CHALLENGING OF AN ARBITRAL AWARD

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Submitted By

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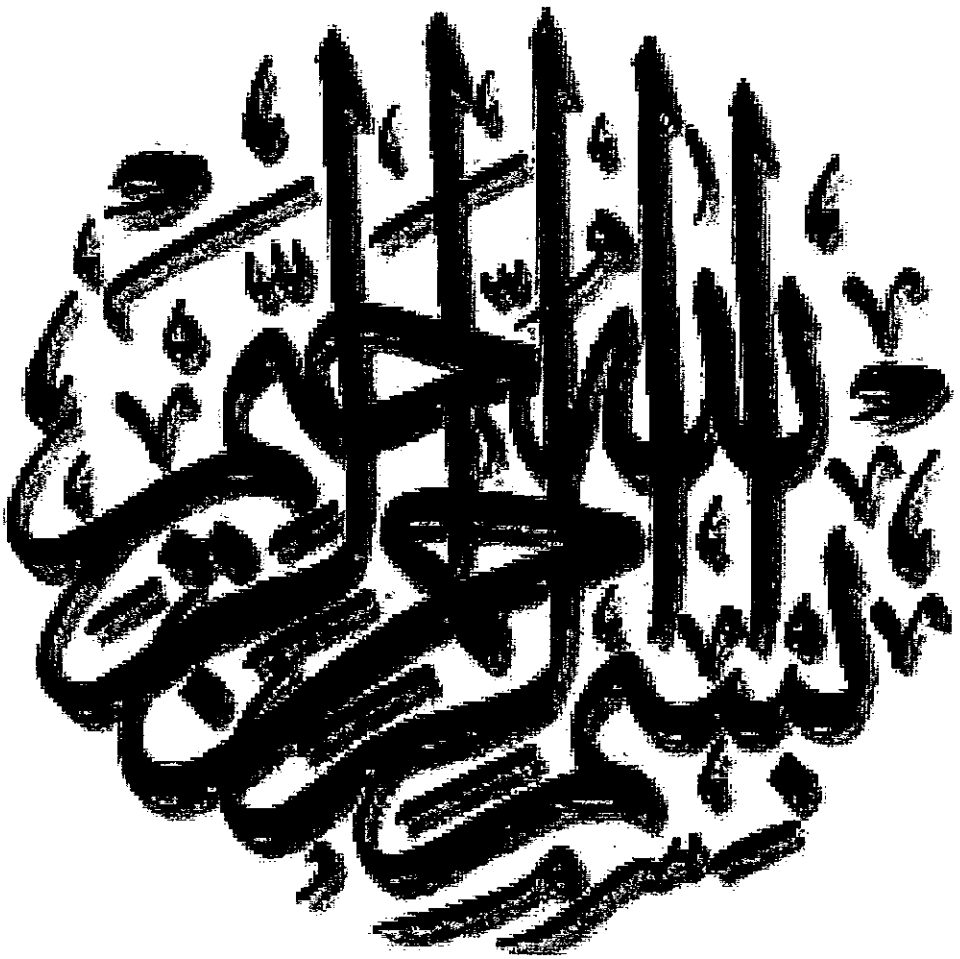

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Dedication to

This Research Work is Dedicated to my Parents

ABSTRACT

In simple term, Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons instead of by court.

Arbitration was facilitated by the two Hague Conventions were concluded in 1899 and in 1907; both entitled the Hague Conventions for the Pacific Settlement of Disputes. These conventions created the permanent Court of Arbitration which still exist and functions today. In the late 19th century and at the beginning of the 20th century, the development of modern international arbitration began. However it was based on national courts.

Arbitration system in the world developed with the lightning speed. Every jurisdiction of the world struggled to make the arbitration system more effective, efficient and transparent. Arbitration system has so many advantages therefore parties to the disputes give preference to the arbitration rather than court system. In arbitration disputant parties appoint the arbitrators according to their own choice. If any party has doubt on the impartiality of the arbitrators they can make an application for the removal of that arbitrator. Arbitrators after completion of hearing of both the parties give their decision that is called an award. Award passed by the arbitral tribunal is duly signed by the arbitrators and if required is registered. Courts are required under law to treat the award in the same manner as the local judgment or order of the court. After passing an award the parties who are aggrieved from that award if feel that award is passed against any law they can challenge the award to stop its enforcement. Grounds for challenging an award are available in the laws that deal with the arbitration.

In Pakistan the laws that deal with arbitration are not according to the needs of the day. Still we follow the law that is obsolete and is badly in needs of reforms. Arbitration Act, 1940 is not sufficient to make the arbitration system effective, efficient to meet the 21st century challenges. Arbitration after passing an award also takes a long time for its enforcement. Some special laws are required for the enforcement and recognition of foreign arbitral award. To make all these things easy some new legislation is required to promote the foreign investment in Pakistan that has an imperative role to enhance the economy of any country.

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PREFACE

This thesis is an attempt to introduce the laws related to the arbitration in Pakistan and in other jurisdiction of the world. It also elaborates the origin and history of the arbitration. This research paper is divided into four chapters. Chapter 1 comprises on the detail definition, history, object, and kinds of the arbitration. Chapter 2 overviews on the introduction of an arbitration award, making of an award, kinds and grounds for challenging the foreign arbitral award. Chapter 3 focuses on the laws available in Pakistan to deal with arbitration. The domestic laws of Pakistan and international treaties and conventions that deal with arbitration have been discussed in a detail in this chapter. The last chapter contains the net conclusion of this paper and also includes the proposal for reforms in the arbitration laws.

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LIST OF ABBRIVATIONS

ADR	Alternate Dispute Resolution
ECO	Economic Cooperation Organization
GATT	General Agreement on Trade and Tariff
IBRD	International Bank for Reconstruction and Development
ICSID	International Centre for Settlement of International Dispute
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
IMF	International Monetary Fund
LCIA	London Court of International Arbitration
MIGA	Multilateral Investment Guarantee Agency
NEC	National Economic Council
NFC	National Financial Council
NYC	New York Convention
REAO	Recognition and Enforcement Agreement Ordinance
SAARC	South Asian Association for Regional Cooperation
UNICTRAL	United Nation Convention on International Trade Law
UNDP	United Nation Development Program
WTO	World Trade Organization
WIPO	World International Property Organization

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CHAPTER – I

Introduction

People business together always face various commercial disputes arise from different issues, from time to time. Facts and figures and personal experiences prove that there exist no societies in which individuals or social organizations do not face differences or disputes on various issues. Mostly, there are some laws and regulations in every society to settle the disputes arise between the individuals and the organizations. Besides other ways to settle the dispute the one well known method is the settlement of the disputes through arbitration.

In this chapter the detail introduction of the Arbitration, International Arbitration, its origin, history and principles shave been given in detail. In simple term Arbitration is the generic term for a form of binding disputes resolution outside the national courts system. It is equally so for domestic and international arbitration. Arbitration is known as the private or settlement of a dispute, through an impartial third party. Usually, an arbitration hearing uses or involves an individual arbitrator or tribunal; which most of the time, through various legal systems, consists of different number of arbitrators and in order to avoid a tie or to get definite result, such legal systems suggest to have an odd number in the tribunal.

Similarly, International Commercial Arbitration is the way of settling business issues between or amongst parties of different countries through one or more arbitrators instead of

courts. Usually, the arbitration clause is presented to parties through business agreement or the contract, and mostly the decision through arbitration is binding by nature.

Hague Conventions, which were entitled for the pacific settlement of disputes, concluded in 1899 and 1907, facilitated the process of arbitration. These conventions established the permanent Court of Arbitration which still exists and functions today. Modern international arbitrations started flourishing in the late 19th century and in the early years of 20th century.

Arbitration system in the world developed with the lighting speed. The progress of national arbitration laws to the recent parameter of international commercial arbitration has been evidence in much legal systems. In England the arbitration system was adopted in 1698. In France, the arbitration law was incorporated in the Code of Civil Procedure 1806. While for United States the first federal arbitration legislation was the federal arbitration Act 1925.

The UNICITRAL Rules deals with every aspect of arbitration from the formation of the tribunal to rendering an award. These rules were made with the intention to provide the guidance and flexibility for the best operation of the arbitration. These rules were made to be applicable in the developed and developing countries and common law and civil law jurisdictions.

The rules of world trade and commercial activity are being continuously refined and transparent. The most important and effective method of dispute resolution is international

arbitration. The backbone of commercial arbitration is the enforcement, with equitable redress for aggrieved party on the grounds of their compelling objections and justification to challenge the arbitral award.

An Arbitral Award is basically the decision rendered by the arbitral panel which finally determines the issues submitted to it. Section 35 of the Arbitration and Conciliation Act 1996 of India states:

> "an arbitral award shall be final and binding on the parties and persons claiming under them".

Thus an arbitral award becomes immediately enforceable unless challenged under Section 34.

In arbitration if the party to the case is not satisfied is entitled to challenge the arbitral award passed by the arbitrators. There are grounds available in the law to challenge the arbitral award. The major issue in the arbitration system is discussed in the next chapter, still it is very difficult and time consuming to discuss all the aspects of the implementation of the International Arbitral Award.

Section 16 of the Arbitration Act, 1899 (repealed by Arbitration Act, 1940) the award is enforceable like decree. Earlier under the Arbitration Act, 1940 an award had to be recorded in the court to make it the Rule of Court. Objection from the parties were invited, but if no objections were registered or were sustained, the court used to pass a judgment in form of award and then it was converted in to decree for enforcement, yet the process of

implementation of the arbitral award is complicated and time taking. It is the need of the day to reform all those laws which deal with the enforcement of the international arbitral award for the equitable redress of the aggrieved party.

Like other jurisdictions, in Pakistan laws associated with implementation of arbitral award are also not according to the need of the day. Formally, there does not exit any recognized arbitration body or national institutional rule or organization in Pakistan. The Arbitration Act 1940, which is currently applicable here, is not according to the UNCITRAL Model. The bill was presented in the National Assembly on 27 April, 2009, for the re-enforcement of the new arbitration law, rooted on the model law of UNCITRAL; but unfortunately the bill is still under consideration.

Pakistan became the original signatory of the UN in 1958, and after 47 years in July 14, 2005, it officially propagated the Recognition and Enforcement Agreement Ordinance 2005 (REAO), which replaced the previously applied Arbitration Act 1937. It Act was based on the clauses of the Geneva Protocol on Arbitration 1923 and the Geneva Conventions on the Execution of Foreign Arbitral Awards of 1927.

All these laws available in Pakistan and in other jurisdiction of the world are not sufficient for the implementation of the international arbitral award.

1.1 What is Arbitration?

According to Lew Loukas:

> "Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons instead of by court"[1].

Now a days, it is very frequent to use an arbitration process to settle international trade disputes. As a matter of fact, an arbitration clause has become the part of most of the international contracts. Making arbitration, instead of court proceedings, is very common form of dispute resolution for trade transactions. According to one account, almost 90% of different types of international transactions contain arbitration clauses[2].

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties choose for a private dispute resolution procedure instead of going to court.[3] It is a reference of a dispute to an impartial person or persons, called arbitrators, for a decision or award based on evidence and arguments presented by the disputants. The parties involved usually agree to resort to arbitration in lieu of court proceedings to resolve an existing

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[1] Julian D M Lew Loukas A Misteliess Stefan M Kroll, *Comparative International Commercial Arbitration,* (Kluwer Law International New York 2003). 3.

[2] Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules.*, Vol. 49, No. 5. (Duck Law Journal March, 2000) p 4. Available at: http://www.jstor.org/stable/1373012 (accessed 1 Nov, 2010).

[3] WIPO Arbitration and Mediation Center, A Guide to Wipo. Available at: http://www.wipo.int/amc (Accessed 12 Oct, 2010).

dispute or any grievance that may arise between them.[4] Arbitration may sometimes be compelled by law, particularly in connection with labor disputes involving public employees or employees of private companies invested with a public interest, such as utilities or railroads.[5] A tribunal may consist of any number of arbitrators though some legal systems insist on an odd number for obvious reasons of wishing to avoid a tie. Mostly one or three are the numbers of arbitrators. In case of even number of arbitrators an Umpire is nominated to resolve the issue in case of tie.[6]

An Arbitral Award is the decision rendered by the Arbitral Tribunal which finally determines the issues submitted to it. Section 35 of the Arbitration and Conciliation Act 1996 states that an arbitral award shall be final and binding on the parties and persons claiming under them. Thus an arbitral award becomes immediately enforceable unless challenged under Section 34.[7]

Most arbitral awards are voluntarily complied with and do not require judicial enforcement. It is only if an arbitral award can be adequately enforced, however, that a successful claimant can ensure that it will actually recover the damages awarded it.[8]

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[4] Vincent P. Crawford, On Compulsory-Arbitration Schemes, Vol. 87, No. 1. (The University of Chicago Press, Feb., 1979). Available at: http://www.jstor.org/stable/1832213 (1 Nov, 2010).
[5] Lowenfeld, Andreas F and Collins, Daniel G. "Arbitration." Microsoft® Encarta® 2009 [DV D]. Redmond, WA: Microsoft Corporation, 2008.
[6] Ibid.
[7] Ashok Sharma, *Enforcement of Arbitral Award Difficulties Experienced.*. (New Delhi, December 2005). Available at: http://www.sharmalawco.in/...../Enforcemment%200F%20AWARDS%5B1%d..... (accessed 20 Oct, 2010).
[8] R. Doak Bishop King & Spalding, *Enforcement of Foreign Arbitral Awards.* Available at: http://www.kslaw.com/library/pdf/bishop6.pdf (accessed 8 Oct, 2010).

After passing the award the most difficult and time consuming process is the enforcement of the arbitral award. For this purpose many laws have been made and amended old one but couldn't achieve the said purpose. New York Convention was passed in 1958 to make the arbitration system more effective and transparent. Above convention couldn't achieve this object therefore, in 1958 UNICTRAL Model Laws have been passed that again revised in 2006[9]. The main focus in these laws and conventions were the enforcement of the Arbitral award.[10]

The Draft Convention on the Enforcement of Arbitration Award was also introduced in May, 2008 to provide a fair and transparent system for the proper implementation of the arbitral award.[11] After the 50 years of the New York Convention this Draft was introduced because many provisions of the New York Convention were needed to be added, many were required to be deleted and many were required aligned for the facilities of the disputed parties. The object of the introduction of the Draft Convention on the Enforcement of the International Arbitral award to fulfill the shortcoming of the New York Convention 1958.[12] The provisions available in the New York Convention and in the UNICTRAL Model Laws 1985

[9] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (accessed 15 Oct, 2010).

[10] Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards Explanatory Note, (May,* 2008). Available at: http://www.arbitration-icca.org/media/0/12133703697430/explanatory_note_ajb_rev06.pdf (accessed 12 Jan, 2010).

[11] By Stephanie Cohen, The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards. Available at: www.arbitration-icca.org/.../hypothetical_draft_convention_ajbrev06.pdf (accessed 20 Oct, 2010).

[12] For detail of the New York Convention 1958, visit http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf (accessed 18 Oct, 2010).

