

**STAY OF COURT PROCEEDINGS IN ARBITRATION CASES:
A COMPARATIVE STUDY OF INDIAN AND PAKISTANI LAW**

*(Thesis submitted in partial fulfilment for the Award of Degree in LLM
Corporate Law)*



SUBMITTED BY:

MUHAMMAD ZIKRIA IFTIKHAR

REG NO: 667-FSL/LLMCL/S23

SUPERVISED BY:

DR. HAFIZ MUHAMMAD USMAN NAWAZ

DEPARTMENT OF LAW

FACULTY OF SHARIAH & LAW

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

DECLARATION

I, Muhammad Zikria Iftikhar, hereby solemnly declare that this dissertation titled **“STAY OF COURT PROCEEDINGS IN ARBITRATION CASES: A COMPARATIVE STUDY OF INDIAN AND PAKISTANI LAW”** is my individual work and effort. Moreover, I am sole author and drafter of this dissertation and not even a single part of this dissertation is submitted to any of the degree or university. I hereby declare and acknowledge with the best of my knowledge that this dissertation has no such information, which had been published by someone else before. It does not violate any of the ethical constrain and there is no infringement of anyone’s copyright and not a single content of this dissertation has been approved by any of the institution or higher learning.

Muhammad Zikria Iftikhar

INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD
FACULTY OF LAW

FINAL APPROVAL

It is certified that we have read the dissertation submitted by Mr. Muhammad Zikria Iftikhar entitled “Stay of Court Proceedings in Arbitration Cases: A Comparative Study of Indian and Pakistani Law” as a partial fulfillment for the award of the degree of LLM Corporate Law. We have scrutinized this dissertation and found it up to requirement in its scope and quality for the award of LLM Corporate Law Degree.

VIVA-VOCE EXAMINATION COMMITTEE

1. SUPERVISOR:

Dr. Hafiz Muhammad Usman Nawaz
Assistant Professor Law
Department of Law
International Islamic University Islamabad

2. INTERNAL EXAMINER:

.....

3. EXTERNAL EXAMINER:

.....

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DEDICATION

THIS WORK IS DEDICATED

TO ALMIGHTY ALLAH

For giving me health, mind and opportunities to achieve this.

TO MY PARENTS

A special feeling of gratitude to my beloved Parents. Who have been my source of inspiration and they strengthen me and their continuous support has made me able to achieve this.

TO MY TEACHERS

To my teachers and supervisor, Sir Hafiz Muhammad Usman Nawaz, who has helped me from the beginning till the end to complete his task. It's all because of his help, support and encouragement.

ABSTRACT

This thesis provides a comparative and critical examination of the judicial attitude in India and Pakistan regarding the stay of court proceedings under arbitration agreements, analysing legislative frameworks, judicial interpretations, and conformity with international arbitration standards. This analysis assesses the ‘*Indian Arbitration and Conciliation Act, 1996*’—particularly Sections 8, 45, and 54—and Pakistan’s ‘*Arbitration Act, 1940*,’ the ‘*Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011*,’ and the ‘*Arbitration Bill, 2024*.’ It underscores India’s progressive transition towards mandatory referral and reduced judicial interference following the amendments of 2015, in contrast to Pakistan’s maintenance of extensive judicial discretion as stipulated in Section 34 of the 1940 Act. The study reveals a consensus on the acknowledgment of legitimate arbitration agreements and non-arbitral disputes, although highlights discrepancies in discretion levels, readiness-to-arbitrate criteria, and fraud exceptions. Utilizing examples from arbitration-friendly jurisdictions, it advocates for the codification of mandatory stay, the implementation of the “two-stage matter” test, the incorporation of separability and competence-competence principles, the restriction of fraud and public policy exceptions, and the establishment of specialized benches. These measures would augment autonomy, efficiency, enforceability, and the arbitration-friendly position of Pakistan.

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CHAPTER 01: INTRODUCTION

1.1 THESIS STATEMENT:

The efficacy of the arbitral system as a dispute resolution mechanism is highly influenced by the stay of court proceedings in favor of arbitration. However, the approaches adopted by Indian and Pakistani courts, particularly the latter, in relation to the enforcement of arbitration agreements by staying the court proceedings have undermined the efficacy of arbitral system. Therefore, a uniform and consistent approach is needed in the arbitration regimes when dealing with stay applications.

1.2 INTRODUCTION TO THE TOPIC:

There is no specific definition of the term ‘stay’ in the arbitration law; however, it is generally understood as the suspension of court proceedings, wherein the court decides to suspend the proceedings and refer the issue to arbitrators due to an arbitration provision in the agreement. This indicates that the litigation must be halted while the arbitration continues, which may be accomplished by staying the proceedings. Article II (3) of the ‘*Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*’ (‘New York Convention or NYC’) stipulates that the court where proceedings were initiated must refer the non-compliant party to arbitration unless the arbitration agreement is “null and void, inoperative or incapable of being performed.”¹ This clause is likewise included in the arbitration frameworks of India and Pakistan. The stay of court proceedings in favor of arbitration is a critical criterion for the effectiveness of arbitration as a dispute resolution method. Moreover, it indicates the degree of a regime’s amicability towards

¹ Ikram Ullah, *Arbitration Law of Pakistan* (Wolters Kluwer Law International, 2021).

arbitration.² The issue arises when one of the parties decides to choose litigation despite the existence of arbitration clause in the agreement. The other party against whom the action is brought takes the plea before the court for staying of proceedings and referral of the matter to arbitration. Nevertheless, in countries such as India and Pakistan, the relationship between the courts and arbitration proceedings continues to be a significant area of concern, particularly in Pakistan, in the context of the stay of court proceedings when a valid arbitration agreement is in place.

