avoid the contracted mode of dispute resolution by approaching the courts for relief on the substantive dispute. There are classic grounds on which local parties succeeded to sustain their courts proceedings over the contracted foreign arbitration clause because of the difficulty of taking voluminous evidence abroad and the high expense of pursuing the foreign arbitral remedy.

Since the last decade or so important developments in Pakistani law on international commercial arbitration have occurred. These reflect a dynamic and realistic approach by the Hon'ble Supreme Court. The parameters laid down in its judgments ensure adherence to contractual dispute resolution unless exceptional circumstances exist to show illegal and unconscionable dealings. The steps taken so far are appreciable and undoubtedly there would be further developments with the pace and scale of international commercial transactions in Pakistan. We cannot anticipate those changes; therefore, the present legal landscape on the subject is worthy of notice. Firstly, the visionary call by

Mr. Justice Ajmal Mian in the case titled M/S Eckhardt & Co. Marine GmbH v. Muhammad Hanif[1] to enforce the sanctity of international arbitration clauses for commercial disputes has indeed become the legal norm in Pakistan. Secondly, in the case of contractual disputes there is judicial aversion to interference with foreign arbitration agreements. Thirdly, the local legal community has built and demonstrated capacity to conduct international arbitration on contractual disputes. Fourthly, foreign contracting parties carry the burden under their due diligence obligations to comply with mandatory laws for the validity of their commercial contracts entered with public bodies. This appears to have been reaffirmed by the Hon'ble Supreme Court in the recent Watan Party v. The Federation of Pakistan[2]. In this case, an international commercial contract was struck down for non-compliance with mandatory laws governing the formation of the contract. Finally, violation of public policy (discussed in the 3rd chapter) or mandatory law is a ground for non-arbitrability of a dispute arising under a contract. This is a commonly accepted principle of many municipal legal systems and therefore Pakistan is no exception in this regard.

In view of the above, 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: -

- The enactment of a statute to replace the Ordinance that currently implements the New York Convention.
- 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.[3]
- The implementation of the Washington Convention.
- Sustained training of lawyers and arbitrators firstly, in order to improve the domestic arbitral process, and allow it to return to its original function as a

[1] PLD 1993 SC 42.
[2] The case was decided on 23.06.2006 through a short order. Comprehensive judgment came on 30.06.2006.
[3] 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 that have since reappeared through evolving case law. England is the best example that has chosen to use the UNCITRAL Model Law as the basis for a wider and more detailed reform.

reliable, truly cost effective, efficient and alternative means of dispute resolution and secondly to build a body of arbitration experts in Pakistan who are properly equipped to participate in the international arena.

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

As far as the last item is concerned, 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 significance, 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.

Dr. Tariq Hassan has given many suggestions in terms of international arbitration in Pakistan in his articles and I fully support the following appropriate measures in the light of Dr. Tariq Hassan's Article[4] given to me by Professor Aziz Ur Rehman:

1) "An effective legislative framework should be established for the resolution of international disputes. Pakistan should adopt a holistic approach to international arbitration legislation. A single statute that includes international arbitration should be promulgated. The 1940 Arbitration Act should be modernized taking into account the UNCITRAL Model Law on International Commercial Arbitration.

2) Enactment of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2006 (Ordinance No XIV of 2006).

3) Pakistan must establish its own Council of Arbitration, based on the experience of the Indian Council of Arbitration, to provide facilities for arbitration of both domestic and international commercial disputes.

4) Pakistan should promote the SAARC arbitration Council as a matter of policy and subscribe to the UNCITRAL Arbitration Rules.

[4] Dr. Tariq Hassan, "International Arbitration in Pakistan, A developing country Perspective," Journal of International Arbitration 19(6): 591-600, 2002, Kluwer Law International.

5) The government should conduct a comparative analysis of UNCITRAL, ICSID, ICC and other arbitration procedures with a view to promoting healthy competition between these mechanisms to ensure proper and reasonable costs, neutrality and speed.