(revised 2006)[13] are almost same. The Hypothetical Draft Convention on the International Agreement sand Awards also build on the structure and concepts of the New York Convention.[14] After discussing these modern laws that have been made for the enforcement of the International Arbitral Awards are not sufficient to fulfill the lacuna of the New York Convention 1958 and UNICTRAL Model Laws 1985 (revised 2006) for the enforcement of the arbitral award. Amendments and reformations are required to provide the adequate remedy to the aggrieved party.

1.2 Kinds of Arbitration

It is always assumed that arbitration process is actually the replacement of judicial machinery, but as a matter of fact it is an alternative procedure to litigation and it exists side by side.[15] It has two kinds:

i- Ad hoc Arbitration

ii- Institutional Arbitration

Both are being discussed in detail.

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[13] UNICTRAL Model Laws. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf (accessed 18 Oct, 2010).

[14] Ibid.

[15] Julian D M Lew Loukas A Mistelies Stefan M Kroll, *Comparative International Commercial Arbitration,* (Kluwer Law International New York 2003). 3

1.2.1 Ad hoc Arbitration

An ad hoc arbitration is not directed by any institution or organization an thus, the parties themselves determine all features of the arbitration process like what should be the number of arbitrators, how to appoint the arbitrators and how to carry out the procedure of arbitration.[16]

It is a process that is not run by others and the involved parties required to make their own measures for appointment of arbitrators and for selection of rules, applicable law, procedures and administrative support.[17] When the parties fail to agree on these issues for example parties are only agree to settle their dispute through arbitration or on a nominated city then the provisions of the law of that nominated place will be applicable.[18] Designation of the place of arbitration is sufficient for the further process that how to appoint the arbitral tribunal, how the proceeding will be carried, out and most important is how the award will be enforced. All these rules and regulations for the settlement of disputes will be adopted of the designated place.[19]

The ad hoc arbitration is independent from the institution, but still an institution may be involved for the selection of the arbitrators. For the appointment of the arbitrators specific

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[16] Ad hoc and Institutional Arbitration, Available at: http://www.legalserviceindia.com/article/23_civil_laws.com (accessed 12 Oct, 2010).
[17] Harry L Arkin, International Ad hoc Arbitration A practical Alternative. Available at: http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/ibl15&div=6&id=&page= (accessed 20 Dec, 2010).
[18] Julian D M Lew Loukas A Mistelies Stefan M Kroll, *Comparative International Commercial Arbitration,* (Kluwer Law International New York 2003) 623.
[19] Mr Carrow, Ad hoc Arbitration. Available at: http://www.carrow.com/ad-hoc.html (accessed 12 Oct, 2010).

institutions are available. Parties always give preference to select the ad hoc arbitration because they wish to have control of the procedure and the mechanism rather than to be subjected to institutional administration or control. Ad hoc arbitration cost less as parties carry out the process.[20]

1.2.2 Institutional Arbitration

After the dispute the foremost thing for the parties to contract is the selection of the appropriate institution. In most of the cases institutions are selected by the default because one party gives suggestions and other is not aware to it.[21] Arbitration institutes conduct an international arbitration, but on the other hand an ad hoc arbitration is not dependent upon any institution or organization, and the parties themselves or their attorneys specified the rules and regulations of arbitration and for the same reason it cost less than institutional arbitration and the rules and regulations are more flexible. Parties to the dispute like ad hoc arbitration, also favor the institutional arbitration because institutions conduct the cases neutrally. Institutional arbitration provides a comfort system to the parties. For example, the ICC has a large secretariat comprising numerous legal experts who give assistance for the settlement of the disputes.[22] In institutional arbitration the parties have no direct contact with the arbitrators. Institutions receive the fee from the parties for the arbitrators. Institutions always remain in touch with the case and give instructions to the arbitrators to focus solely

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[20] An International Arbitration Law Firm, Ad hoc Arbitration. Available at: http://www.internationalarbitrationlaw.com/arbitration-types/ad-hoc (accessed 20 Oct, 2010).
[21] Ibid.
[22] Institutional Arbitration. Available at: http://www.legalserviceindia.com/article/l64-Ad-Hoc-and-Institutional-Arbitration.html

on the substance of the case rather then discuss with the parties a matter that is personal to them.[23]

1.3 ADVANTAGES OF THE ARBITRATION

The advantage of the arbitration is the controversial debates. Some experts have an opinion that it the fair and transparent system for the settlement of the dispute between the parties. And some have an opinion that implementation of the arbitral award is very difficult and time consuming.[24] In arbitration the parties choose the arbitrator of their own choice. Therefore, in very rare cases one of the parties is not agree with the decision. To clear this point it is necessary to discuss the advantages of the arbitration in detail.

1.3.1 Choice of Decision Maker

The well known method for the settlement of the dispute is the national courts. These courts are maintained by the states to facilitate the citizens. In arbitration the parties are agree to withdrawn their disputes from the courts and solve by the arbitration.[25] The first advantage of the settlement of the disputes through arbitration is that the parties of the case choose their

[23] Ibid.,
[24] Robert D Benjamin, *What is Arbitration*... .....
[25] Horacio A. Grigera Naón, Choice-of-law problems in International Commercial Arbitration. Available at: http://www.books.google.com.pk/books?isbn=316145636X- (accessed 20 Feb, 2011).

arbitrators according to their own will.[26] No party has a right to force the other or interfere the choice of decision maker. They are free to choose the ad hoc or institutional arbitration.[27]

1.3.2 Efficiency

Arbitration can usually be heard sooner than the court cases. Whenever the parties want the proceeding of the case may be started. The settlement of the disputes with the involvement of the court is totally dependent on that procedure. Whatever procedure is available parties are bound to follow but, in arbitration no such court procedure is adopted. Arbitrators settle the disputes according to the arbitration rules and regulations.[28]

1.3.3 Privacy

As we said above that courts are maintained by the states, it means they are public while arbitration is private. The arbitration hearing is confidential.[29] In private meeting of the arbitrators the media and public is not allowed to attend. The public does not know about the

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[26] Timmy Chou, Arbitration/Mediation. Available at: http://en.allexperts.com/q/Arbitration-Mediation-908/2008/11/party-harm-its-own.htm (accessed 2 Jan, 2011)
[27] Ibid.
[28] Ibid.
[29] Arthur Mazirow, Esq., CRE, THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION AS COMPARED TO ILINOIS LITIGATION. (Chicago, April 13, 2008). Available at: http://www.cre.org/images/MY08/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_to_Litigation_2_Mazirow.pdf (accessed 22 Dec, 2010).

case between the parties. The final decision is also not published. Only parties are aware about the proceeding of the case.[30]

1.3.4 Conveniences

The hearing of the case is arranged at time and places that suit to the parties and they arrange the hearing place according to their conveniences. This facility is not available in the court procedure to settle the disputes.[31]

1.3.5 Finality

Generally there is no right of appeal in the arbitration. In arbitration parties are to be agreed on the arbitral award. The decision of the arbitrators is final and binding on the parties. Court has a power to set aside or remit an award. Parties can also challenge the arbitral award but can't go in to appeal.[32]

The above advantages describe the value of the arbitration system. Arbitrations system is very simple and transparent but the main issue discussed in this thesis is that the implementation of the international arbitral award is very difficult and time consuming. Challenging of the Arbitral Award is an equitable remedy for the aggrieved party but the

[30] Ibid.
[31] Ibid.,
[32] Ibid.,

laws, rules and regulations that deal with the challenging of the award are not sufficient to provide the remedy to the aggrieved party.

1.4 International Arbitration

The rules of world trade and commercial activity are being continuously refined and transparent. But the possibility of disputes never is ruled out. The whole world is innovated and modern dispute resolution mechanisms are developed. The most important and effective method of dispute resolution is international arbitration. The backbone of commercial arbitration is the enforcement, with equitable redress for aggrieved party on the basis of their valid objection and grounds to challenging the arbitral award.[33]

International arbitration is an esteemed system for the concluding and obligatory resolution of differences or arguments, related to an agreement or contract or any other issues linked with an international factors, through an impartial or independent arbitrators, in line with mechanism, infrastructure and both legal and non-legal substantive standards by the parties either directly or indirectly.[34]

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[33]R. Doak Bishop King & Spalding Houston, A PRACTICAL GUIDE FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES. Available at: http://www.kslaw.com/library/pdf/bishop9.pdf (accessed 12 Jan, 2011).

[34] Julian D M Lew Loukas A Mistelies Stefan M Kroll, *Comparative International Commercial Arbitration*, (Kluwer Law International New York 2003). 623.

The United Nations has in the past few years made a number of contributions to the development of international arbitration. A study of arbitration conventions was published under the title *"Systematic Survey of Treaties for the Pacific Settlement of Disputes 1928-1948".*[35] A collection of reports of international arbitral decisions is being published in the series, Reports of International Arbitral Awards, the fourth volume of which recently appeared.[36]

International arbitration is the settlement by a mutually acceptable third party of disputes among sovereign states. Modern international arbitration began with the conclusion of Jay's Treaty (1794) by Great Britain and the United States.[37] Numerous disputes were arbitrated during the 19th century, many involving these two countries. The most important disputes were settled in the Treaty of Ghent (1814) and in various treaties defining fishing rights in specific areas. The Treaty of Washington (1871)[38] embodied arbitrations of the San Juan Boundary Dispute and of claims arising from the American Civil War. In Europe, the first important development in international arbitration in modern times was the Hague Conference of 1899,[39] which resulted in the creation of the Permanent Court of Arbitration.

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[35] By A. J. van den Berg, International Commercial Arbitration: Important Contemporary Questions. Available at: http://www.books.google.com.pk/books?isbn=9041122192- (accessed 12, Dec, 2010).

[36] Kenneth S. Carlston, *Codification of International Arbitral Procedure,* Vol. 47, No. 2 (American Law Journal Apr, 1953) 2. Available at: http://www.jstor.org/stable/2194821 (accessed 1 Nov, 2010).

[37] Treaty of 1794 between the Passamaquoddy Tribe and the Commonwealth of Massachusetts Bangor, January, 1834. Available at: http://www.wabanaki.com/1794_treaty.htm (accessed 14 Oct, 2010).

[38] W. Stewart WALLACE, *The Encyclopedia of Canada,* (Vol. VI, Toronto, University Associates of Canada, 1948). Available at: http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/TreatyofWashington-CanadianHistory.htm (accessed 12 Dec, 2010).

[39] United States History, Hague Conference 1899 and 1907. Available at: http://www.u-s-history.com/pages/h989.html (accessed 12 Dec, 2010).

Although reluctant to participate in many early international treaties, the U.S. continued to make individual arbitration treaties, especially in the years between World Wars I and II.[40]

The ICCA is an organization that promotes international arbitration and other forms of ADR[41]. Today, international arbitration may be used to settle boundary disputes, controversies about interpretation of international agreements, and claims arising out of wartime damage. International commercial arbitration involves private parties and/or governments engaging in commercial activity. The International Bank for Reconstruction and Development, for example, sponsors the International Center for Settlement of Investment Disputes, to hear disputes between private investors and the countries in which their investments were made.[42]

International commercial arbitration, like its counterpart in the U.S., proceeds on the basis of an arbitration clause contained in an export-import, investment, or similar contract between persons from different countries. Since neither party wishes to have future disputes adjudicated in the courts of the other party, arbitration in a neutral forum is a common solution. The arbitration clause usually provides for the manner of selecting arbitrators;

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[40] Carl E. Van Horn, Herbert A. Schaffner, Work in America: an encyclopedia of history, policy, and society, Availabel at: http://www.books.google.com.pk/books?isbn=1576076768- (accessed 12 Jan, 2010).

[41] Salman Raval, Alternative Dispute Resolution in Pakistan, pub, Jun 2008, Available at: http://www.law.hyv.edu/students/index.htm (accessed 15 Oct, 2010).

[42] Ibid.,

sometimes provision is made for arbitration to be conducted under the supervision of an institution such as an international trade association.[43]

International arbitration is a established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international elements, by independent arbitrators, in accordance with procedure, structures and substantive legal or non legal standards chosen directly or indirectly y the parties.[44]

Some countries, including the United States, the former Soviet republics, and all other major commercial nations outside Latin America, are parties to the United Nations Convention on the Recognition of Foreign Arbitral Awards. This convention enforces arbitral awards rendered in any contracting state, regardless of the nationalities of the parties to the dispute. Agreements to arbitrate are also enforceable, and a court will generally not hear a dispute that is governed by a valid agreement to arbitrate between persons from different contracting states.[45]

Typically, international arbitrations are heard before three arbitrators, one appointed by each side and the third by mutual agreement or by designation of an administering body. Most arbitrators are jurists and are expected to support their award by full opinions. Centers

[43] Ibid.,
[44] Julian D M Lew Loukas A Mistelies Stefan M Kroll, *Comparative International Commercial Arbitration,* (Kluwer Law International, New York 2003). 18.
[45] Ibid.,

for international arbitration are London, Paris, Zürich, Geneva, New York, Tokyo, Hong Kong, and Stockholm.[46]

[46] Ibid.,

1.5 History of Arbitration

Arbitration is an old method of settling disputes between people and even disputes between different nations.[47] The history of arbitration began with the conclusion of Jay's Treaty (1794) by Great Britain and the United States[48] but, development in the international arbitration began at the beginning of 19th and 20th century. However, it was on the based on national law.[49]

As world trade expanded, the need to create a mechanism for international recognition and enforcement of both arbitration agreements and awards in relation to international commercial agreements was of paramount importance. To facilitate arbitration two Hague Conventions were concluded in 1899 and in 1907, both entitled The Hague Convention for the Pacific Settlement of International Disputes. These conventions created the Permanent Court of Arbitration which still exists and functions today.[50]

The ICC was established by the world's business community, in 1919, and since then it continues to express the international business community.[51] For the settlement of the commercial disputes, either between parties or between different countries, the ICC established a neutral and independent arbitration system in the form of court of International

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[47] Robert V. Massey, Jr. *History of Arbitrations and Grievance Arbitration in theUnited States,* Available at: http:// www.kslaw.com/library/pdf/bishop6.pdf (accessed 10 Oct, 2010)

[48] Treaty of 1794 between the Passamaquoddy Tribe and the Commonwealth of Massachusetts Bangor, January, 1834. Available at: http://www.wabanaki.com/1794_treaty.htm (Accessed 14 Oct, 2010).

[49] Julian D M Lew Loukas A Mistelies Stefan m Kroll, *Comparative International Commercial Arbitration,* (Kluwer Law International, New York 2003). 18.