1.3 EVOLUTION OF STAY OF COURT PROCEEDINGS:

Before the split of Indian sub-continent, arbitration was regulated under the '*Arbitration Act, 1940*' (1940 Act) for the domestic arbitration while '*Arbitration (Protocol and Convention) Act, 1937*' (1937 Act), was applicable to foreign seated arbitration. Section 34 of the 1940 Act stipulated that, unless there was an application with a compelling justification for not advancing with the arbitration agreement, supported by adequate evidence to persuade the court, the courts could stay judicial proceedings and mandate the initiation of the arbitration process. Furthermore, concerning foreign-seated arbitration, section 3 of the 1937 Act demonstrated that the mere existence of an arbitration clause inside a contract did not always permit the parties to elect arbitration. Therefore, they must provide pertinent submissions that would enable the parties to use section 3 of the 1937 Act, and allowing them to pursue arbitration. Otherwise, court may intervene and suspend the arbitration proceedings. Moreover, it was suggested that courts had the authority to determine the outcome of proceedings, either by granting or denying a stay.³

² Supra.

³ "The Pakistani Legal Regime on Stay of Court Proceedings in Favour of Arbitration," accessed August 3, 2025, https://scholar.google.com/citations?view_op=view_citation&hl=en&user=5Qln5XoAAAAJ&cstart=20&pagesize=80&citation_for_view=5Qln5XoAAAAJ:Tyk-4Ss8FVUC.

The purpose of these legislations was to safeguard international arbitration agreements and to guarantee the execution of arbitral awards. Regrettably, it continued to serve as an instrument for courts to interfere in the arbitration process, exercising discretion that ultimately compromised the standardisation of the arbitration system.⁴ These statutes exemplified the courts' interventionist stance on arbitration and were seen as an impediment to the seamless operation of arbitration framework.⁵

However, in the year 1996, India witnessed the amalgamation of previous three laws on arbitration to become '*The Arbitration and Conciliation Act, 1996*' ('IACA'), a comprehensive and robust arbitration legislation.⁶ This legislation is based upon the principles of the '*United Nations Commission on International Trade Law* ('UNCITRAL' Model Law' or 'UML'). The IACA, in contrast to prior legislations, in section 8 and 45 imposes a mandatory duty on the courts to enforce the arbitration agreements by staying the proceedings and referring the subject to arbitration for both domestic and international arbitration respectively.

Unlike India, Pakistan faced a very long struggle in reforming its arbitration regimes. In fact, section 34 of the 1940 Act is still in force in the country and the same section of law is dealing the enforcement of arbitration agreements and stay of court proceedings. With regards to foreign arbitration, Pakistan implemented '*Recognition and Enforcement (Arbitration Agreements sand Foreign Arbitral Awards) Act, 2011*' ('2011 Act'). Thus, international arbitral awards are enforced under the NYC through the 2011 Act. As far enforcement of arbitration agreements by staying the court proceedings is concerned, Section 4 of the 2011 Act states that an application by one of the

⁴ "Foreign Arbitration Laws - An Appellate Adventure of Pakistani Courts," *Courting The Law*, March 3, 2018, <https://courtingthelaw.com/2018/03/03/commentary/foreign-arbitration-laws-an-appellate-adventure-of-pakistani-courts/>.

⁵ Syed Jawad Muzaffar, *Enforcement of Arbitration Agreement: A Comparative Analysis of Pakistani and English Legal Regimes*, Page No. 76, n.d.

⁶ Hiro N. Aragaki, "Arbitration Reform in India: Challenges and Opportunities," SSRN Scholarly Paper no. 3088355 (Social Science Research Network, December 15, 2017), <https://papers.ssrn.com/abstract=3088355>.

parties for stay of court proceedings, the court shall refer the parties to arbitration unless the arbitration agreements fall in one of the exceptions mentioned in clause 2 of the aforesaid provision.

1.4 SIGNIFICANCE OF STAY OF COURT PROCEEDINGS IN FAVOUR OF ARBITRATION:

A court order suspending proceedings in favor of arbitration is essential since it upholds a contractual obligation to settle disputes via arbitration instead of litigation. This guarantees that parties comply with their selected conflict resolution method and precludes judicial involvement in issues that ought to be addressed by arbitrators. The stay order mandates the parties' commitment to address issues via arbitration, a voluntary procedure. Arbitration is often more expedient and economical than litigation, promoting speedy and cost-efficient settlement of disputes. It facilitates more adaptable procedures and customized processes, fostering harmony between courts and arbitral tribunals. A stay order prohibits redundant or contradictory processes, enhancing efficiency and uniformity. It is crucial in international arbitration for guaranteeing the enforcement of arbitration agreements across many countries.

1.5 LITERATURE REVIEW:

The literature on arbitration law consistently stresses on the significance of judicial restraint and the enforcement of arbitration agreements through the provision of stay of court proceedings. Arbitration is one of the most prevalent alternative dispute resolutions (ADR) process, used by disputing parties to settle issues privately, cost-effectively, and swiftly. This process is premised on little court involvement, party autonomy and procedural efficiency. This research comparatively and critically examines the existing literature – both academic and judicial – relating

to stay of court proceedings in arbitration cases, with a special focus on the global instruments and arbitration regimes of India and Pakistan. This review analyses the legal framework under NYC and ‘*UNCITRAL Model Law on International Commercial Arbitration, 1985*’ (‘UNCITRAL Model Law or UML’), their interpretation by different arbitration-friendly jurisdictions and the statutory framework and judicial interpretations by the superior courts of India and Pakistan. The objective is to identify doctrinal development, judicial trends, inconsistencies, and the gaps that necessitate the present study.