6) The government should develop a viable policy framework consistent with its legal and institutional structures to bolster the bargaining position of Pakistani officials and businessmen for negotiating favourable arbitration clauses in international agreements."[5]

Tariq Hassan has called the above-mentioned suggestions as the "equivalent legal standard" (ELS) and has laid emphasis upon the developing countries to adopt these legal standards for the maintenance of good bargaining position in international commercial transactions. The above quoted legal standards are tentative in nature and are up to the free disposal of the country concerned to adopt.

Pakistan is a developing country and it needs proper education, professional skill and expertise in the field of arbitration both at the Bar and on the Bench. Therefore, the World Bank (WB) and the Asian Development Bank (ADB) could take the initiative to sponsor courses and training programmes locally. Many international bodies and institutes such as the Chartered Institute of Arbitrators, the International Development Law Institute, the International Chamber of Commerce, and Institute of World Business Law and other professional bodies and international organizations could offer and support these programmes. Furthermore, international development banks, national, regional and international business bodies or multinational energy companies could take similar initiatives. The money would be well spent in the sense that if a congenial atmosphere could be created for arbitration by enhancing education and developing professional skills, knowledge and awareness in arbitration, the international business community as a whole would reap great benefits in return over time.

However, more educational activities and training programmes for arbitration are needed for lawyers, judges and dispute settlement professionals in developing countries in order to help them gain positive benefits from globalization. At present, not enough is being done.

[5] Ibid.

5.1 Conclusion

Pakistan has been confronting bundle of problems in the enforcement of foreign arbitral awards since its independence. We have no proper mechanism for the arbitration that could be in line with the international conventions and treaties. Foreign direct investment has been hindered in Pakistan due to these problems. This is an era of modernization and globalization in which the whole world has tended to move towards internationalization of arbitration. We have also been witnessing these changes in sub-continent for many years. India has accommodated international arbitration in its domestic litigation system. There still persist many difficulties in the enforcement of foreign arbitral awards in Pakistan that merit special consideration. These cultural and legal problems can be avoided if international commercial arbitration is tuned in the cultural needs and expectations. This research work has highlighted all those issues and recent legal developments & trends in that regard.

In Pakistan dispute settlement and enforcement of arbitral awards still remain a grave cause of concern for foreign investors as ever. In some instances arbitral awards are denied enforcement because local courts come under significant pressure from local Government authorities. Another reason is the serious lack of understanding of international arbitration rules and conventions. Much in depth research is needed to find out how dispute settlement by various ADR methods particularly arbitration could be promoted. Various business organizations, international development agencies, national professional organizations and regional organizations in Asia could make valuable contributions in this regard.

Traditionally International Commercial arbitration has been beset with many problems. My research work has addressed all those issues and problems, which are the main impediments because of which the foreign investors are reluctant to invest in Pakistan. The question is that why foreign investors are hesitant to come to Pakistan? The answer is that there is no proper legislation in our domestic law to deal with foreign arbitration so as to remove the misgivings and bad perceptions of foreign investors about the litigation system of Pakistan. There are many cultural, legal, institutional, educational hurdles in sub-continent particularly in Pakistan that obstruct foreign investment and

trade. My thesis statement has dealt with all those points that foreign investors would definitely come to Pakistan for investment when a proper law concerning international arbitration is enacted in Pakistan, which will pave the way for foreign investors to invest particularly in the field of Energy.

Public international law judicial forums that arbitrate disputes amongst the states are extremely important forums but are undermined on account of lack of familiarity. Although the permanent forums are few in number, the provisions in various treaties that can create a forum upon request are in abundance. They are not as visible on the commercial radar of lawyers and judges as are commercial forums such as LCIA or ICC. But that should not be the basis to undermine them. The relevant public officer are, often, not familiar with these provisions or they are overlooked. In fact the states should examine the possibility of using them. Their familiarity would generate greater interest in the legal and judicial community of all states.

States should consider inclusion of elements of public international law while carrying out training programmes of judges in their states. Senior judges having administrative powers over their judicial organs should take proactive approach to familiarize existing judges with international law. Furthermore, they should include propositions of international law in the training of the upcoming judges. That way, we shall collectively prepare a human resource that would be having a more rationale, logical and solution oriented approach towards resolving international disagreements and disputes.

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