[50] Ibid.,

[51] International Chamber of Commerce Arbitration. Available at: http://www.iccwbo.org/uploadedFiles/Court/Arbitration/request_arbi.pdf (accessed 12 Oct, 2010)s

Arbitration, in 1923.[52] The International Court of Arbitration has an imperative role to settle the dispute arises from the international arbitration. In the year 2007 ICC received almost 600 requests for the arbitration from all over the world. America is the second number party who filed the cases to the ICC for settlement international dispute resolution.[53] Since the early 1920 the ICC has been playing a major role in upgrading arbitration, which not only settled the international business disputes, but it also supported the international rules and regulations to carry out the process.[54]

The major catalyst for the development of an international arbitration regime was the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[55]

Arbitration process is used from ages to settle down the business controversies and disputes between people and countries. The parties utilize the process after the controversies arise or adopt it to avoid future conflicts and for the same reason they include the arbitration clause in their contracts.[56] A neutral third party, either a group or an individual, discusses all the arguments and after great mediation it proposes suggestions to resolve the dispute between

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[52] International Court of Arbitration. Available at: http://www.iccwbo.org/court/ (accessed 14 Oct, 2010).
[53] International Court of Arbitration, ICC Arbitration Today: Bridging the Cultural Gap in International Arbitration. (Monday, September 15, 2008, New York). Available at: http://www.iccwbo.org/uploadedFiles/Court/Arbitration/News/September_NewYork.pdf (accessed 20 Jan, 2011).
[54] Anne Marie Whitesell, How does the International Chamber of Commerce (ICC) Contribute to Capacity Building? (12 December, 2005, Paris). Available at: http://www.oecd.org/dataoecd/22/46/37215823.pdf (accessed 20 Oct, 2010).
[55] United Nations Commission on International Trade Law, 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (accessed 15 Oct, 2010).
[56] Jean Murry, International Arbitration. Available at: http://biztaxlaw.about.eom/od/glossarya/g/arbitration.htm (accessed 12 Dec, 2010).

contracting parties. It the contracting parties are not able to resolve the disputes through mediation, they submit their issues to binding arbitration by an impartial and unprejudiced arbitrator, which is selected either by the parties or by an arbitration agency. The arbitrator not only works as a judge, but also acts as a jury, and after hearing all aspects of disputes, it renders its decision which is called an award. The parties are bound to agree with the decision which is final and binding in nature.[57]

History proves that both arbitration and mediation have been used to resolve many different kinds of disputes. The disputes can be categorized into three major groups, which are international disputes, commercial disputes and labour disputes. The former president of Bosina, Jimmy Carter, successfully settled the dispute through international mediation. Moreover, the history of renaissance period shows that different countries of Europe were settled by various Catholic Pops and by warring Greek City states, through the process of arbitration.[58] In short, there are many examples of settlement of international conflicts by arbitration.

International efforts to provide a strong infrastructure for long lived universal peace are also incorporated with arbitration. One of the examples of such efforts is the establishment of permanent court of arbitration, which came into existence after many

[57] History of Alternative Dispute Resolution. Available at: http://www.gama.com/HTML/history.html (accessed 12 Oct, 2010).
[58]Global Arbitration Mediation Association (GAMA), History of Alternative Dispute Resolution. Available at: http://www.gama.com/HTML/history.html (accessed 22 Oct, 2010).

international meetings conducted in Hague, between 1899 and 1907.[59] Additionally, Netherland and the evolution of the League of Nations in year 1918, exercised the process of arbitration as one of the ways to settle the disputes.[60]

United States not only contains arbitration clauses in its business and labour contracts, but also prefers the arbitration process as means of dispute resolution; and for the same reason the federal government supported the Inter-state Commerce Act 1887, which contains the arbitration clause for employs of railroad industry.[61] Another example of governmental support for arbitration was in 1925 when Congress passed the Federal Arbitration Act (FAA) which further enhanced the credibility of arbitration and later in the 1991 Civil Rights Act Congress encouraged the use of arbitration in the interpretation of antidiscrimination laws.[62]

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[59] United States History, Hague Conference 1899 and 1907. Available at: http://www.u-s-history.com/pages/h989.html (accessed 12 Dec, 2010).
[60] Ibid.,
[61] Federal Government Interstate Commerce Act 1887 - The First Cleveland Administration. Available at: http://www.foothilltech.org/krenger/american_hist/urbanization/railroad_legislation.pdf (accessed 19 Nov, 2010).
[62] Robert V. Massey, *History of Arbitration and Grievance Arbitration*

The history of the arbitration shows that how many laws, rules and regulations have been made to deal with arbitrations, but all these laws have some deficiency to provide the equitable remedy to the aggrieved party at the time of challenging the award. In Pakistan still we follow the law that deal with arbitration is obsolete and is badly needs to reforms. The domestic laws of Pakistan are not sufficient to meet the 21st century challenges in the field of arbitration.

CHAPTER 2

CHALLENGING OF THE INTERNATIONAL ARBITRAL AWARD

From the earliest times, it has been recognized that justice delayed is justice denied. Such recognition has in turn given rise both to statutory limitations on the time within which civil claims can be prosecuted and to procedural limitations on the time within which a particular step in an action must be taken. To challenge the arbitral award by an aggrieved party is an equitable remedy that has been filed in the appropriate time.

The international arbitration rules lay down the procedure to challenge the arbitral award by an aggrieved party. In the world the UNCITRAL model rules are available to deal with the International trade. These laws also describe the procedure of arbitration. The value of arbitration as a method of settling disputes arising in the centre of international commercial relations. It is natural that if there are relations among the people there would be disputes.

UNICTRAL rules have been prepared after the extensive consultation with arbitral institution and centers of international commercial arbitration. After consultation with an expert were adopted by the UNICTRAL at its ninth session 1 after due deliberation. Article 1 of the UNICTRAL rules defined the arbitration. Article 2 lays down the procedure to notices to the respondent party. After noticing the respondent the second step is the appointment of the arbitrators. Arbitrators shall be appointed on the choice of the parties. Arbitrators

appointed by the parties shall appoint the third arbitrator who will exercise his duty as a presiding officer. If within thirty days after the receipt of the Party notification the second party does not appoint the arbitrators then first party will request the appointing authority previously designated by the party to appoint the second arbitrator. If appointing authority also fails to appoint the second arbitrator then party shall request to the sectary general of the permanent court of arbitration to appoint the second arbitrator. After the appointment of the two arbitrators if they are not agreed on the appointment of the presiding arbitrators the appointing authority shall appoint the presiding arbitrators as provided in the article 6 of the UNCITRAL rules. Arbitrators after hearing the case shall pass an order that called an award.

The decision of the arbitrator or arbitrators is called award. It is an instrument which embodies a decision of an arbitrator or arbitrators as regards matter referred to him or them.

After the award has been rendered serious breaches of the arbitrators duties may justify a challenge to the award to have it set aside or annulled, or b a ground to resist enforcement. The lack of independence and, in particular, the partiality of the arbitrator can fall under several of the widely recognized grounds for annulment. At least in extreme cases the tribunal may be considered to be constituted. To challenge the award is the only remedy to the aggrieved party. The aggrieved party after passing the award may apply to the court to set aside the validity of the award. The grounds laid down for challenging an award are often comparable with grounds laid down in the New York Convention 1958 for the purposes of refusing the enforcement.

A challenge procedure is a guarantee that state courts may review the award if a party has a good reason to be dissatisfied or aggrieved with the arbitration and the way in which the award was rendered. This guarantee inspires the confidence of the parties in the arbitration process. An aggrieved party has a right to challenge an arbitral award. There are many provisions available in law to challenge the award on the available grounds. The party who is seeking to challenge an award is required to furnish the full proof to invoke the jurisdiction of the court. Article 34 of the UNICTRAL Model Law unequivocally suggests that judicial review to challenge an award can be based on natural justice and legality grounds. Legality and due process is the pre condition of the arbitration. Breach of these conditions is also a ground to challenge the Award. Absence or invalidity of the arbitration agreement, irregularity in the constitution or appointment of the arbitration tribunal, procedural irregularity and without the jurisdiction of the tribunal is also the grounds to challenge an arbitral award. All these grounds have been discussed in a detail in this chapter.

2.1 WHAT IS AN AWARD?

Before going to discuss the grounds for challenging the award it is necessary to first explain the term award. Award means, a decision on the merits of the disputes.[63] It is also the instrument recording the tribunal decision provisionally or finally determining claim of the

[63] Law on Arbitrtaion, part one- General Provisions, Available at: http://www.hgk.biznet.hr/hgk/fileovi/180.pdf (accessed 16 December, 2010).

parties.[64] The award may concern legal or factual differences between the parties, may involve interpretation of contract term or determining the respective rights and obligations of the parties under the contract.[65] There are several legal consequences associated with the rendering of the various types of award. After passing the final award the tribunal authority expires and tribunal can do no more in respect of the party's differences. Parties come under the law of res-judicata that they cannot bring the case again to the same tribunal on the same subject matter.[66] An award is a decision offering the rights between the parties and which is generally capable of being enforcement under the New York Convention, 1929.[67]

Most arbitral awards are voluntarily complied with and do not required judicial enforcement. It is only if an arbitral award can be adequately enforced, however, that successful claimants can ensure that it will actually recover damages awarded to it.[68] USA court lay down that law regarding the enforcement of arbitration agreements and confirmation of arbitral awards. Court in United States pursues a consistent well articulated policy for the enforcement of the domestic and foreign arbitral award. The major sources in the United States for the enforcement of foreign awards are the 1975 Inter-American Convention on International Arbitration and United Nations Convention on the recognition and enforcement of foreign arbitral awards.[69] In every jurisdiction of the world law is available to deal with international

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[64] Julian D M Lew Loukas A Mistelis Stefan M Kroll, *Comparative International Commercial Arbitration,* (Kluwer Law International New York, 2003). 628.
[65] International law book
[66] Ibid.,
[67] New York Convention 1958.
[68] R. Doak Bishop King & spalding Elaine Martine Hughes & Luce, L.L.p, Enforcement of Foreign Arbitral Award, Available at: http://www.googlebook.com (accessed 15 December, 2010).
[69] Ibid.,

arbitration but no appropriate law is available to grant an equitable remedy to the aggrieved party who challenge an internal arbitral award especially in Pakistan. In Pakistan still we follow the law that is obsolete, if not the law that is inadequate and badly in need of improvements.

Article 31 of the UNICTRAL lays down that when there are three arbitrators, the award or any decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, presiding arbitrator may decide on his own, subject to revision.[70] Many legal systems are involved in international arbitration. Every legal system has its own rules to deal with arbitration in its jurisdiction. This the basic hurdle in the implementation of the international arbitral award because there is no specific procedure to deal with arbitration. This is on the choice of the arbitral tribunal to adopt the any code of law of the any country. In international arbitration the main laws and rules are the UNICTRAL Model Laws and New York Convention 1929, are being followed during the dealing of arbitration.[71]

The award is made in writing and is final and binding on the parties. Before making the final award the arbitral tribunal is entitled to make interim, interlocutory or partial award.[72] The parties undertake to carry out the award without delay. The arbitral tribunal is bound to state the reason upon which the award based. It shall be signed by the arbitrators and also contains the date and place where award is made. If there are three arbitrators and one of them fails to

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[70] United Nation Commission on International Trade Law (UNCITRAL), Arbitration Rules by General Assembly Resolution 31/98. Available at: http://www.unictral.org/pdf/english/text/asrbitration/arb.....rules.pdf- (accessed 12 Oct, 2010).

[71] United Nation Conference on Trade and Development, Dispute Settlement, International Arbitration, Available at: http://www.unctd.org/docs/edminisc.232add39-en.pdf (accessed 8 Nov, 2010).

[72] Ibid.,

sign an award the award states the reason for the absence of the signature. Copies of the award are communicated to the parties by the arbitral tribunal. If the arbitration law of the country where an award has been made is required that the award be filed or registered by the arbitral tribunal. The arbitral tribunal under law is required to fulfill this condition within the period of time required by law.[73]

There is no specific definition of the foreign award and domestic award. The New York Convention 1958 on the Recognition and Enforcement of an arbitral award also does not define the domestic and foreign award.[74] Article 1 (1) of New York Convention 1955 applies only on two circumstances. The first is an award of foreign arbitration means arbitral award is made in the territory of state other than the state where the recognition and enforcement of such award are sought. The other situation is those of an international award is not strictly foreign but not consider as domestic award in the state where their recognition and enforcement are sought.[75] There are many types of an arbitral awards that has been discussed in a detail.

2.2 TYPES OF AN AWARD

Arbitral proceedings are superior then judicial proceedings because disputed parties can receive a final resolution after only one instance in the arbitral proceeding. To make the

[73] Ibid.,
[74] Ibid.,
[75] Journal of International Arbitration, (KLUWER LAW INTERNATIONAL NETHERLAMD, 2008) Available at: http://www.misbank.com/.....o1o6-Nolan-Journal-of-intl-Arbitration.pdf. Also available at: http://www.kluwerlawonline.com (accessed 12 Oct, 2010).

proceedings of the arbitration is the recognition and enforcement of the award otherwise efficiency of the arbitration proceeding will be weakened and frustrated.[76] This is the issue in the world that the enforcement of the internal arbitral award takes a long time.[77] Award is the decision of the arbitral tribunal. [78] Article 32 of the UNICTRAL envisages that before making the final award tribunal is entitled to make interim, interlocutory, or partial award.[79] All awards are decisions of the tribunal but all decisions are not awards. Several decisions of the tribunal aim at only organizing the procedural matters and are rendered without any formality or reasoning. These decisions do not decide any matter between the parties but only make an arrangement for the proceeding, for example, a procedural order may fix the hearing at a place different from the seat of the arbitration or order for the submission of the documents, or indicates to the parties about the issue on which final arguments will be held.[80] Procedural order cannot be challenged. *In Braspetro Oil Services Company v The Management and Implementation Authority of the Great Man-Made River Project 1986 ("Brasoil")* the tribunal passed partial award but Paris Court of Appeal annulled the order on two independent grounds. First it held that the procedural order was effectively an award because its settled the all issues between the parties therefore aggrieved party is entitled to come in to the appeal and second is that the tribunal violated the brasoil's rights of due

[76] Kenneth S. Carlston, *Law Theory of the Arbitration Process*, (Vol. 17, No. 4 Duke University School of Law 1952). Available at: http://www.jstor.org/stable/1190383 (accessed 1 Nov, 2010).
[77] Ibid.,
[78] Ibid.,
[79] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), GENERAL ASSEMBLY RESOLUTION 31/98. Available at: http://www.unctd.org/docs/edminisc.232add39-en.pdf (accessed 8 Nov, 2010).
[80] Julian D M Lew Loukas A Mistelis, Stefan M Kroll, *Comparative International Commercial Arbiotration,* (Kluwer Law International London) 536.

process. Court of Appeal considered this procedural order as an award and annulled it on above two grounds.[81] There are several essential characteristic that distinguish an award from other decisions of an arbitration tribunal. To understand the award from the other decision of the arbitration tribunal it is necessary to fist understand the award.

I. "Award concludes the disputes as to the specific issue determines in the award so that it has res judicata effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;
II. It disposes of parries respective claims;
III. It may be confirmed by recognition and enforcement;
IV. It may be challenged in the courts of the place of arbitration."[82]

All types of awards have been discussed in detail.