Scholars generally viewed that stay of court proceedings as a procedural safeguard to uphold arbitration agreements and prevent parallel litigation. Gaillard Banifatemi Shelbaya Disputes, Shearman & Sterling and Columbia Law School in their ‘*New York Convention Guide (Article II)*’ concluded that Article II (3) mandates national courts to refer the parties to arbitration unless the relevant agreement is deemed “null and void, inoperative, or incapable of being performed.”⁷

The courts in arbitration-friendly jurisdictions have adopted a strict referral policy limiting judicial inquiry at the referral stage. In ‘*InterGen N.Y Vs. Grina*’ (2005), the Court of Appeals, First Circuit, United States emphasizes on the stay of court proceedings and held that the judicial interpretation of the term ‘shall’ in Article II (3) of NYC signifies that arbitration referral is mandatory and cannot be subject to judicial discretion.⁸

Indian arbitration regime underwent significant reforms particularly post-2015 amendments in the IACA. Scholars such as Sindhu Soman in his PhD dissertation titled as ‘*Judicial Intervention in Arbitration*’ (2023) has extensively worked on the pro-arbitration policy of Indian courts in arbitration agreements. He concluded that the domestic courts are required to refrain from undue

⁷ “Article II - Guide - NYCG 1958,” accessed August 1, 2025, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1.

⁸ ‘*InterGen N.V. (Netherlands) Vs. Grina (Switzerland)*, Court of Appeals, First Circuit, United States of America, 22 September 2003, 03-1056.’

meddling in matters within the arbitrator's authority, while also acting effectively when issues about by the tribunal's jurisdiction are brought before the court. He concluded that the tribunal's decision is considered final when it comes to factual matters, but legal problems such as jurisdiction may still be taken to court and pursued.⁹

Gaurav Chakrabarti in his article '*Arbitrability of Disputes in India: Evolution of Judicial Reference to Arbitration*' (2024) concluded that, courts, under Sections 8 and 11 of IACA, have embraced a pro-arbitration stance, especially after the 2015 amendment, which restricts involvement during the pre-reference and pre-appointment phases. Nonetheless, exceptions persist for matters including fraud, unstamped contracts, or conflicts under advantageous statutes when court action is essential to safeguard statutory rights. The courts' balanced position guarantees that arbitration flourishes as an effective dispute settlement method while protecting public interest and legal frameworks. The Indian court have significantly influenced the arbitrability framework, promoting arbitration as a viable alternative conflict resolution method to litigation, while safeguarding statutory rights and public policy considerations. This equilibrium is essential for the sustained development and legitimacy of arbitration in India.¹⁰

Hiro Naraindas Aragaki in his article '*Arbitration Reform in India: Challenges and Opportunities*' (2017) concluded that the legislature, influenced significantly by various government entities like the LCI, has historically established the reform agenda by implementing new legislative frameworks aimed at aligning India with contemporary world standards. While there exists a subtle

⁹ "Sindhu Soman-THESIS 16-03-2023.Pdf," n.d., accessed August 2, 2025, <https://dr.ddn.upes.ac.in/bitstream/123456789/4300/1/Sindhu%20Soman-THESIS%2016-03-2023.pdf>.

¹⁰ Gaurav Chakrabarti, "Arbitrability Of Disputes In India: Evolution Of Judicial Reference To Arbitration," SSRN Scholarly Paper no. 5069949 (Social Science Research Network, December 19, 2024). <https://doi.org/10.2139/ssrn.5069949>.

distinction between superfluous judicial involvement and essential judicial assistance, the courts have mostly succeeded in undermining these progressive legislative accomplishments.¹¹

Similarly, Indian courts have played a decisive role in shaping the jurisprudence on stay of court proceedings. Early judicial approaches reflected uncertainty towards arbitration, where courts assumed wide judicial discretion at the referral stage. Subsequent rulings indicate a gradual shift towards judicial restraint. In '*Sanjiv Prakash Vs. Seema Kukreja*' (2021), the Indian Supreme Court embraced the pro-arbitration policy of India and held that pursuant to Section 8 of IACA, the court's jurisdiction is extremely restricted, necessitating adherence to a *prima facie* test to determine the existence of a valid arbitration agreement and the applicability of the disputes within its parameters.¹²

Unlike India, the arbitration regime of Pakistan has consistently been criticized by the outdated 1940 Act, arguing that it permits broad judicial involvement. In his work '*Arbitration Laws of Pakistan*,' (2021) Dr. Ikram Ullah, a professor of International Islamic University, has conducted a comprehensive study on the arbitration regime of Pakistan. In Chapter 6, the author determined following the enactment of the 2011 Act, the authority to decide whether to stay the court proceedings for international arbitration has been eliminated. Nevertheless, the current state of domestic arbitration remains bleak, since the arbitration agreement is unable to exclude the authority of the court. Furthermore, the court has interpreted its discretion under section 34 in a broad manner. In this instance, the court devised several justifications to undermine the party's choice to pursue arbitration, regardless of whether the legitimacy and existence of such an agreement were called into question.¹³

¹¹ Hiro N. Aragaki, "Arbitration Reform in India: Challenges and Opportunities," SSRN Scholarly Paper no. 3088355 (Social Science Research Network, December 15, 2017), <https://papers.ssrn.com/abstract=3088355>.

¹² '*Sanjiv Prakash Vs. Seema Kukreja*, (2021) 9 SCC 732.'

¹³ Ikram Ullah, *Arbitration Law of Pakistan* (Wolters Kluwer Law International, 2021).

The conclusion of Dr. Ikram Ullah is also supported by the superior courts of Pakistan which reflects an interventionist approach. The Karachi High Court in '*Akbar Cotton Mills Ltd. Vs. VES/OJUANOJO OBJEDINENSIJE TECH/AMESH EXPORT*' (1984) concluded that a party seeking relief under section 34 of the 1940 Act does not possess an unequivocal right to secure a stay of legal proceedings before the Court. The Court has discretionary authority to deny a stay of proceedings, even where an arbitration provision in the parties' agreement stipulates referral of disputes to arbitration, under suitable circumstances.¹⁴

The literature on stay of court proceedings reveals several gaps; 1) absence of comparative analyses of the legal framework of India and Pakistan; 2) absence of comparative analyses of the judicial approaches adopted by both India and Pakistan on stay of court proceedings; 3) insufficient examination of the judicial approaches adopted by both countries vis-à-vis arbitration-friendly jurisdictions; and 4) lack of coherent principles guiding Pakistani courts in disposing of the stay applications and enforcing arbitration agreements. This research has filled these gaps by conducting a comprehensive comparative analysis, exploring the approaches and practices adopted by both countries. These gaps further justify the present study's focus on recommending principles or policy changes that needs to be adopted by the courts in enforcing the arbitration agreements by staying the proceedings before it.

1.6 RESEARCH QUESTIONS:

1. What are the legal provisions governing the stay of court proceedings in India and Pakistan?

¹⁴ '*Akbar Cotton Mills Ltd. Vs. VES/OJUANOJO OBJEDINENSIJE TECH/AMESH EXPORT*, 1984 CLC 1605 KARACHI-HIGH-COURT-SINDH.'

2. How the courts in both countries have interpreted and applied these provisions?
3. Do the judicial approaches adopt by both the countries are in line with approaches adopted by arbitration-friendly countries?
4. What principles need to be adopted by the courts in enforcing the arbitration agreements by staying the proceedings before it?

1.7 RESEARCH OBJECTIVES:

1. To compare the legal provisions governing the stay of court proceedings from international as well as from the perspective of India and Pakistan.
2. To examine and explain the approaches taken by the courts of both countries in interpreting and applying these provisions.
3. To examine the judicial approaches adopted by both the countries with arbitration-friendly countries.
4. To suggest principles that needs to be adopted by the courts in enforcing the arbitration agreements by staying the proceedings before it.

1.8 SIGNIFICANCE OF STUDY:

This research is important because it has focused on the crucial interaction between the courts and arbitration, which may have a substantial effect on the efficacy and attractiveness of arbitration as a method for resolving disputes. By comparing India and Pakistan, the study has explored the approaches adopted by the courts of both the countries in relations to the enforcement of arbitration agreements by staying their proceedings. This study has further provided some insights for Pakistan in aligning the efficacy of arbitral system with that of the arbitration-friendly countries.

The findings of the research may inform reforms in the legislative framework and practical implementation, possibly improving the arbitration-friendly policy effectively and efficiently.

1.9 DOCTRINAL RESEARCH METHODOLOGY:

The comparative study was conducted by using a qualitative approach. This comparative study employs a detailed analyses of the provisions related to the stay of court proceedings in arbitration cases as well as the judicial approaches adopted by both India and Pakistan while disposing of stay applications. This study further elucidated the provisions of stay of court proceedings under the global conventions and the interpretation of these provisions by arbitration-friendly jurisdictions. Extensive research was conducted by examining both primary and secondary sources, in order to arrive at a practical conclusion. The main sources of data were collected from the following sources;

- 1) The statutes related to arbitration of India and Pakistan, as well as the NYC and UML.
- 2) Judgments rendered by the Superior Courts of India and Pakistan as well as by the courts of different jurisdictions.

Secondary data sources such as research papers, articles, books, and reports were utilized for this research work.

CHAPTER 02: LEGAL FRAMEWORK OF STAY OF COURT PROCEEDINGS UNDER NEWYORK CONVENTION AND UNCITRAL MODEL LAW AND THEIR INTERPRETATION BY DIFFERENT JURISDICTIONS

2.1 INTRODUCTION:

Both ‘*Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*’ (‘New York Convention or NYC’) and ‘*UNCITRAL Model Law on International Commercial Arbitration, 1985*’ (‘UML’) advocates for the referral of disputes to arbitration in the presence of a valid arbitration agreement. This chapter examines the legal framework governing the stay of court proceedings under both laws i.e. Article II (3) of the NYC and Article 8(1) of the UML and the restricted exceptions to referral, including instances where agreements are “null and void, inoperative, or incapable of being performed.” The chapter examines several judicial approaches—from full legal review to *prima facie* evaluations—and underscores procedural stipulations, like prompt requests and the definitions of ‘matter’ or ‘action.’ This chapter provides a foundation for comprehending international rules about judicial non-intervention in arbitration.

2.2 LEGAL FRAMEWORK UNDER NYC:

The contracting states are required to acknowledge the arbitration agreements and the referral of the parties to arbitration under Article II of NYC. Clause II of the said provision imposed a mandatory duty on the court of a contracting state to stop the proceedings before it by using the word ‘*shall*’. As per clause 3 this article;

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”¹⁵

This provision laid down the following general principles while dealing stay application such as mandatory referral, party request, subject matter of the dispute and the grounds of ‘null and void, inoperative or incapable of being performed, which are discussed below in detail.

2.2.1 GENERAL PRINCIPLES UNDER ARTICLE II (3):

Article II (3) of NYC is the first provision in the global instruments which provides a comprehensive general principle for stay of court proceedings in arbitration cases. These principles envisage in Article II (3) of NYC are as under;

2.2.1.1 MANDATORY REFERRAL OF PARTIES TO ARBITRATION:

Article II (3) stipulates that a “*court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement in writing within the meaning of this article, shall refer the parties to arbitration.*”¹⁶ The Canadian Supreme Court has indicated that the aim of the said provision is to reinforce the duty to uphold arbitration agreements.¹⁷ The *travaux préparatoires*¹⁸ do not address the extent of the courts’ responsibility to direct parties to arbitration. The phrase “refer the parties to arbitration” originates from the Geneva Protocol which

¹⁵ New York Convention, “United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958),” accessed August 1, 2025, <https://www.newyorkconvention.org/english>.

¹⁶ “Article II - Guide - NYCG 1958,” accessed August 1, 2025,

https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1.

¹⁷ ‘GreCon Dimter Inc. Vs. J. R. Normand Inc., Supreme Court, Canada, 22 July 2005, [2005] SCC 46 (CanLII), available on the Internet at <http://canlii.ca/t/116wn>.’