2.2.1 Final Award

International Arbitration is now a day's one of the most common dispute resolution methods used in international commercial and international investment matters. There is more swiftness and flexibility in the arbitration proceedings therefore; people give preference to settle their dispute than the court.[83] Arbitration proceeding is very simple and flexible but the most important is the enforcement of an award that is time consuming and difficult to enforce the award in the other jurisdiction where that award is not passed. UNICTRAL rules state in Article 32(1) that the tribunal before making the final award arbitration tribunal is

[81] Ibid.,
[82] Ibid.,
[83] Dr ,Thomas Mark, challenge of an Awards vis-à-vis the finality of International Arbitration, (Award 2010, Souse Uva Lisbon, Portugal). Available at: http://www.consulegis.com/fileod,nin/.../consuiegis-tma-pedro-susa-vva.pdf (accessed 12 December, 2010).

entitled to make interim, interlocutory, or partial award.[84] Article 2(iii) of ICC Rules refers to interim, final and partial awards without any definition.[85] Final award is an award that ends the proceeding of the case and settles the claim between the parties. Article 32(1) of the Model Laws state that "the arbitral proceedings are terminated by the final award". After passing the final award the authority of the tribunal ends and the arbitrators become *functus officio*.[86] Final award may put an end to a part of the dispute or the entire proceeding. Final award can be challenged at the courts of the place of the arbitration or may be enforced anywhere in the world. Award is enforceable in the world. Challenging of an award is a long procedure.[87]

2.2.2 Partial award

Partial award is may be a parts of the claims submitted to the tribunal is appropriate for resolution at an earlier stage while other issues require further submission and assessment. Partial award is precondition to deciding whether a statute barred. The parties can agree that the tribunal determines a specific issue rendering a partial award. Partial award is a ruling for example, on issues of jurisdiction, applicable law, or liability or quantification of the damages. Article 26(7) LCIA Rules provides that "A tribunal may make separate awards on

[84] Unitral
[85] Article 2(iii) of ICC Arbitration Award 1971-85.
[86] Ibid.,
[87] Ibid.,

different issues at different times. Such award shall have the same status and effect as any other award."[88]

No arbitration law defines a partial award. All arbitration laws only explain that the partial award is contrast with the final award which resolves all the issues in the arbitration. If partial award is made it, terminates the proceeding in respect of the specific issues decided, it is partial in the context of the overall dispute referred to arbitration. Every arbitration law makes the partial award final and applicable for the enforcement.[89]

2.2.3 Interim Award

According to the UNCITRAL Model laws that deal with international commercial arbitration lays down that interim, interlocutory or provisional awards are those which does not definitively determines an issue before the tribunal.[90] Interim award is opposite to final award. There is no final definition of the interim award is available in the final text of the Model Laws. The reason is that in practice the term interim award is often used interchangeably with that of partial award. Interim awards do not settle a separate part of the proceeding finally.[91] Article 26(2) of the UNICTRAL Rules state that interim relief to the

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[88] Article 26(7) LCIA Rules Available at: http://www.jus.uio.no/lm/lcia.arbitration.rules.1998/ (accessed 14 March, 2011).
[89] Alexis Mourre, Challenges: Do Institutional Rules matter? (LKluwer Law International). Available at: http://kluwer.practicesource.com/blog/tag/partial-award/ (accessed 20 March, 2011).
[90] UNCITRAL Model Law on International Commercial Arbitration 1985,With Amendments as International Commercial Arbitration Adopted in 2006. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (accessed 15 Feb, 2011).
[91] Ibid.,

party can be granted in the form of the interim award.[92] Interim award like other awards is not an enforceable but, there are different views regarding the enforceability of the interim award.[93] In practice some courts have enforce it like other awards. Article 7 (1) of the United Nation Arbitration and Conciliation Act, 1996 states that arbitral tribunal with the consent of the parties can pass an interim award.[94] This view supports the enforceability of the interim award. There are different findings of the judges regarding the interim award. New York Convention laws are silent on the enforceability of the interim award.

2.2.4 Additional Award

Award is the decision of an arbitral tribunal. Additional award is also a type of an award. In additional award the tribunal addresses the issues that failed to determine during the proceeding. It is available in the arbitration laws that the arbitral tribunal has discretion to pass an additional award.[95] Article 37 of the UNCTAL Model Laws lays down that after receiving the request from the party for the additional award the arbitral tribunal is required to pass an additional award within sixty days without any further hearing and evidence.[96]

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[92] Article 26(2), UNICTRAL Model Laws. Available at: http://www.unictral.org/pdf/english/text/asrbitration/arb.:.....rules.pdf- (accessed 12 Oct, 2010).
[93] Ibid.,
[94] United Nation Arbitration and Conciliation Act, 1996, ACT NO. 26 OF 1996 [16th August, 1996.]. Available at: http://www.netlawman.co.in/acts/arbitration-conciliation-act-1996.php (accessed 20 Feb, 2011).
[95] Ibid.,
[96] Artcicel 37, UNICTRAL Model Laws. Available at: http://www.unictral.org/pdf/english/text/asrbitration/arb.....rules.pdf- (accessed 12 Oct, 2010).

2.3 MAKING OF AN AWARD

The procedure to making an arbitral award is available in the laws of the Arbitration. The first is that it must be made by the tribunal with uniformity.[97] When there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.[98]

The award is normally made after the deliberations of the tribunal but these are not communicated to the parties to the disputes. Awards are the result of unanimous or majority vote while occasionally dissenting or concurring opinions may be included in the award.[99] Arbitrations rules lay down that after passing an award the notification to it should be given to the parties. In some countries the award is required to be registered or deposited with national courts. After passing an award it must be communicated to the parties. In some countries the registration is necessary and in others the registration is optional and serves the purpose of recognition by the courts.[100] Notification of the award to the parties is essential. If the parties after notification want to challenge the award there time limit normally runs on the date of the communication of the award to the parties.[101] Laws that provide for

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[97]Ibid.,

[98] Article 31 of the UNICTRAL Model Laws envisages that, the award is made with the majority of the arbitrators and if there is no majority than the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal. For detail visit, *UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) UNCITRAL,* Arbitration Rules GENERAL ASSEMBLY RESOLUTION 31/98. Available at: http://www.unictral.org/pdf/english/text/asrbitration/arb.....rules.pdf- (accessed 12 Oct, 2010).

[99] Geoffrey M. Beresford Hartwell, The Reasoned Award in International Arbitration. Available at: http://www.hartwell.demon.co.uk/intaward.htm (accessed 26 March, 2011).

[100] Article 32(7), UNICTRAL Model Laws.....

[101] Article 32 of the UNICTRAL Model Laws. Available at: http://www.unictral.org/pdf/english/text/asrbitration/arb.....rules.pdf- (accessed 12 Oct, 2010).

notification are not normally set a time for it to happen. It is generally happen promptly and conditional on payment of cost.

2.4 CONTENTS OF AN AWARD

Award is the final decision of the arbitration tribunal.[102] As we discussed the types and the making of an award its contents are also discussed in this chapter in detail. The structure, form and detail of the award depend on the legal style of the draftsman and the composition of the arbitral tribunal and applicable laws and rules. Article 31 of the UNICTRAL Model Laws contains some important list of the contents of an arbitral award that is as follows:-

i. "Award should be signed and in writing;
ii. Award should state the reasons upon which it is based;
iii. Award should state the date and the place of arbitration; and
iv. Award passed by arbitration is required to be delivered to the parties to the dispute."[103]

The important contents of the award are also to record the claims and defenses of the parties to the dispute. The contents that have been envisaged in the Article 31 of the UNICTRAL Model Laws a typical award in international commercial arbitration will invariably contain:

a. "The procedural background detailing the substantive submission of the parties, and the evidence on which they have relied;
b. The basis for the jurisdiction of tribunal;
c. Factual background to the arbitration, including relationship between the parties, their respective business and the essential terms of their agreements;
d. Nature of the dispute and the respective position of the parties;
e. Issues for determination by the tribunal;
f. Relief sought by the parties;
g. Tribunal analyses and conclusion on each issue listed;
h. Award of the tribunal with declaration and order, decision on damages interest and

[102] Ibid.,
[103] Julian D M Lew Loukas A Mistelis Stefan, *Comparative International Commercial Arbitration*.....P 644.

cost."[104]

2.5 GROUNDS FOR CHALLNAGING AN ARBITRAL AWRAD

The subject of international arbitration is becoming more and more interesting, and possibly, in view of its latest developments, somewhat more difficult to realize. The idea of arbitration, whether between individuals or nations,

In the municipal State these rights are established or de-fined by municipal law, either written or unwritten, and they are compulsory in the sense that the aggrieved individual may appeal to the power of the State to compel a recognition of his rights or a redress for his wrongs.[105]

The decision of an arbitral tribunal is termed as arbitral award. Arbitrators can decide the despite in justice and in good faith if both the parties expressly authorize them. The decision will be by majority. If any party is not agree with the decision of the arbitral tribunal can challenge the award on any ground available in the arbitration laws.[106] In *Lesotho Highlands Development Authority v Impregelio [2005] UK IL 45* case party challenged an arbitral award in the ground of error.[107]

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[104] Ibid.,

[105] George F. Edmunds, *International Arbitration*, Vol. 36, No. 155, (American Philosophical Society, May, 1897), pp.320-323. Avaialbale at: http://www.jstor.org/stable/983659 (accessed 1 November, 2010).

[106] Arbitration and conciliation Act, 1996. December 14, 2010. Available at: www.autherstream.com/presentation/sumitusms.723293-arbitration-and-concilitation-act-1996-1 (accessed 15 Jan, 2011)

[107] In *Lesotho Highlands Development Authority v Impregelio [2005] UK IL 45 is* an aggrieved party raised an objection that the arbitrators exceeded their powers lays down in the section 49(3) of the UK Arbitration Act, 1996. This case gave an object that if arbitrators commit any kind of wrong at the time passing an award will be protected by the ICC Rules. The House Of Lord gave decision in the favour of aggrieved party because aggrieved party suffered in loss due to the negligence of the arbitrators decision. Ellis Baker and

Challenging an arbitral award is the right of an aggrieved party. Under UNICTRAL Model Law an action for setting aside may only be brought in respect of an award made within the territory of the state concerned. It must be brought before the designated courts in the state, and it may only be brought on the grounds set out in the Model Law.[108] These grounds are taken from Article v of the New York Convention. Article 11 of the New York Convention set out the grounds on which recognition and enforcement of an international award may be resolved.[109] Article 34 of the UNCITRAL Model Law sets out the same grounds as the ground son which the arbitral award can be set aside.[110]

2.5.1 Legal Bases for Challenge an Arbitral Award

All national arbitration laws and international instruments regulating arbitration contain the provisions for the challenge of award like national arbitrations international conventions make reference to setting aside the awards but contains no substantive rules to challenge, such as grounds and time limits within which it may be raised.[111] ICSID Convention provides for the challenge of awards. Article 52 gives either party the right to challenge an award within 120 days on the date on which the award was rendered.

Anthony Lavers, challenge of Error in Arbitrators, (Award Asian Dispute Review, October 2005). Available at: http://www.whitecase.com/files/publication.../challenge-of-errors.pdf (accessed 30 December, 2010).

[108] Alan Redfem, Law and Practice of International Commercial Arbitration. Availabal at: http://www.books.google.compk/books/id=9 (accessed 15 December, 2010).

[109] Ibid.,

[110] Ibid.,

[111] Julian D M Lew and Loukas A Mistelies, Comparative International Commercial Arbitration.....

2.5.1.1 National Courts

When arbitrator tribunal passes an award in favour of one part and against another, the aggrieved party can challenge that arbitral award on the legal bases and on the grounds available in the arbitration laws.[112] The parties who want to challenge the award should exhaust possibilities for review of the award by the tribunal that rendered it or the institution within which the award was made. This includes seeking correction and interpretation of the award as appropriate.

Challenging of an award must be filed in a court which has a jurisdiction to hear the application. Here the court entertains the jurisdiction on the seat of arbitration. Article 34 (1) (6) of the UNICTRAL Model Laws lays down the provisions regarding the challenging of an arbitral award on the legal bases.[113] There are however many cases where the courts have assumed jurisdiction to hear the challenges of awards rendered abroad on the basis that the law of this state was applicable to the merits.[114] B.L. Harbert International LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir.2006) was a case in which the plaintiff challenged an adverse arbitration award arising out of a dispute over a construction project. The challenge was on the ground that the arbitrator manifestly disregarded the law. The district court disagreed and entered judgment enforcing the award. The plaintiff appealed. The Eleventh Circuit explained that the plaintiff's argument was nothing more than a disagreement with

[112] Ibid.,
[113] Article 34 (1) (6) of UNICTRAL Model Laws. Available at:
[114] Ibid.,

the arbitrator's decision, which is not a basis for vacating an arbitral award.[115]

In 2007, the Tenth Circuit likewise warned those spurned by an arbitration award that it would impose sanctions in appropriate cases of groundless challenges to awards in its decision in *Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1153 (10th Cir.2007).* More recently, the court acted on its warning. DMA Int'l Inc. v Qwest Communications Int'l, Inc, 585 F.3d 1341 (10th Cir. 2009) involved a challenge to an arbitral award on grounds of manifest disregard of the law. The court explained that the underlying dispute was a typical contract dispute, there were arguments to be made on both sides and that, therefore, even if it were convinced that it would have decided the contractual dispute differently, that would not be nearly enough to set aside the award.[116]

Most recently, a district court in the Southern District of New York issued sanctions against a law firm that "succeeded in undermining the purpose of arbitration and protracting this dispute into a three year, multi-million dollar litigation" in *Prospect Capital Corp. v. Emnon, Case. No. 08 Civ. 3721 (LBS) (S.D.N.Y. March 9, 2010).*[117]

Article v (1) (e) of the New York Convention 1958 assumes that an award may be challenged" by a competent authority of the court in which, or in under the laws of which

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[115] David Zaslowsky, *Litigation: Courts Award Sanctions for Unsuccessful Challenges to Arbitral Awards,* (Published on 8/12/2010). Available at: http://www.insidecounsel.com/Exclusives/2010/8/Pages/Courts-Award-Sanctions-for-Unsuccessful-Challenges-to-Arbitral-Awards.aspx (accessed 6 Feb, 2011)

[116] Ibid.,

[117] Capital Corp. v. Emnon, Case. No. 08 Civ. 3721 (LBS) (S.D.N.Y. March 9, 2010). Available at: http://www.insidecounsel.com/Exclusives/2010/8/Pages/Courts-Award-Sanctions-for-Unsuccessful-Challenges-to-Arbitral-Awards.aspx (accessed 6 Feb, 2011).

that award was made."[118] Accordingly, an award May be challenged in a country under the law of which an award may be challenged or is deemed to have been made. This article of the New York Convention can be interpreted in a negative as limiting the courts in which an award may be challenged or may be seen in a positive as manifesting the potential for challenge an award in a places other than the place of arbitration.[119]

This is also a problem to challenge an arbitral award when there are multinational awards. Awards are deemed to be made in a particular place by normally applying the rules of that place. To challenge an award different criteria exist in a various countries. Every country deal with an arbitral award according to their own laws. Adoption of laws and rules are different in every country. When an award is passed in one country and is required to be challenge in another country it becomes more difficult to challenge the award. Once the seat and the nationality of the award have been determined, challenges will be brought to the competent authority, normally to a court of higher instance.[120] The court designated has an exclusive jurisdiction and no other court of the state is assumes jurisdiction to hear the challenges.[121]

2.5.1.2 Time Limits to Challenge an Award

Time is of the essence to challenge an arbitral award. The court has should considered an appropriate time to challenge foreign arbitral award as soon as possible after the award is

[118] Article V (1) (e) of the New York Convention 1958.
[119] Ibid.,
[120] Ibid.,
[121] Ibid.,

made. The time to challenge an award starts to run from the time when the award is made and is notified to the parties to the disputes.