¹⁸ “The Travaux Préparatoires are the official documents recording negotiations, drafting, and discussions during the process of creating a treaty.”

states that the “*tribunals of the Contracting Parties [...] shall refer the parties on the application of either of them to the decision of the arbitrators.*”¹⁹

Judicial interpretation of the term ‘shall’ in Article II (3) signifies that arbitration referral is mandatory and cannot be subject to judicial discretion.²⁰ In reality, courts have fulfilled their duty to refer the parties to arbitration in two distinct ways. The first approach, supported in civil law states, is rejecting jurisdiction where an arbitration agreement exists. For example, many rulings by French and Swiss courts have determined that, in accordance with Article II of the NYC, the existence of an arbitration agreement made national courts incapable, therefore referring the parties to arbitration.²¹ The second approach, supported in most common law regimes, involves staying judicial proceedings to fulfil the courts’ duty to uphold arbitration agreements. The Australian Federal Court, while interpreting Section 7(2) of the ‘*Australian International Arbitration Act*’ in accordance with Article II (3), determined that the phrase “shall refer the parties to arbitration” should not be construed as imposing an obligation on the parties to arbitrate.²² The court clarified that although judicial processes should be stayed, it cannot mandate arbitration if the parties are unwilling to participate. Both approaches align with the responsibility of the courts of Contracting Parties to the Convention to refer the parties to arbitration. Courts in certain countries may issue anti-suit injunctions to encourage arbitration. The Court of Appeal of England and Wales has

¹⁹ “Protocol on Arbitration Clauses - The Faculty of Law,” accessed August 1, 2025, <https://www.jus.uio.no/english/services/library/treaties/11/11-05/protocol-arbitration-clauses.html>.

²⁰ *Renusagar Power Co. Ltd. Vs. General Electric Company and another*, Supreme Court, India, 16 August 1984; *InterGen N.V. (Netherlands) Vs. Grina (Switzerland)*, Court of Appeals, First Circuit, United States of America, 22 September 2003, 03-1056.’

²¹ *Société Sysmode S.A.R.L. et Société Sysmode France Vs. Société Metra HOS et Société SEMA*, Court of Appeal of Paris, 8 December 1988; *Fondation M Vs Banque X*, Federal Tribunal, Switzerland, 29 April 1996.’

²² “*Hi-Fert Pty Ltd Vs. Kiukiang Maritime Carriers Inc (No 5)* - (24 November 1998),” accessed August 1, 2025, <https://www.ato.gov.au/law/view/print?DocID=JUD%2F90FCR1%2F00001&PiT=99991231235958>.

determined that anti-suit injunctions aimed at compelling compliance with an arbitration agreement do not contravene the Convention.²³

2.2.1.2 PARTY REQUEST REQUIRED:

According to Article II (3), the courts are mandated to refer the parties to arbitration at the request of one party. The ability of a court to refer parties to arbitration *ex officio* is not explicitly determined by Article II (3). Nonetheless, as arbitration is fundamentally based on consent, the parties have the freedom to relinquish their previous agreement to arbitrate. If no party claims the existence of an arbitration agreement, the court will not refer the parties to arbitration *ex officio*, but will instead maintain its own jurisdiction.²⁴ In such circumstances, courts often determine that the parties have relinquished their right to arbitrate. For example, United States courts often determine that parties waive their right to arbitrate when they ‘substantially’ engage in litigation or when they attempt to nullify the arbitration agreement in the courts of a foreign nation.²⁵ In evaluating whether the parties’ actions constituted a waiver of their right to arbitrate, a Brazilian court determined that such waiver must be explicitly established; that is, the parties must have acted in a way that clearly indicated their intention to waive the arbitration agreement.²⁶

2.2.1.3 SUBJECT MATTER OF THE AGREEMENT:

Article II (3) restricts the duty to refer the parties to arbitration to “*matters in respect of which there is an agreement*” as delineated in Article II (1) and (2). The Court of Appeal of England and

²³ “Article II - Guide - NYCG 1958,” accessed August 1, 2025,

https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1.

²⁴ “British Telecommunications Plc Vs.SAE Group Inc, High Court of Justice, England and Wales, 18 February 2009, HT-08-336, [2009] EWHC 252 (TCC).”

²⁵ ‘Anna Dockeray Vs. Carnival Corporation, District Court, Southern District of Florida, Miami Division, United States of America, 11 May 2010, 10-20799; Apple & Eve LLC v. Yantai North Andre Juice Co. Ltd, District Court, Eastern District of New York, United States of America, 27 April 2009, 07-CV-745 (JFB)(WDW)’

²⁶ ‘Companhia Nacional de Cimento Portland—CNCP Vs. CP Cimento e Participações S/A, Court of Justice of Rio de Janeiro, Brazil, 18 September 2007, Civil Appeal 24.798/2007’

Wales held that, according to the ‘*English Arbitration Act, 1975*’ and the NYC, courts are obligated to refer a dispute to arbitration if it pertains to any issue designated for referral.²⁷ The Australian Federal Court interpreted the term ‘matter’ by referencing the pro-arbitration policy of the NYC, and held that the term possesses a ‘wide import’ and is not confined, for the purposes of Section 7(2)(b) of the Australian Arbitration Act (analogous to article II (3) of the Convention), to issues stemming solely from the parties’ pleadings.²⁸ National courts evaluate the extent of the arbitration agreement to ascertain whether a dispute or specific claim is subject to the obligation of referral to arbitration.²⁹ An Australian Court suspended proceedings under Section 7(2) of the Arbitration Act, which implements Article II (3) of the NYC, by interpreting the expansive wording of the arbitration agreement that encompassed “all dispute arising in connection with the agreement or execution thereof.” The court determined that allegations concerning the execution of the agreement were within the parameters of the arbitration agreement.³⁰

2.2.1.4 PROVISIONAL AND CONSERVATORY MEASURES:

The obligation to refer the parties to arbitration does not include provisional and conservatory measures, unless the arbitration agreement explicitly addresses such measures. Most courts assert jurisdiction to provide interim or temporary relief in aid of arbitration upon a party’s application, notwithstanding the existence of an arbitration agreement.³¹

²⁷ ‘Kammgarn Spinnerei GmbH Vs. Nova (Jersey) Knit Ltd, Court of Appeal, England, 2 April 1976’

²⁸ ‘Casaceli Vs. Natuzzi S.p.A. Federal Court, Australia, 29 June 2012, NSD 396 of 2012’

²⁹ ‘Nicola Vs. Ideal Image Development Corporation Inc., Federal Court, Australia, 16 October, NSD 1738 of 2008; Commonwealth Development, Corp Vs. Montague, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No 8159 of 1999, DC No 29 of 1999’

³⁰ ‘CTA International Pty Ltd. Vs. Sichuan Changhong Electric Co., Supreme Court of Victoria, Australia, 6 September 2002, 4278 of 2001’

³¹ “Article II - Guide - NYCG 1958,” accessed August 1, 2025, https://newyorkconvention1958.org/index.php?lvl=cmepage&pageid=10&menu=618&opac_view=-1.

2.2.2 ENFORCEMENT OF ARBITRATION AGREEMENTS UNDER ARTICLE

II (3):

Article II (3) mandates national courts to refer the parties to arbitration unless the relevant agreement is deemed “null and void, inoperative, or incapable of being performed.” Neither the *travaux préparatoires* nor the NYC’s text provide any guidance on the standard of review that national courts should use in this context, nor does it clarify the phrases “null and void, inoperative, or incapable of being performed.”³²

2.2.2.1 STANDARD OF REVIEW:

The standard of review of arbitration agreements under Article II (3) is not addressed in the NYC. Two patterns are evident in the case laws. Certain courts conduct a comprehensive examination of the arbitration agreement to determine whether it is “null and void, inoperative, or incapable of being performed,” whilst others restrict their analysis to a limited or *prima facie* investigation, which may manifest in diverse forms and distinctions. NYC does not exclude courts from doing either a *prima facie* review of the arbitration agreement or a comprehensive assessment of its existence and legality; hence, neither method may be deemed in violation of the NYC.³³ Italy and Germany are among the jurisdictions that have endorsed the comprehensive review standard. The Italian Court of Cassation determined that Article II (3) empowers national courts to evaluate the legality and effectiveness of the arbitration agreement, emphasizing that this assessment is an intrinsic aspect of the domestic court’s authority to review the arbitration agreement’s validity.³⁴

³² “Article II - Guide - NYCG 1958,” accessed August 1, 2025, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1..

³³ *Supra*.

³⁴ ‘Heraeus Kulzer GmbH Vs. Dellatorre Vera SpA, Court of Cassation, Italy, 5 January 2007, 35.’

Although without explicitly mentioning the Convention, German courts do a comprehensive examination of the arbitration agreement when determining whether to refer the parties to arbitration. Consequently, courts refer to the German Code of Civil Procedure, which explicitly states that before the formation of the arbitral tribunal, a party may petition a court to determine the admissibility or inadmissibility of arbitration proceedings.³⁵ For instance, under Section 1032 of the Code of Civil Procedure, the German Federal Supreme Court performed a full review of the arbitration clause in a normal consumer contract. It held that, notwithstanding the concept of competence-competence,³⁶ the lower court mistakenly restricted its examination of the arbitration agreement, since the court's authority cannot be diminished by the parties' agreement. The court referred the parties to arbitration after confirming that the arbitration agreement met the formal and substantive requirements of German law.³⁷

Other countries have confined their examination of the arbitration agreement to a cursory assessment to establish *prima facie* that it is not "null and void, inoperative, or incapable of being performed." In France, courts use a *prima facie* criterion to review arbitration agreements. They assert that courts are barred from conducting a comprehensive examination of the arbitration agreement and must refer the parties to arbitration unless the agreement is clearly null and invalid.³⁸

³⁵ Section 1032 of the Code of Civil Procedure

³⁶ 'The principle of competence-competence prescribes that an arbitral tribunal may determine its own jurisdiction.'

³⁷ "Article II - Guide - NYCG 1958," accessed August 1, 2025,

https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1."

³⁸ 'SA Groupama transports Vs. Société MS Régine Hans und Klaus Heinrich KG, Court of Cassation, France, 21 November 2006, 05-21.818;' 'Ste A.B.S. American Bureau of Shipping Vs. Copropriété Maritime Jules Verne et autres, Court of Appeal of Paris, France, 4 December 2002;' 'Société Generali France Assurances et al. Vs. Société Universal Legend et al., Court of Cassation, France, 11 July 2006, 05-18.681.'

2.2.2.2 COURTS REVIEW OF THE EXISTENCE AND VALIDITY OF A WRITTEN AGREEMENT:

Article II (3) mandates the national courts to refer the parties to arbitration “*unless [they find] that the said agreement is null and void, inoperative or incapable of being performed.*” The United States courts have held that the grounds for denying arbitration referral enumerated in Article II (3) are comprehensive.³⁹

2.2.2.2.1 NULL AND VOID:

Article II (3) of NYC does not provide the legal criterion for ascertaining whether an arbitration agreement is null and void. Certain courts assert that the matter should be resolved according to the relevant municipal law, either the *lex fori* or the law dictated by the conflict-of-laws provision in article V (1)(a) of NYC.⁴⁰ United States and English courts have delineated the term ‘null and void’ as ‘devoid of legal effect,’ and implemented an international standard of defenses in contract law. Both jurisdictions held that null and void ground in line with ‘standard breach-of-contract defenses’ that may be universally applied, including fraud, mistake, duress, and waiver.⁴¹

2.2.2.2.2 INOPERATIVE:

Courts often evaluate the criterion of ‘inoperability’ within the larger framework of “null and void, inoperative, or incapable of being performed” without further differentiation. The relevant case law indicates that the term ‘inoperative’ encompasses scenarios in which the arbitration agreement

³⁹ ‘Lindo (Nicaragua) Vs. NCL (Bahamas), Ltd. (Bahamas), Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10-10367;’ ‘Aggarao (Philippines) Vs. MOL Ship Management Company Ltd. (Japan), Court of Appeals, Fourth Circuit, United States of America, 16 March 2012, 10-2211.’

⁴⁰ “Article II - Guide - NYCG 1958,” accessed August 1, 2025, https://newyorkconvention1958.org/index.php?lvl=cmsspage&pageid=10&menu=618&opac_view=-1.