In arbitration time limits to challenge an arbitral award must be observed otherwise it will be considered to fail to bring an objection on the time limits. In every country the national laws for arbitration are different. Most of the national laws lay down that to challenge an arbitral award should be within week rather than months after time limits have started to run. To bring an action against set aside an award may be as short as 28 days.[122]

Article 34(3) of the Model Laws sets a time to challenge an arbitral award is three months from notification of the award to the party wishing to challenge it. An application for set aside may not be made after the three months from the date on which the party making that application had received the award or if a request had been made. Under article 33 of the Model Law from the date on which that request had been disposed of by the arbitral tribunal. The word may in the law mean that there is also discretion to the court to grant the extra time to the party to challenge an arbitral award. A party who file an application for set aside an award but couldn't file in prescribed time must satisfy the court that there is reasonable excuse for extending the limits.[123]

A partial award can also be challenged only in conjunction with the final award. Time limit for initiating the challenge procedure runs for each separately. In *Eco Swiss v Benetton* case the tribunal first rendered an award determining general liability and then a second award for

[122] Ibid.,
[123] Ibid.,

the damages.[124]

2.5.2 Legal Grounds for set aside an Arbitral Award.

Arbitration is the process to settle the dispute outside the court. Parties to the dispute according to their own choice appoint the arbitrators to make a decision in their case. Decision passed by arbitral tribunal is called an award.[125] After passing an award this is natural that one party is aggrieved but law contains provisions for the party to challenge an arbitral award. There are grounds to challenge the award that must be followed at the time to file an application to challenge an award. There are natural and legal bases to challenge an award.[126]

2.5.2.1 Natural Justice and Legality

Article 34 of the Model Law envisage that the judicial review in the context of an application to challenge an award can only be on the bases of natural justice and legality grounds.[127] There can be no review on the merits in the arbitration. Due process and legality is the precondition of the arbitration.[128] The Model Law and national law and national law contain these requirements. In Government of the Republic of Philippines v Philippine International Air Terminals Co Inc [2006] SGHC 2006 the Singapore High Court considered an application by the Philippines government to set aside an arbitral award under the Singapore

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[124] Ibid.,
[126]Ibid.,
[126]Ibid.,
[127] Ibid.,
[128]Ibid.,

International Arbitration Act (Cap 143A)..[129] In The Trustees of Rotoaira Forest Trust v the Attorney General (High Court, Auckland, CL 47/97 30 November 1998, Fisher J). This was a challenge to an arbitration award made principally on the grounds that it is a breach of natural justice. The plaintiff alleged that the terms of the award made by the arbitrators was outside the respective positions advanced by the parties in the arbitration, effectively depriving the parties of the opportunity to make submissions or adduce evidence accordingly.[130] In both of these cases the foreign award has been challenge on the ground of natural justice. The breach of these requirements is the ground co challenge an award. Matter of natural justice and regularity are often the matter of jurisdiction and matter of procedure.

Absence or Invalidity of the arbitration agreement

An arbitration award that is made in the absence of arbitration agreement also a ground to set aside an award. When a tribunal rules that it has no jurisdiction the aggrieved party can challenge on the ground that available in the relevant law but not on the basis that the tribunal has erroneously denied its jurisdiction.[131] *In the Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent) [2010] UKSC 46*, Supreme Court of Pakistan dismissed an appeal by the Dallah Real Estate on the ground that there was no arbitration agreement between the

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[129] I n Government of the Republic of Philippines v Philippine International Air Terminals Co Inc [2006]. Philippines government challenge an arbitral award In Gordon Smith, *No Breach of Natural Justice in Arbitration, March 8, 2007.* Available: http://www.internationallawoffice.com/Newsletters/Results.aspx?og=796d49f5-fdb6-446b-a163-448642a89f73 (accessed 12 Jan, 2011).

[130] Fortune manning's, arbitration - challenge to an award on grounds of Breach of natural justice, 17 January, 2005. http://www.203.97.37.192/publications/property.../lease_arbitrationrotoaira.htm- (accessed 15 Jan, 2011).

[131] Ibid.,

governments and declined the enforcement of an arbitral award. Article V (1) and s.103 (2), which provide that "recognition or enforcement of the award may be refused" if the arbitration agreement is proved to be invalid.[132] Parties of the case are not allowed to make any application against the tribunal that they denied their jurisdiction. This is not a ground to challenge the validity of the award on the bases of natural justice and legality.

a. Irregularity in the Constitution or the Appointment of the Arbitration Tribunal

Appointment of the arbitration tribunal is necessary to be conducted in accordance with the agreement of the parties. This is the requirements for the constitution of the arbitration tribunal that it should be established according to the wishes of the both of the parties according to their own arbitration agreements.[133]

b. **Procedural Irregularity**

Procedural irregularity is the violation of the law of the fairness. Every legal system apply different standard of fairness. It is essential that this standard should be observed to conduct the arbitration proceeding fairly.[134] Non disclosure of the documents is not the irregularity to challenge an arbitral award. It is also the principal of the fair arbitration that notice to the parties for the appointment of the arbitrators should be served on the right time. The prevailing view is that a procedural irregularity or defect alone neither will nor invalidate an

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[132] Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent) [2010] UKSC 46. The Supreme Court Summery Press, 3 Nov, 2010. Available at: www.supremecourt.gov.uk/decided-cases/index.html (accessed 20 Feb, 2011).
[133] Ibid.,
[134] Ibid.,

award.[135]

c. Arbitration Tribunal Exceeded its Jurisdiction or failed to respect the Agreement of the Parties

It is also a ground to challenge an arbitral award where the arbitration tribunal exceeds its power at the time of issuing an award. Normally the issues decided in the award which fall under the scope of the reference to arbitration will survive an eventual challenge of the award for issues not covered. An award which fails to deal with all issues may be characterized as incomplete, but it is not as such challengeable.[136] Arbitration tribunal is required to addresses those issues that has been raised in the case and not deal with issues which are insignificant and immaterial and are not required to be explained in award.

d. The Award is Contrary to the Public Policy of the Court.

The award that has been made by the arbitration tribunal is contrary to the public policy of the court is also a ground to setting aside that award.[137] It is the violation of public policy of the court either because the matter is not capable of settlement by arbitration or because the award is contrary to the policy of the court where the challenge is sought.[138] In *Club Atlético de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD, Bundesgericht [BGer] [Federal*

[135] Ibid.,
[136] Ibid.,
[137] Ibid.,
[138] Ibid.,

Court] Apr. 13, 2010 (Switz.) case court decided the case on the public policy.[139] The test of the public policy is normally observed at the place of arbitration. Occasionally it is a transitional test where the court assesses the compliance of the award with international accepted standards of public policy. For example, transitional public policy rules require that the award can be challenged if it has been induced or affected by bribery, corruption or fraud.[140]

2.6 OTHER GROUNDS UNDER NATIONAL LAWS

There are some other grounds to challenge an arbitral award in the national laws. These grounds are formal grounds such as the expiration of specific time limits, or substantive grounds relating to the application of law by the tribunal.[141] The rules that have been discussed first are unproblematic to the extent that they do not lead to substantive injustice. The latter grounds raise concerns as they may amount to an appeal on merits.[142] The grounds to challenge an arbitral award in the national laws are amounts only to bring an appeal on merits. These grounds are discussed in detail,

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[139] *Club Atlético de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD, Bundesgericht [BGer] [Federal Court] Apr. 13, 2010 (Switz.).* Available: Paul Hastings, Janofsky & Walker LLP, *Swiss Federal Tribunal Overturns Arbitration Award on Public Policy Grounds.* August, 2010. Available at: http://www.paulhastings.com (accessed 12 Oct, 2010).
[140] Ibid.,
[141] Ibid.,
[142] Ibid.,

2.6.1 Award made after the Expiration of certain time Limits.

In arbitration the disputes are settled out side of the court. Parties of the dispute on their own choice appoint an arbitrator to hear the proceeding. Arbitrators are required to follow the prescribed procedure during the case between the parties.[143] After completion of the proceeding arbitration tribunal passed an award that is called award. The award can be challenge under the available grounds lays down in the Arbitration Laws of the different countries.[144] It can be challenged also on the grounds available in the national laws. These grounds give grounds to make an appeal against the decision of an arbitral tribunal. The Paris Court of Appeal rejected the arguments that the award could be challenge as it was rendered later than the three months time limits set in the arbitration agreements. The court found no ground to apply French NCPC Article 1502(1).[145]

2.6.2 Award with Contrary Decision

If an award has been made with the contrary decision of an arbitral tribunal is also give a ground to challenge an award. This ground can be found in an Article 25(2) (j) European

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[143] Ibid.,
[144] Ibid.,
[145] The Paris Court of Appeal rejected the Appeal in *La Direction General de lavation Civil de l'Émirat de Dubai v Société International Bechtel Co* (Paris Court of Appeal, Chamber 1C, 29 September 2005) on the ground that the award could be challenge as it was rendered later than the three months time limits set in the arbitration agreements. The court found no ground to apply CNCP Article 1502(1). For detail visit, **Michael Polkinghorne**, *Recent decision confirms France's readiness to enforce international arbitral awards annulled at place of arbitration,* Vol, 11, No 2, published, Sep 2006. Available at: http:// www.whitecase.com/files/.../article_Arbitration_Polki_Ioann.pdf (accessed 10 Jan, 2011).

Uniform Law on Arbitration.[146] It has been implemented in Article 1704(2) (j) Belgian Judicial Code Article.[147]

2.6.3 Control of the merits of the Case

In civil law countries court control of the merits of the award is an exceptional, though it is rarely stated expressly. In most common law jurisdictions there is a risk of court control on the merits in the exceptional cases where there is an appeal on a question of law. An internal appeal procedure is also available under ICSID Arbitration Rules[148]. Article 50 of the said rules envisages the grounds that if the tribunal was not properly constituted, or the tribunal manifestly exceeds its powers, there was corruption on the part of one arbitrator, absent of the fundamental rule of procedure and the award failed to state the reason on which it is based.[149] All these reasons are the bases for the challenging an arbitral award.

2.7 JURISDICTION FOR THE ARBITRATION

Section 40 of the Arbitration Act, 1940 envisages that the small causes courts have no jurisdiction over any proceeding or over any application arising thereout save on application

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[146] Article 25(2) (j) European Uniform Law on Arbitration.

[147] Article 1704(2) (j) Belgian Judicial Code 1998. Available at: http://www.iclg.co.uk (accessed 14 February, 2011).

[148] International Legal Materials, *INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES,* Vol. 42, No. 1,(American Society of International Law January 2003). available at: http://www.jstor.org/stable/20694331 (accessed 1 Nov, 2010).

149 Julian D M Lew Loukas A Mistelis Stefan M Kroll, Comparative *International Commercial Arbitration*.....p 623.

made under section 2.[150] The jurisdiction of the tribunal is fundamental to the authority and decision making power of the arbitrators. Awards rendered without jurisdiction have no legitimacy.[151] Section 31 of the Arbitration Act, 1940 is dealt with jurisdiction in the arbitration.[152] Section 31 of the Arbitration Act, 1940 states that an award may be filed in any court in the matter in which the reference. Where a reference has been made by a court under section 21 or an agreement has been filed in a court under section 20 an award is required to be filed in the court. But, when an arbitration tribunal passes an award without the intervention of the court, an award may be filed in any court having jurisdiction to entertain the reference.[153] The absence of jurisdiction is one of the few recognized reason for a court to set aside or refuse recognition and enforcement of award. Accordingly, it is necessary to resolve the issue of jurisdiction at an early stage.[154]

Arbitration tribunal before the commencement of the proceeding is required to first determine that whether the tribunal has jurisdiction or it should refer the case to the court. The jurisdiction of the tribunal sometimes became an issue at various stages.[155] The first stage is during the proceeding of the case and second is after passing an award. If the issue arises during the proceeding, the court declines jurisdiction in favour of arbitration under

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[150] Section 21 (1) of the Arbitration act 1940 says that "where any persons have entered in to an arbitration agreement before the institution of nay suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under chapter 11, may apply to a court having a jurisdiction in the matter to which the agreement relates, that the agreement be filed in the court." For detail see, Raja Said Akbar Khan, Arbitration Act, 1940.

[151] Ibid.,

[152] Section 31. Raja Said Akbar Khan, Arbitration Act 1940.

[153] Raja Said Akbar Khan, *The Arbitration Act, 1940.* Pp 75-80.

[154] Julian D M Lew Loukas A Mistelis Stefan M Kroll, Comparative International Commercial Arbitration.....p 329.

[155] ibid

article II (3) of the New York Convention 1929.[156] 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.

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

The arbitral tribunal may rule on a plea referred to in paragraph of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral

[156] New York Convention 1958.

tribunal may continue the arbitral proceedings and make an award.[157]

If you have sufficient arguments against the jurisdiction of a tribunal present them immediately. Do not be afraid to antagonize the arbitrators. It is much better to resolve the issues of jurisdiction at the beginning of the process, than to face the restrictions on challenging an arbitrator's award on substantive jurisdiction after it is issued.[158]

As follows from arbitrations laws in many countries, especially those designed on the basis of the UNCITRAL Model Law, it is prescribed that the arbitrator, and not the court, to decide whether the arbitrator has substantive jurisdiction or not. Ukraine is not an exception here. Normally, certain restrictions are imposed upon a party's right to challenge the arbitrator's substantive jurisdiction.[159]

There is a distinction between an objection as to substantive jurisdiction which is raised at the start of proceedings and an objection raised during proceedings.

2.7.1 Objection at the Start

Pursuant to the Law of Ukraine "On International Commercial Arbitration" the tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.[160] 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

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[157] International arbitration blog, Do challenge the jurisdiction of the tribunal, 1 March, 2010. Available at: http://www.arbitration-blog.eu/ehallenge-jurisdiction-tribunal/- (accessed 12 Oct, 2010).
[158] Ibid.,
[159] Ibid.,
[160] Do challenge the Jurisdiction of the Tribunal, March, 2010. Available at: http://www.arbitration-blog.eu/challenge-jurisdiction-tribunal/- (accessed 15 Jan, 2010).

decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[161]

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.[162] Therefore, although a party may have appointed or participated in the appointment of an arbitrator, he can still allege that, for example, the appointment was flawed because the dispute lies outside the terms of the arbitration agreement.[163]

2.6.2 Objection during the Proceedings

We already mentioned that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.[164]

Therefore, if a claimant amends his statement of case and the respondent objects that the amendment falls outside the terms of the arbitration agreement, the objection must be made 'as soon as possible' with both the arbitrator and the other parties being informed of the objection. Note that this provision is treated as a mandatory and thus cannot be varied by the

[161] Ibid.,
[162] Ibid.,
[163] Ibid.,
[164] Ibid.,

parties.[165]

These jurisdictional rules therefore specify a timeframe over which an objection on jurisdictional grounds can be made, and one may draw the conclusion that there will be instances where parties lose their right to object. The Law of Ukraine "On International Commercial Arbitration" stipulates that a party who knows that any provision of that Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without slating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object. This is the general case, but there is a provision which allows the arbitrator to admit an objection later than the time specified. This provides a degree of flexibility on the arbitrator's part to perform his duty of managing the arbitral process by admitting a later objection if he deems the delay to be justified.[166]

The subject of international arbitration is becoming more interesting and time saving procedure to settle disputes between the individuals and the nations.[167] The decision passed by these arbitrators is called an award. This is natural that with the decision of the arbitrators appointed by the parties one party is an aggrieved. An aggrieved party has legal right to challenge the award to challenge an arbitral award is the remedy for an aggrieved party

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[165] Ibid.,
[166] Ibid.,
[167] George F. Edmunds, *International Arbitration,* Vol. 36, No. 155, (American Philosophical Society, May, 1897). Pp 320-332. Available at: http://www.jstor.org/stable/983659 (accessed 1 Nov, 2010).