⁴¹ ‘Rhone Mediterranee Compagnia Francese Vs. Lauro, Court of Appeals, Third Circuit, United States of America, 6 July 1983, 82-3523.’

is no longer applicable to the parties or their dispute.⁴² In cases where the parties waived their right to arbitrate by commencing judicial proceedings, an Indian court determined that the arbitration agreement was rendered inoperative under Section 45 of IACA which mirrors Article II (3) of NYC.⁴³ Consequently, it declined to refer the parties to arbitration, since they had filed many civil and criminal lawsuits in Indian courts.

2.2.2.2.3 INCAPABLE OF BEING PERFORMED:

The phrase “incapable of being performed” clause is often interpreted as pertaining to circumstances in which the arbitration cannot be effectively initiated.⁴⁴ An Indian court elucidated that “the phrase incapable of being performed signifies, in effect, frustration and the consequent discharge, if, after the making of the contract, the promise becomes incapable of being fulfilled or performed, due to unforeseen contingencies, the contract is frustrated.”⁴⁵ Case law indicates that an arbitration agreement is deemed incapable of being performed when it is pathological, specifically in two primary scenarios: (i) when the agreement lacks clarity and fails to offer adequate guidance for the arbitration to advance, and (ii) when it identifies a non-existent arbitral institution.⁴⁶

⁴² ‘Golden Ocean Group Ltd. Vs. Humpuss Intermoda Transportasi TBK Ltd. & anr, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.’

⁴³ ‘Ramasamy Athappan and Nandakumar Athappan Vs. Secretariat of Court, International Chamber of Commerce, High Court of Madras, India, 29 October 2008.’

⁴⁴ Stefan Kröll, *The “Incapable of Being Performed” Exception in Article II(3) of the New York Convention*, (London), Cameron May, 2008.

⁴⁵ ‘Ramasamy Athappan and Nandakumar Athappan Vs. Secretariat of Court, International Chamber of Commerce, High Court of Madras, India, 29 October 2008.’

⁴⁶ “Article II - Guide - NYCG 1958,” accessed August 1, 2025, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1.

2.3 LEGAL FRAMEWORK UNDER UNICITRAL MODEL LAW:

Article 8(1) of UML stipulates that courts must refer the parties to arbitration where a valid arbitration agreement is present, save in certain specified circumstances. According to this article;

Arbitration agreement and substantive claim before court: (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.⁴⁷

Article 8 (1), akin to Article II (3) of NYC, addresses the ‘negative’ impact of the arbitration agreement, which prohibits the parties from initiating judicial proceedings over issues within the parameters of the agreement. Article 8 (1) mandates that courts refer a case to arbitration under certain circumstances. The first pre-requisite, which is substantive, necessitates that the subject matter of the dispute falls within an agreement that is not null and void, inoperative, or incapable of being performed. A second procedural prerequisite mandates that the request for arbitration be made no later than the submission of the party’s first statement about the content of the dispute. Some cases further indicate that Article 8 necessitates the existence of a disputes between the parties. The referral of a matter to arbitration precludes its continuation in domestic courts.⁴⁸ Article 8 (2) permits the commencement or continuation of arbitration proceedings

⁴⁷ “UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission on International Trade Law,”

⁴⁸ ‘COMTEC COMPONENTS LTD. V. INTERQUIP LTD. | [1998] HKCFI 803 | HKLII,’ accessed August 2, 2025, <https://www.hklaii.hk/en/cases/hkcfi/1998/803>.’

notwithstanding the existence of a pending application to refer a dispute to arbitration (“referral application”). This provision effectively delegates the decision about the continuation of arbitration, while a referral application is pending, to the arbitral panel instead of the court.⁴⁹

2.3.1 SCOPE OF APPLICATION OF ARTICLE 8:

According to Article 1 (2) of the UML, the location of arbitration in a foreign jurisdiction does not affect the application of Article 8. The law chosen by the parties to govern the contract including the arbitration provision does not affect the criteria for granting a referral application.⁵⁰ Consequently, such restrictions are always regulated by the legislation of the jurisdiction in which the court functions. Article 8 stipulates its applicability when a court is seized of an action. If the court is not seized of an action, Article 8 is inapplicable, and no referral order may be secured.⁵¹ Pre-action document discovery applications⁵² and company liquidation applications are not classified as actions.⁵³ Nonetheless, petitions to vacate a default judgment (if the underlying issue is subject to arbitration) constitute an action.⁵⁴

⁴⁹ Patrick Oliver Ott, “UNCITRAL – United Nations Commission On International Trade Law,” in *A Concise Encyclopedia of the United Nations*, ed. Helmut Volger (Brill | Nijhoff, 2010), <https://doi.org/10.1163/ej.9789004180048.i-962.595>.

⁵⁰ ‘Francis Travel Marketing Pty. Limited Vs. Virgin Atlantic Airways Limited, Supreme Court of New South Wales— Court of Appeal, Australia, 7 May 1996, [1996] NSWSC 104’

⁵¹ ‘CLOUT case No. 386 [ATM Compute GmbH Vs. DY 4 Systems, Inc., Ontario Court of Justice, Canada, 8 June 1995].’