CHAPTER 3

LEGISLATIVE FRAME WORK IN PAKISTAN REGARDING INTERNATIONAL ARBITRATION

Twentieth century set down its last sun amidst lots of pains and pleasures. Advancement of technology, media, communication, space exploration for navigation of hidden mineral resources of Mother Planet all have extended and enhanced industrialization and merchandise of goods and services. Institutions like World Trade Organization, GATT, World Bank, IMF, have given boost to Multi-national commercial transactions and the projects, which earlier were not feasible with limited resources of a single country, were carried through amalgamation of multiple accounts of different countries. This all has given rise to multiple disputes between persons and persons, associations of persons forming into companies, between companies and companies and between companies and states. Since each country is run by its own constitution and each state varies to a large extent, so global transactions found a way for settlement of mega companies, disputes and that was International Arbitration. Its expedient and somewhat cheaper aspects have made it popular and now hardly there would be an arbitration clause.

To make effort to settle the differences is our social duty. The Holy Qur'an urges the Muslims to try to resolve the disputes which may arise between them. "Have fear o f Allah and resolve your differences". (Surah al Anfal, 8:1).

In tradition also much importance has been given to this question. The holy Prophet is reported to have said: "To settle the differences is more meritorious than prayers and fasting".

There are neither formally recognized arbitration bodies nor national institutional rules in Pakistan. The current Arbitration Act 1940 is not based on the UNCITRAL model law. A bill for the enactment of a new consolidated arbitration law based on the UNCITRAL model law was presented in the lower house of the Parliament, the National Assembly, on 27 April 2009. This bill is still pending before the National Assembly.

The law of arbitration in Pakistan is contained in the Arbitration Act, 1940 (a pre-partition enactment, which still continues in force). The laws available in the Arbitration Act, 1940 is not sufficient to control the dispute arise by the arbitration proceeding. Every country amended its laws to make the arbitration system more efficient and transparent.

Alternative Dispute Resolution (ADR) is a vast field. In Pakistan, it is not a new concept. In fact, dispute resolution in Pakistan is, in one form or another, as old as the country itself. Parties have presented disputes to Punchaiats or Jirgas – committee of honorable elders of the community – to resolve them for years. However, this type of particular dispute resolution has been most often associated with marital and other family matters. The focus of this guide is on ADR related to commercial activities in Pakistan. Even within commercial dispute resolution, this guide focuses primarily on international investment and trade disputes, with a focus on arbitration.

Arbitration proved its effectiveness as a dispute resolution mechanism during and after the American Civil War. This positive experience led to the desire for institutionalization of international adjudication, and subsequently the Permanent Court of Arbitration was created in 1899. It is worth mentioning that the name, Permanent Court of Arbitration, is misleading, as it is neither a court, nor permanent. Its role is to provide interested parties with a list of qualified arbitrators and a set of rules for the settlement of their disputes.[168] When we defined arbitration and its laws and procedure in the world then we have to say with confidence that in Pakistan arbitrations laws are not according to the needs of the day and are badly in needs of improvement. To compete the 21st century it is necessary to make some reformations and amendments in the old laws and legislate some new to make Pakistan developed like other country of the world.

3.1 LEGAL RESOURCES IN PAKISTAN TO DEAL WITH ARBITRATION

The current Arbitration Act 1940 (Arbitration Act) governs and regulates domestic arbitration proceedings in Pakistan. It is not based on the UNCITRAL model law. A bill for the enactment of a new consolidated arbitration law based on the UNCITRAL model law was presented in the lower house of the Parliament, the National Assembly, on 27 April 2009. This bill is still pending before the National Assembly. Under the Arbitration Act, the

[168] Christina Leb, *Arbitration as a Solution for Protracted and Intractable Conflicts,* July 2003. Available at: http://www.beyondintractability.org/essay/arbitration/- (accessed 20 Feb, 2011).

parties are free to adopt procedures of their choice, subject to certain limitations. Since there are no national arbitral institutions, there are no national institutional rules; however, the Pakistani High Courts have formulated some rules within the framework of the Arbitration Act.[169] The Arbitration 1940 is not on the base of the UNICTRAL Model Laws and does not fulfill the necessities of the hour of the day.

3.2 DOMESTIC (PAKISTANI) LAWS AND RULES IN PAKISTAN REGARDING ARBITRATION

Arbitration system in Pakistan is also in practice like the other jurisdictions of the world. The difference is that other jurisdiction of the world reformed their old laws and legislated new to make the arbitration system more efficient and transparent but in Pakistan still we follow the law that is obsolete, and is badly in need to reforms. Statute law in Pakistan that deals with arbitration is Arbitration Act, 1940.[170] In India this Act was applicable till 1996 but in Pakistan still we follow the Arbitration Act, 1940 in the arbitration proceeding. Pakistan is the signatory of many international conventions and treaties but they did not incorporated in Pakistan for a long time.[171] Global changes are taking place with the lightning speed. Since each country is run by its own constitution and each state varies to a large extent, so global transactions found a way for settlement of mega companies, disputes and that was

[169] Pakistan in Arbitration. Available at: www.herbertsmith.com/uploads/HSpdfs/Asia.../11_Pakistan.PDF-(Norton Rose Group Arbitration in Asia Pacific January, 2010 Pakistan) (accessed 22 Jan, 2011).
[170] Arbitration Act, 1940.
[171] Mr. Justice Mian Saqib Nisar Judge, Lahore High Court Lahore, INTERNATIONAL ARBITRATION IN THE CONTEXT OF GLOBALIZATION: A PAKISTANI PERSECTIVE, Available at: http: www.supremecourt.gov.pk/ijc/Articles/8/2.pdf (accessed 15 March, 2011).

International Arbitration. Its expedient and somewhat cheaper aspects have made it popular and now hardly there would be an arbitration clause.[172] If we want to survive in the world as the part of the international community we have to bring a lot of reformations in our laws relating to arbitration.[173] In Pakistan the laws that deal with arbitration are not sufficient according to the needs of the day. To compete the 21th century it is necessary to pay serious attention to make the arbitration system more effective and efficient.

3.2.1 Constitution of Pakistan

In Constitution of Pakistan no explicit mention of Alternative Dispute Resolution is available (ADR) although a reference to commercial and financial activities can be pinpointed in the Constitution, which may, however implicitly, lead to a view that Pakistan practices certain methods of ADR. A quick review of the Constitution reveals that articles 153-154 deal with the Council of Common Interest, article 156 deals with the National Economic Council, article 160 deals with the National Finance Commission, and article 184 of the Constitution gives rise to original jurisdiction to the Supreme Court of Pakistan in "any dispute between any two or more Governments.[174] *The Hubco Power Company Limited v Wapda PLD 2000 Supreme Court 841* is the examples of the Constitutional Jurisdictions' of the Supreme Court to resolve the dispute between the parties. Civil appeal was filed by the Wapda v Hubco and *Hubco Power Company Limited v Wapda PLD 2000 Supreme Court 841*. Supreme Court

[172] Huma Anbmreen, *ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN PAKISTAN–A BROADER VIEW,* in Aug 18th, 2010. Available at http://www.ogel.org/article.asp?key=154 (accessed 7 Feb, 2011).
[173] Ibid.,
[174] Salman Ravala, Alternative *Dispute Resolution in Pakistan*..... (Hauser home, May/June 2008).

allowed the appeal by the Wapda and dismissed the appeal by the Hubco and restrained to invoke the arbitration clause of an agreement.[175]

3.2.2 Small Claims and Minor Offences Ordinance, 2002.

The Small Claims and Minor Offences Court Ordinance is a law intended to establish a court of Small Claims and Minor Offences, where the value of the small claims suit is less than Rs.100,000 ($1600) and the punishment for minor offences is less than three years.[176] The purpose of the law is to provide legal cover to amicable modes of settling disputes between parties easily and expeditiously.[177] This law encourages the amicable settlement of the disputes between the parties.[178] Section 19 of the Small Claims and Minor offences Ordinance, 2002 lays down the grounds for the objections on the arbitral Award.

Section 19 of Small Claims and Minor Offences Ordinance, 2002

[175]In the Hubco Power Company Limited v Wapda PLD 2000 Supreme Court 841, Wapda Company raised the objections that the agreement was obtained through fraud and bribe therefore, Hubco Company by is not entitle to invoke the jurisdiction of the arbitration clause. Court accepted the instance of the Wapda Company and dismissed the appeal of the Hubco Company Limited. For detail please visit Hubco Power Company Limited v Wapda PLD 2000 Supreme Court 841. Available at: http://www.pakistanlawsite.com/LawOnline/law/casedescription.asp?casedes=2000S34 (accessed 20 Jan, 2011).

[176] Muhammad Ramzan, Small Claims and Minor Offences Courts Ordinance, 2002, March 13, 2009. Available at http://www.pakistanlaw.net/pakistan-law/civil-law/small-claims-and-minor-offences-courts-ordinance-2002/ (accessed 12 March, 2011).

[177] Section 14, Small Claims and Minor Offences Ordinance, 2002.

[178]Ibid.,

19. Objections on awards

"(1) The Court shall, before passing a decree based on award, call objections of the parties within fifteen days of the receipt of award and settle such objections within fifteen days thereof."[179]

Small Claims and Minor Offences Ordinance, 2002 enumerate that the court before passing any order or decree on the basis of an award shall call the parties who have an objections on the award passed by the arbitration tribunal. This is an equitable remedy for an aggrieved party to challenge an arbitral award because arbitral can be on the grounds of fraud or misrepresentation.[180]

Section 19 (2) of the Small Claims and Minor Offences Ordinance, 2002 envisaged that "No separate proceedings shall lie in any other Court to challenge the validity of the award on the plea of fraud misrepresentation on involuntary nature of the settlement of any other ground whatsoever."[181] The Small Claims and minor Offences Ordinance, 2002 contains the same procedure like the other laws that deal with arbitration. The Civil procedure Code shall be apply if the award has been passed on the grounds of fraud or misrepresentation.[182] Section 19(3) of the same ordinance also describes the procedure to make an application for challenging the validity of an award.

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[179] Section 19 (1), Small Claims and Minor Offences Ordinance, 2002.
[180] Small Claims and Minor Offences Ordinance, 2002. Available at: http://www.ahmedandqazi.com/actsandregulations/litigationLaws/smallClaimsMinorOffencesCourtsOrdinance 2002.pdf (accessed 15 March, 2011).
[181] Section 19 (2), small Claims and Offences Ordinance, 2002.
[182] Section 12(2) Civil Procedure Code, 1908.

Section 19(3) says that (3) "Where a person challenges the validity of the decree on the plea of fraud, misrepresentation or want of jurisdiction, he shall make an application to the Court within thirty days of passing the decree and no separate suit shall lie for it."[183]

In *PROVINCE OF PUNJAB through Executive Engineering, and 2 others- v Messrs AMMICO CONSTRUCTION (PVT.) LIMITED, LAHORE through Chief Executive Engineer- 2011 M L D 135*[184]. The person who challenged the award can make an application to the court within thirty days after passing an award. Limitation Act is applicable in the arbitration proceeding.

3.2.3 Arbitration Act, 1940.

The Arbitration Act of 1940, an Act passed for all of British Indian before Pakistan's independence, continues to apply to Pakistan today. Arbitration Act, 1940 provides three classes of arbitration.

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[183] Section 19(3).....

[184] Respondent company after completion of construction work according to agreement raised certain claims against appellant Authority before the nominated arbitrators. Both arbitrators found respondent entitled to recover amount claimed by respondent company. Application filed by the respondent company under Ss.14 & 17 of Arbitration Act, 1940 for making award as rule of the court, was accepted and Executive Engineer of the Appellant Authority appeared in court and stated that he had no objection with regard to making the award rule of the court in accordance with law. When award was finally made rule of the court, appellant Authority assailed the same through appeal. Article 158 of Limitation Act,. 1908 had provided 30 days' time to the parties from the date of filing of award to raise objection, if any---After said period no party could be allowed to raise any objection with regard to the award---No provision of law required a court to fix a particular date inviting objections from either party; it was choice of the parties, within the prescribed period of limitation, to raise any objection or not. Executive Engineer of the appellant Authority appeared before the court and made a specific statement that he had no objection if award was made rule of the court---Appellant Authority had been continuously represented till the last date of impugned order and it never bothered to raise any objection with regard to the award. Award could not be objected to at such a belated period in circumstances. Appeal was dismissed on the grounds that after 30days time no party is entitled to raise any objection. For detail please visit, PROVINCE OF PUNJAB through Executive Engineering, and 2 others- v Messrs AMMICO CONSTRUCTION (PVT.) LIMITED, LAHORE through Chief Executive Engineer- 2011 M L D 135. Available at: http://www.pakistanlawsite.com/LawOnline/law/casedescription.asp?casedes=2011L2508 (15 March, 2011).

i. **Arbitration without Court Intervention.** Section 3-9 deals with the arbitration without the intervention the court. Section 3-9 totally deals with the initial of the arbitration that what is the arbitration agreement, procedure of appointment of an arbitrator, making of an award etc.

ii. **Arbitration where no suit is pending.** Section 20 of the Arbitration Act, 1940 deals with the arbitration where no suit is pending.

> "Section 20 (1) of the envisages that where any person of an agreement entered in to in arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it,, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under II, may apply to court having a jurisdiction in the matters to which the agreement relates, that the agreement be filed in court." [185]

The above section deals with the application by the parties to file the arbitration agreement in the court. Section 20 (2) also contains that application is in writing and having a numbered and registered as a suit between one or more of the parties. Court after receiving the application notices to the parties of the suit.[186]

iii. **Arbitration in Agreement through Court.** Section 21 -25 of the Arbitration Act, 1940 deals with the arbitration through agreement.[187] Section 21 envisages that "where in nay suit all the parties interested agree that any matter in difference

[185] The Laws of Arbitration and Arbitration (protocol Convention) Act, 1937. (Irfan Law Book House, 2003).
[186] Ibid.,
[187] Section 21-25 of the Arbitration Act, 1940.

between them in the suit shall be referred to arbitration, that may at any time before judgment is pronounced apply in writing to the court for an order of reference," This section makes provision for making reference in pending suits. *In ARABTEC PAKISTAN (PVT.) LTD. Through Chief Executive versus ENSHAANLC DEVELOPMENTS (PVT.) LTD, 2011 CLC 323* Karachi is the example of arbitration in agreement through court.[188] It is not applicable to reference to arbitration made without the intervention of the court. The issue in the arbitration is the enforcement of arbitral award, sometime the party against whom the award passed challenges the award for its setting aside. The laws deal with the grounds of challenging an arbitral award has been discussed in this chapter.

3.2.3.1 Laws in Arbitration Act, 1940 to Challenge an Arbitral Award.

As we said that arbitration mean the method through which a dispute is referred to certain persons called arbitrators. Their decision is known as the award.[189] A party against whom an award is passed can challenge the award according to the arbitration laws available in the national and in the international conventions and treaties. In *Dallah Real Estate and Tourism*

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[188]Arbitration agreement, filing of---Dispute between parties relating to construction contract---Application by plaintiff to restrain defendant from encashing Bank Guarantee---Plaintiff's plea that such guarantee was conditional upon default of contractual obligations by plaintiff; that defendant had stopped construction for redesigning project, thus. plaintiff stood released from performance and that what was owed to plaintiff by defendant was more than total value of such Guarantee---Validity---Question involved was as to whether any payment was due to plaintiff or whether defendant had paid to plaintiff more than what was due---Such question could successfully be decided by Arbitrator appointed by court with consent of both parties---High Court accepted such application by observing that such Guarantee would remain intact till making of award by Arbitrator. For detail visit, ARABTEC PAKISTAN (PVT.) LTD. Through Chief Executive versus ENSHAANLC DEVELOPMENTS (PVT.) LTD, 2011 CLC 323 Karachi. Available at: http://www.pakistanlawsite.com/LawOnline/law/casedescription.asp?casedes=2011L2508 (15 March, 2011).

[189] L.N Tandon, *International Law,* revised and enlarged by Munir Ahmed Khokhar, (ed. 2004 Haji Tajammul Hussain Rathour and Irfan Law Book House Lahore) 758.

Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46[190] Pakistan challenged the award passed against it on the bases that award is invalid and unlawful. Supreme Court of Pakistan also dismissed the appeal filed by the Dallah Company on the grounds that government of Pakistan was not the party of an agreement and order for the independent investigation.[191] The enforcement of an award is not an easy job. It is long and time consuming process. Like other available laws in the world Arbitration Act, 1940 also contains the grounds to challenge an arbitral award.[192]

Section 30 of the Arbitration Act, 1940. Grounds for setting aside award.

"An award shall not be set aside except on one or more of the following grounds namely:-

a) That an arbitrator or umpire has misconduct himself or the proceeding's
b) That an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceeding had been invalid, under section 35; and
c) That an award has been improperly procured or is otherwise invalid."[193]

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[190] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.* Available at: http://www.clydeco.com/knowledge/articles/case-update-dallah-real-estate-and-tourism-holding-company-v-the-ministry-of-religious-affairs-government-of-pakistan-2010-uksc-46.cfm (accessed 15 Jan, 2011).

[191] In 1996 Pakistan established the Awami hajj Trust to provide facilities to the Pakistan pilgrims visiting to Mecca for hajj. After that Awami Trust entered into agreement with the UK Dallah Company for the construction of the houses for the accommodation for Pakistani which would leased by Dallah to the trust for 99 years. The arbitration contained the arbitration clause. Referring dispute between the parties. No express choice of law was nominated in the agreement. Trust was signed between the parties and not with the governments. Awami Trust Company was ceased after the collapse of the Benazir Bhutto government. Pakistan got an Award against it and in favor of UK Company. Pakistan filed an appeal against the Award on the grounds that award is no valid. High Court set aside the award. Dallah UK company finally appeal to the Supreme Court of Pakistan for the enforcement of the award. Supreme Court dismissed the appeal on the grounds that government of the Pakistan was not party to that agreement. For detail please visit, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.* Available at: http://www.clydeco.com/knowledge/articles/case-update-dallah-real-estate-and-tourism-holding-company-v-the-ministry-of-religious-affairs-government-of-pakistan-s2010-uksc-46.cfm (accessed 15 Jan, 2011).

[192] Arbitration Act,1940.

[193] Section 30 of the Arbitration Act, 1940.

Award cannot be set aside except on the grounds enumerated in the section 30 or on the basis of section 33 of the Arbitration Act, 1940. The sole purpose of an Arbitration Act, 1940 is to curtail litigation in courts and promote settlement of dispute amicably through persons in whom both the parties repose their confidence. Court has to Endeavour to sustain the award rather than to destroy the same unless it can be shown by sufficient and reliable material on record that the arbitrator is guilty of misconduct or that the award is beyond the scope of reference or that the same is violative of statute or in contradiction to the well-settled norms and principle of law.[194] *In MUHAMMAD KHAN versus SALEHUN alias SALEH MUHAMMAD 2010 SCMR 36* appellant contended that there was no arbitration agreement between the parties. Appeal was allowed by the Supreme Court of Pakistan.[195]. Court while hearing objections to award could not undertake reappraisal of evidence recorded by arbitrator to discover error or infirmity therein. Objections against the enforcement of award should be filed within thirty days and if filed beyond statutory period, then the objections could not be taken into consideration.[196]Error or infirmity in award which would render the same invalid must appeal on the face of award and should be discovered by reading the same. All these grounds are available with the aggrieved party to setting aside an award. The debatable issue is that the parties who get an award against them always misuse these grounds and challenge the award only to delay the enforcement of it.

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[194] The Law of Arbitration and Arbitration (Protocol Convention Act, 1937. Ed. 2003.(Irfan Law Book House Lahore).p 307.

[195]MUHAMMAD KHAN versus SALEHUN alias SALEH MUHAMMAD 2010 SCMR 36. Available at: http://www.pakistanlawsite.com/LawOnline/law/casedescription.asp?casedes=2010S706 (accessed 20 March, 2011).

[196]The Law of Arbitration and Arbitration (Protocol Convention Act, 1937.

3.2.4 The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance, 2005.

The New York Convention (Enforcement and Recognition of Foreign Arbitral Award) 1958 achieved a wide spread acceptance by the international community. The signatory of this convention were east and west countries.[197] Pakistan is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958.[198] It gave effect to the Geneva Protocol and convention by implementing "the Arbitration (Protocol and Convention) Act, 1937 and after a long time came "Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards Ordinance, 2005 to give effect to the New York Convention of 1958. The Recognition and Enforcement (Arbitration Agreements and Foreign) Awards Ordinance, 2005 (2010) is a Domestic law in Pakistan also to provides the laws for the enforcement of foreign arbitral award.[199] Section 6 of the Enforcement and Recognition (Foreign Arbitral Award) Ordinance, 2005 (2010) deals with the enforcement of the foreign arbitral award.[200] The Ordinance, 2005 though was a late effort made by the Pakistan but at least an attention was paid towards it that has been neglected for a long time. Globally the starting point for the enforcement of an arbitral award is the New York Convention 1958 but in Pakistan the legislation of the Enforcement and Recognition

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[197] Ibid.,

[198] By Albert Jan van den Berg, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, Available at: http://www.untreaty.un.org/cod/avl/ha/crefaa/crefaa.html (accessed 10 March, 2011).

[199] Ibid.,

[200] Section 6 of the Recognition & Enforcement(Arbitration Agreements & Foreign Arbitral Awards) Ordinance, 2010 promulgated. Available at: http://www.pak.gov.pk/Constitution/Recognition.pdf (accessed 22 Feb, 2011).

(Foreign Arbitral Award) 2005 (2010) was the last point for the enforcement of foreign arbitral award. Internationally many other attempts have been made to make the arbitration system more effective and efficient.[201] Section 6 (1) of the Enforcement and Recognition of foreign arbitral award 2010 says that "Unless the Court, pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognize and enforce the award in the same manner as a judgment or order of a court in Pakistan"[202] If the award has been passed according to law and without any objectionable manner the court is bound to enforce the foreign award in the same manner as the award has been passed by the domestic court.[203]

Section 7 of the Enforcement and Recognition (Foreign Arbitral Award) Ordinance, 2010 lays down that, "the Court shall not refuse the recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with article v of the convention"[204]

The court shall not refuse to enforce and recognize the foreign arbitral award except the objection raised by the aggrieved party. Enforcement of an award become meaningless and it takes long time to enforce the foreign arbitral award[205]. *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46* is the example of it. Arbitration tribunal passed an Award in Favor of Dallah Company and against the

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[201] Huma Anbreen, ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN PAKISTAN–A BROADER VIEW, published by Muhammad Ramzan on Aug 18th, 2010. Available at http://www.ogel.org/article.asp?key=154 (accessed 7 Feb, 2011).
[202] Section 6(1) of the Enforcement and Recognition(Foreign Arbitral Award) Ordinance, 2005(2010).
[203] Ibid.,
[204] Section 7 of the Enforcement and Recognition (Foreign Arbitral Award) Ordinance, 2010.
[205] Ibid.,

Pakistan Trust Company but Pakistani Company Challenged the award on the grounds that this award is invalid and cannot be enforced.[206] Award was passed in Paris by the ICC and had to enforce in England. Supreme Court of England dismissed the appeal on the grounds that the government of Pakistan was not the Party of agreement.[207]

3.3 International Treaties and Conventions

Pakistan is a party to the many International Treaties and Conventions. These include, the Economic Cooperation Organization (ECO),[208] South Asian Association for Regional Cooperation (SAARC),[209] World Trade Organization (WTO),[210] United Nations

[206] Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46. Available a: http://www.clydeco.com/knowledge/articles/case-update-dallah-real-estate-and-tourism-holding-company-v-the-ministry-of-religious-affairs-government-of-pakistan-s2010-uksc-46.cfm (accessed 15 Jan, 2011).

[207] Ibid.,

[208] Economic Cooperation Organization (ECO), is an intergovernmental regional organization established in 1985 by Iran, Pakistan and Turkey for the purpose of promoting economic, technical and cultural cooperation among the Member States. ECO is the successor organization of Regional Cooperation for Development (RCD) which remained in existence since 1964 up to 1979. In 1992, the Organization was expanded to include seven new members, namely: Islamic Republic of Afghanistan, Republic of Azerbaijan, Republic of Kazakhstan, Kyrgyz Republic, Republic of Tajikistan, Turkmenistan and Republic of Uzbekistan. The date of the Organization's expansion to its present strength, 28th November, is being observed as the ECO Day. The ECO region is full of bright trading prospects. The ECO has also a contributory role to resolve the dispute in the arising from the international trade. For detail please visit website, http://www.ecosecretariat.org/ (accessed 14 March, 2011)

[209] The South Asian Association for Regional Cooperation (SAARC) is an organization of South Asian nations, founded in December 1985 and dedicated to economic, technological, social, and cultural development emphasizing collective self-reliance. Its seven founding members are Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, and Sri Lanka. Afghanistan joined the organization in 2005. Meetings of heads of state are usually scheduled annually; meetings of foreign secretaries, twice annually. It is headquartered in Kathmandu, Nepal. Detail is available at: http://en.wikipedia.org/wiki/South_Asian_Association_for_Regional_Cooperation (accessed 10 Feb, 2010).

[210] The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. Pakistan is a member of all these organization to promote the international trade. Available at: http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (accessed 5 March, 2011).

Commission on International Trade Law (UNCITRAL),[211] and World Intellectual Property Organization (WIPO).[212]

Pakistan ratified the New York Convention on 14 July 2005. Pakistan has exercised a reservation, and will only recognize and enforce awards from other New York Convention states.[213] Pakistan has also signed and ratified the Convention establishing the Multilateral Investment Guarantee Agency (MIGA)[214] and the International Center for Settlement of Investment Disputes (ICSID).[215] It has also signed the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. As we discussed above that Pakistan is signatory o f all these international convention and treatise but available laws in Pakistan to deal with the enforcement of the arbitral award are not sufficient to meet the 21st century challenges.

3.3.1 The UNICTRAL Arbitration Rules

In the 1970 there was an increasing need for a neutral set of arbitration rules suitable for us in ad hoc arbitration. UNCITRAL is a Commission of the UN established by the General

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[211] The core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years. UNCITRAL's business is the modernization and harmonization of rules on international business. Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. Available at: http://www.uncitral.org/uncitral/en/about_us.html (accessed 10 Feb, 2010).

[212] Ibid.,

[213] Arbitration in Pakistan.....

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[215] ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States with over one hundred and forty member States. The Convention sets forth ICSID's mandate, organization and core functions. The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes. Available at: http://icsid.worldbank.org/ICSID/Index.jsp (accessed 10 March, 2011).

Assembly on 17 December 1966 by Resolution 2205 (XXI).[216] Thus, although the New York Convention was adopted in 1958, the Commission's essential mandate is to promote the Convention further. Furthermore, UNCITRAL serves as the International Trade Law Branch of the Office of Legal Affairs of the UN. Hence, UNCITRAL, under the umbrella of the UN, is the biggest organizational body to prepare rules relating to ADR, namely arbitration and conciliation.[217] These rules were required to be adopted in the developed, developing and in common law as well as civil law jurisdiction. This is because rules have a truly universal origin, in particular their parallel creation in six languages (Arabic, Chinese, English, French, Russian and Spanish) by experts representing all region of the world as well as the various legal and economic systems.[218] Pakistan like the Signatory of United Nation Conventions is also the member of UNCITRAL Model Law. No doubt UNCTRAL Laws received an international recognition and are widely used. The issue is that Pakistan is also signatory of the UNCITRAL Model Laws and, these Laws are not compulsory to be adopted. Each state adopts its own national laws that regulate and control the arbitration.[219] National laws in the arbitration are more convenient than the international law. National courts have at least perceived to have an inherent national prejudice. Judges are drawn from that nationality. They do not necessarily have the knowledge of, ability to handle disputes arising from

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[216] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) UNCITRAL Arbitration Rules GENERAL ASSEMBLY RESOLUTION 31/98Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

[217] Ibid.,

[218] Julian D M Lew Loukas A Misteliess Stefan M Kroli, *Comparative International Commercial Arbitration,* (Kluwer Law International New York 2003). 26.

[219] Ibid.,

international business transactions or even disputes between parties from different countries.[220]

3.3.2 UNICTRAL Model Laws to deal with Challenging the Arbitral Award

Article 34. Application for setting aside as exclusive recourse against arbitral award

Article 34 of the UNICTRAL Model Laws contain the procedure to challenge an arbitral award passed by the arbitration tribunal. The aggrieved party will make an application to the arbitration tribunal to set aside an award and is also furnish the proof regarding the grounds to challenge an arbitral award.[221] It is required by law that party to making application must satisfy the court that there was no arbitration agreement between the parties, or an aggrieved party did not receive any notice of proceeding or the agreement was not according to the UNICTRAL Model Laws.[222]

3.3.3 New York Convention.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (the New York Convention), is described as the most successful treaty in private international law. It is adhered to by more than 140 nations. The more than

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[220] Ibid.,

[221] UNCITRAL Model Law on International Commercial Arbitration (United Nations documents A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006). Available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (accessed 20 March, 2011).

[222] Ibid.,

1,400 court decisions reported in the Yearbook: Commercial Arbitration show that enforcement of an arbitral award is granted in almost 90 per cent of the cases.[223]

The Convention was established as a result of dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[224] The initiative to replace the Geneva treaties came from the International Chamber of Commerce (ICC), which issued a preliminary draft convention in 1953.[225] The ICC's initiative was taken over by the United Nations Economic and Social Council, which produced an amended draft convention in 1955. That draft was discussed during a conference at the United Nations Headquarters in May-June 1958, which led to the establishment of the New York Convention.[226]

Pakistan was once again, one of the earliest signatory members to an ADR related document, here the New York Convention. It signed the Convention on December 30, 1958 and ratified it on July 14, 2005, bringing it into force three months later in October 2005. Although the New York Convention is just one treaty related to ADR that Pakistan has signed and ratified, there are various other ADR related Conventions by the UN that Pakistan has overlooked in implementing. These include, but are not limited to, 1) Convention on the Limited Period in International Sales of Goods; 2) UN Convention on Contracts for the International Sale of

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[223] By Albert Jan van den Berg, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, Available at: http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html (accessed 10 Feb, 2011).

[224] Geneva Convention, 1927, CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS SIGNED AT GENEVA ON THE TWENTY-SIXTH DAY OF SEPTEMBER, NINETEEN HUNDRED AND TWENTY-SEVEN. Available at: http://interarb.com/vl/g_co1927 (accessed 10 Feb, 2011).

[225] History New York Arbitration Convention 1953. Available at: http://www.newyorkconvention.org/new-york-convention/history- *(accessed 10 March, 2011).*

[226] Ibid.,

Goods (CISG); 3) UN Convention on Independent Guarantee and Stand-by-Letters of Credit; UN Convention on International Bills of Exchange and International Promissory Notes; 5) UN Convention on Assignment of Receivables in International Trade; 6) UN Convention on Carriage of Goods by Sea.

3.3.4 Multilateral Investment Guarantee Agency (MIGA)

Pakistan is a member of MIGA. MIGA is an agency of the World Bank that enhances foreign direct investment into developing countries by insuring cross-border investments. To promote its goal, in 1996, MIGA began offering dispute resolution services to help governments and foreign investors find creative solutions to their disagreements.[227] Pakistan is a developing country that has an influx of investments. Given that it has signed and ratified the convention establishing MIGA, it has agreed to all its terms including those pertaining to ADR. Pakistan became a member to MIGA in April 1992.[228]

The benefits of MIGA guarantees are numerous. MIGA insurance gives confidence to investors that their projects are backed by a strong guarantee, which weighs into their investment risk/return profile. In this sense it acts as an umbrella of deterrence against government actions that could disrupt investments. Over the course of MIGA's history only one claim has been filed, and it eventually was paid.[229]

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[227] Discussion with Luis Doldero General Council and Vice President of MIGA Thursday, October 11, 2001. Available at: http://www.miga.org/ (accessed 28 March, 2011).

[228] Stephan W. Schill, Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System. Paper for the 4th Global Administrative Law Seminar, Viterbo, June 13-14, 2008. Available at: http://www.miga.org/documents/Master-Rules-of-Arbitration.pdf (accessed 3 April, 2011).

[229] World Bank Progrram, Syndications: Facultative Reinsurance and Cooperative Underwriting Program. Available at: http://www.miga.org/documents/CUP_FacRe.pdf (accessed 15 March, 2011).

The Multilateral Investment

Guarantee Agency (MIGA), a member of the World Bank Group, promotes foreign direct investment in emerging economies to support economic growth, reduce poverty, and improve people's lives. It does this through providing political risk insurance, or guarantees, to investors and lenders, against losses caused by noncommercial risks. The risks covered by MIGA include:

I. Currency inconvertibility and transfer restrictions Expropriation

II. War, civil disturbance, terrorism, and sabotage

III. Breach of contract

IV. Non-honoring of sovereign financial obligations[230]

MIGA provides dispute resolution services for guaranteed investments to prevent disputes from escalating.

MIGA rules of arbitration for disputes under contract of guarantee on arbitration also have the provisions like other international conventions and treaties to deal with arbitration. Article 1 to 69 of the MIGA rules envisages the procedure in a detail regarding the arbitration. Article 53 of the MIGA rules 1990 describes the detail procedure to making an award, correction of an award and authentication of an award.[231]

3.3.5 International Center for Settlement of Investment Disputes (ICSID)

[230] MIGA, Bolstering Private Equity Investment. Available at: http://www.miga.org/documents/privateequity.pdf (accessed 12 Feb, 2011).

[231] Multilatral Investment Guarantee Agency Rules of Arbitration Disputes Under Contrcat of Guarantee 1990. Available at: http://www.miga.org/documents/Master-Rules-of-Arbitration.pdf (accessed 26 Feb, 2011).

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention).[232] The Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). On March 18, 1965, the Executive Directors submitted the Convention, with an accompanying Report, to member governments of the World Bank for their consideration of the Convention with a view to its signature and ratification. The Convention entered into force on October 14, 1966, when it had been ratified by 20 countries. As at April 10, 2006, 143 countries have ratified the Convention to become Contracting States.[233]

Pakistan is a member of ICSID. ICSID is also an institution of the World Bank that "provides facilities for conciliation and arbitration of international investment disputes.[234]

ICSID is a "multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966. Today, ICSID is considered to be a leading international arbitration institution.[235]

Like others international treaties and conventions that deal with arbitration the ICSID also contains the provisions to deal with arbitration. Article 41(5) lay down that the party can

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[232] ICSID CONVENTION, REGULATIONS AND RULES, International Centre for Settlement of Investment Disputes, ICSID/15 April 2006. Available at: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (accessed 29 March, 2011).
[233] Ibid.,
[234] Andrew de Lotbinière Mcdougall and Ank Santens, ICSID Amends its Arbitration Rules. Available at: www.whitecase.com/.../article_Icsid_Amends_its_Arbitration_Rules.pdf (accessed 5 April, 2011).
[235] Ibid.,

raise the preliminary objection on the claim of the other party if it finds that their claim is without legal justification. This application can be made in 30 days.[236] Article 41(6) envisages that the arbitration tribunal must render the objections in the award. In other words, a decision by the tribunal that only part of the claims are manifestly without legal merit is not required to be rendered by way of an award. This is relevant as an award is subject to immediate enforcement and annulment proceedings.[237]

One of ICSID arbitration's perceived strengths and one of its most characteristic features is its internal mechanism for reviewing arbitral awards. Awards issued outside the ICSID Convention framework are generally open to challenge before domestic courts, with the uncertainty that entails.[238] In Klöckner v. Cameroon (1985)[239] and Amco v. Indonesia (1986)[240] —were poorly received, leading some commentators to cast doubt on the effectiveness of ICSID arbitration as a whole. This criticism subsided following the partial

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[236] Ibid.,

[237] Ibid.,

[238] Gaillard, Emmanuel and Banifatemi, Annulment of ICSID Awards. July 2004. Available at: http://www.jurispub.com/cart.php?m=product_detail&p=2688 (accessed, 12 Feb, 2011).

[239] In April of 1981, Klockner, a German company, and two subsidiaries of Klockner instituted an arbitration proceeding against Cameroon and the SocittC Camerounaise des Engrais under the aegis of the International Centre for Settlement of Investment Disputes (ICSID). The Arbitral Tribunal, constituted in October of 1981, rendered its award on October 21, 1983. Attached to the award was a dissenting opinion by one of the three arbitrators. . For detail please see In Klöckner v. Cameroon (1985). Available at: http://www.icsid.worldbank.org/icsid/frontServlet? (accessed 4 April, 2011).

[240] In 1968, Amco, an American Corporation, and PT Wisma, an Indonesian company operating under the guidance of the Indonesian government, entered into a Lease and Management Agreement whereby Amco was to invest in, and manage a hotel/office complex for the duration of 30 years, until 1999. In April 1980, after growing differences between the parties, PT Wisma forcibly took over management of the hotel. In July 1980, the Indonesian government revoked Amco's license to engage in business ventures in Indonesia. Amco initiated ICSID arbitration, claiming compensation for damages incurred due to the unlawful taking of the hotel and the termination of the license. In the First Arbitral Award of 1984, the Tribunal held that Indonesia's actions were in breach of international law and awarded damages of US$ 3,200,000. However, that Award was annulled in 1986 on the grounds that the Tribunal had failed to state the reasons for its findings on several substantive issues. Subsequently, Amico resubmitted the dispute to ICSID arbitration, with essentially the same claims. Detail of the case is available on the website, http://www.biicl.org/fi;les/3936-1990-amco-vindonishia.pdf (accessed 5 March, 2011).

annulment decision in MINE v. Guinea (1989) and the unpublished decisions dismissing the applications to annul the awards rendered in the resubmitted Klöckner (1990) and Amco (1992) disputes.[241]

Challenging an arbitral award rules are also available in the ICSID rules. Article 52(1) deals the grounds that annul an arbitral award passed by an arbitral tribunal. The ICSID rules provides the provisions on the basis of which arbitral award can be challenged. Article 52(1) (b) contains the rules if the award has been passed without having jurisdiction to the tribunal than an aggrieved party can make an application to setting aside an award.[242] As stated above, foreign direct investment in Pakistan is fairly large. Given that Pakistan has signed and ratified the Washington Convention establishing ICSID, it has agreed to all its terms. Pakistan was one of the first countries to sign the Washington Convention on July 6, 1965.[243] It deposited its ratification of the Convention on September 15, 1966 and the Convention went into force one month after, in October 1996.[244] Pakistan signed and ratified all these above mentioned international treaties and conventions but the issue is still controversial that the international conventions and treaties are not equally applicable in every signatory state. To make the arbitration system more efficient and effective is required to strenuous the domestic laws of the Pakistan.

[241] Gaillard, Emmanuel and Banifatemi, Annulment of ICSID Awards.....
[242] Andrew de Lotbinière Mcdougall and Ank Santens, ICSID amends its Arbitration Rules. Available at: www.whitecase.com/.../article_Icsid_Amends_its_Arbitration_Rules.pdf (accessed 5 April, 2011).
[243] Ibid.,
[244] Ibid.,

3.4 Criticism on the Arbitration proceeding

Arbitration is the procedure to settle the dispute out of the court.[245] In arbitration the parties have a choice to appoint an arbitrator for the proceeding of the arbitration. When we compare the arbitration proceeding with the procedure of the court it appears that arbitration is more convenient than court proceeding.[246] But despite of all these appreciation that has been received by the world the arbitration proceeding also got criticism from law experts. Different people criticized the arbitration proceeding in different ways. Some points of criticism are as follows;

I. There is no right of appeal even if the arbitrator makes a mistake of fact or law. However, there are some limitations on that rule, the exact limitations are difficult to define, except in general terms, and are fact driven.[247]

II. There is no right of discovery unless the arbitration agreement so provides or the parties stipulate to allow discovery or the arbitrator permits discovery. The arbitration process may not be fast and it may not be inexpensive, particularly when there is a panel of arbitrators.[248]

III. Unknown bias and competency of the arbitrator unless the arbitration agreement set up the qualifications or the organization that administers the arbitration, has pre-

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[245] Julian D M Lew Loukas A Misteliess Stefan M Kroll, *Comparative International Commercial Arbitration,* (Kluwer Law International New York 2003). P 3.
[246] Arbitration Proceeding. Available at: http://www.rozhodcisoud.cz/rz_e.html (10 March, 2011).
[247] Arthur Mazirow, The Advantages and Disadvantages of Arbitration As Compared to Litigation. April 13, 2008
Chicago, Ilinois. Available at: www.sanet.eu/.../Arbitration_-The_Right_to_Hear_(Rechtsanwalt_Dr._Kloetzel).pdf (accessed 2 April, 2011).
[248] Advantages & Disadvantages of Arbitration. Available at: http://www.beckerlegalgroup.com/pdf/a-d-arbitration.pdf (accessed 29 March, 2011).

qualified the arbitrator. There is no jury and from the claimant's point of view that may be a serious drawback.[249]

IV. An arbitrator may make an award based upon broad principles of "justice" and "equity" and not necessarily on rules of law or evidence. An arbitration award cannot be the basis of a claim for malicious prosecution. Except in certain circumstances, non-signatories of the arbitration agreement cannot be compelled to arbitrate.[250]

The above criticism doesn't mean that the arbitration proceeding is totally useless and not according to the needs of the day. In arbitration the parties to contract can appoint the arbitrator according to their own choice and also can select the place and language of arbitration. The procedure is confidential and not published for the public. The issue is that in Pakistan the domestic laws that deal with arbitration are not sufficient to make this system more convenient than the courts.

[249]Ibid.,
[250]Ibid.,

CHAPTER 4

CONCLUSION AND PROPOSAL FOR REFORMS

4.1 CONCLUSION

It is conclude from the study that laws that deal with arbitration in Pakistan are not sufficient to meet the 21st century challenges are badly in needs of reforms. The domestic laws in Pakistan are not according to the needs of the hour. The most important issue that has been discussed in this paper is the challenging of an arbitral award by an aggrieved party. The detail of the arbitration procedure has been discussed in a detail.

International commercial arbitration is the process of resolving business disputes between or among transnational parties through the use of one or more arbitrators rather than through the courts. It requires the agreement of the parties, which is usually given via an arbitration clause that is inserted into the contract or business agreement. The decision is usually binding. The decision that has been passed by the arbitration tribunal is called an arbitral award.

Arbitration was facilitated by the two Hague Conventions were concluded in 1899 and in 1907, both entitled the Hague Conventions for the Pacific Settlement of Disputes. These conventions created the permanent Court of Arbitration which still exist and functions today. In the late 19th century and at the beginning of the 20th century, the development of modern international arbitration began. However it was based on national courts.

The most important issue that also remained the part of this paper analysis is the international conventions and treaties and domestic laws of the Pakistan that deal with arbitration. Arbitration system in the world developed with the lighting speed. The development of national arbitration laws to the current regulation of international commercial arbitration has been evidence in much legal systems. In England the arbitration system was adopted in 1698. In France, the arbitration law was included in the Code of Civil Procedure 1806. In the United State the first federal arbitration legislation was the federal arbitration Act 1925. But with the passage of times all these jurisdictions of the world amended their old laws and legislate new one to make the arbitration system more efficient but in Pakistan still we follow the law that is obsolete and is badly in need to reforms.

The other issue is the enforcement of an arbitral award that has also been discussed in this research paper. In every jurisdiction of the world has their own laws to deal with the arbitration but the issue arised at the time of an enforcement of an award. as we discussed in detail the cases that happened after passing an award. No doubt to challenge an arbitral award by an aggrieved party is an equitable remedy but many times the other party challenges the awards only with the intension to delay the enforcement of an award. As we discussed in detail in this paper that party to contract raised an objections on the award only to stop the enforcement of an award.

In the current situation Pakistan is facing many problems that are a big hurdle in the development of international trade like, political crises, financial crises and terrorism. Recently the main problem that is the big hurdle in the development of the foreign

investment is the terrorism. The people who have to pay attention on the development of the corporations, industries and international business are busy in the politics. International trade has an imperative role to enhance the economy of the country, but without the security of the international investors it's not possible to enhance it. It is essential to be taken necessary steps to promote the international trade for the development of the Pakistan.

The net conclusion of this thesis is that this issue can be solved with the legislation of new laws and amendments in the old one.

4.2 Proposal for Reforms

After the conclusion it has been proved that there must be amendments in the Arbitration Act, 1940 to make the arbitration system more effective and efficient that has a worldwide scope. The Domestic laws in Pakistan that deals with the enforcement of foreign arbitral award should be according to the need of time. Besides these major reforms some other important proposal for the reforms are as under:-

- The grounds for challenging an arbitral award should be specific and restricted that allow only the aggrieved party as a remedy not to delay the enforcement of an award.
- Domestic laws of Pakistan are required to be a mandate on the bases of international convention and treaties.
- The judges that deal the enforcement of foreign arbitral award must be competent in the field of international commercial arbitration.

- The most important is that only High Court and Supreme Court should have jurisdiction to deal the cases related to the enforcement of foreign arbitral award because after arbitration again a proceeding take place from Civil Court.
- If a party challenge an award on the basis of any available ground the court is required to grant the stay on the part of the award that is objected the remaining should be implemented.

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