⁵² ‘Timoney Technology Limited & Anor. Vs. ADI Limited, Supreme Court of Victoria (Commercial and Equity Division), Australia, 17 October 2007, [2007] VSC 402’

⁵³ ‘Liu Man Wai and Another Vs. Chevalier (Hong Kong) Ltd., High Court—Court of First Instance, Hong Kong Special Administrative Region of China, 29 January 2002, [2002] HKCFI 399’

⁵⁴ ‘Dah Chong Hong (Engineering) Ltd. Vs. Baldwin Construction Co. Ltd., High Court—Court of First Instance, Hong Kong Special Administrative Region of China, 4 October 2002, [2002] HKCU 1180’

2.3.2 COURT MAY NOT REFER AN ACTION TO ARBITRATION ON THEIR OWN MOTION:

Article 8 only addresses instances in which a party to the action requests referral to arbitration. The text does not clearly indicate whether a court may unilaterally refer a case to arbitration. It is evident from the *travaux préparatoires* that Article 8 tacitly prohibits a court from acting otherwise,⁵⁵ and courts have affirmed that they may only refer a case to arbitration if a party has filed a request to that effect.⁵⁶ The request must be submitted before the first statement on the substance of the dispute. The Norwegian Supreme Court ruled that the right to request arbitration was relinquished due to the defendant's failure to raise the arbitration clause prior to filing their first substantive statement.⁵⁷

2.3.3 MANDATORY NATURE OF REFERRAL UPON FULFILMENT OF THE CONDITIONS STIPULATED IN ARTICLE 8:

Upon fulfilment of the requirements specified in Article 8, courts are compelled to refer the matter to arbitration. The Irish High Court, in the matter of *XPL Engineering Ltd*⁵⁸ reaffirmed that upon fulfilment of the conditions outlined in Article 8(1), the court is compelled to mandate arbitration for the parties involved.

⁵⁵ UN. Secretary-General, ed., *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General* (UN, 25), <https://digitallibrary.un.org/record/85728>.

⁵⁶ 'CLOUT case No. 508 [United Laboratories, Inc. Vs. Abraham, Ontario Superior Court of Justice, Canada, 8 October 2002], [2002] CanLII 17847 (ON SC)'

⁵⁷ Erik Sinander, "Norwegian Supreme Court on When an Arbitration Agreement Needs to Be Invoked under Article 8 of the Model Law," *EAPIL*, December 6, 2023, <https://eapil.org/2023/12/06/norwegian-supreme-court-on-when-an-arbitration-agreement-needs-to-be-invoked-under-article-8-of-the-model-law/>.

⁵⁸ 'XPL Engineering Ltd Vs. K & J Townmore Construction Ltd [2019] IEHC 665'

2.3.4 EXCEPTIONS:

The court may decline to refer the parties to arbitration if the agreement is “null and void, inoperable, or incapable of being performed.” An arbitration agreement will be rendered “null and void, inoperative, or incapable of being performed” if its non-severable terms are deemed invalid.

The court denied a referral application on the basis that the arbitration agreement’s terms regarding the formation of the arbitral panel were in violation of public policy and therefore rendered void.⁵⁹

In other situations, the court determined that an arbitration agreement would be considered “null and void, inoperative, or incapable of being performed” if it is shown to be excessively unfair or one-sided, rendering it non-binding under the relevant contract standards.⁶⁰

In some instances, courts have embraced a broader interpretation of the term “null and void, inoperative or incapable of being performed.” An instance is a ruling of the German Federal Court of Justice determining that an arbitration agreement was unenforceable because the party against whom it was asserted lacked the financial means to engage in arbitration.⁶¹ A Canadian ruling exemplifies this, whereby the court rejected a referral application on the basis that the party requesting the reference had presented the matter to a different arbitral institution than that stipulated by the parties.⁶²

⁵⁹ ‘Desbois Vs. Industries A.C. Davie Inc., Court of Appeal of Quebec, Canada, 26 April 1990, [1990] CanLII 3619 (QC CA), available on the Internet at <http://canlii.ca/t/1pjlq>.’

⁶⁰ ‘Dell Computer Corp. Vs. Union des Consommateurs, Supreme Court, Canada, 13 July 2007, [2007] SCC 34, [2007] 2 SCR 801, available on the Internet at <http://canlii.ca/t/1s2f2>’

⁶¹ ‘CLOUT case No. 404 [Bundesgerichtshof, Germany, III ZR 33/00, 14 September 2000]. ‘It should be noted that the court based its ruling on a fundamental right of access to courts as provided by the German Constitution.’

⁶² ‘OEMSDF Inc. v. Europe Israel Ltd., Ontario Superior Court of Justice, Canada, 22 September 1999, [1999] O.J. No. 3594.

2.4 CONCLUSION:

It can be concluded from the above discussions that both instruments respect and protect the arbitration agreements by restricting judicial intervention. Although both require referral to arbitration, their implementation differs across jurisdictions. Civil and common law courts vary in their interpretation of exceptions and the application of the referral duty. The chapter illustrates that although the legal framework seeks consistency, the varied interpretations of national courts—particularly regarding phrases like “null and void” or “inoperative”—create obstacles to consistent implementation. This discrepancy highlights the need for enhanced judicial consistency in advocating arbitration as a dependable dispute settlement method.

CHAPTER 03: LEGAL FRAMEWORK OF STAY OF COURT PROCEEDINGS UNDER INDIAN AND PAKISTANI LAW

3.1 INTRODUCTION:

Statutory provisions governing stay of court proceedings under the arbitration frameworks of India and Pakistan are delineated in the '*The Arbitration and Conciliation Act, 1996*' ('IACA') and the '*Arbitration Act, 1940*' (1940 Act)/ '*Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011*' ('2011 Act') respectively. This chapter offers a comprehensive comparative analyses of the provisions and legal foundations within the IACA—specifically Sections 8, 45, and 54—and Pakistan's legal framework, encompassing Section 34 of the 1940 Act, Section 4 of the 2011 Act, and the newly proposed Section 9 of the '*Arbitration Bill, 2024*.' The chapter delineates the procedural prerequisites while also comparing the provision, ranging from mandatory referrals and *prima facie* review in India to discretionary authorities and judicial oversight in Pakistan.

3.2 LEGAL FRAMEWORK IN INDIA:

The relevant laws regulating the stay of court proceedings in the presence of an arbitration agreement are included in Sections 8, 45, and 54 of IACA. Domestic arbitration is governed by Section 8, whereas international arbitration is regulated by Sections 45 and 54.

3.2.1 SECTION 8 OF IACA:

Section 8 generally resembles with Article 8 of UML and underwent substantial modifications in the 2015 to make India more arbitration-friendly. This section specifies that;

Power to refer parties to arbitration where there is an arbitration agreement:

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.⁶³

3.2.1.1 CONDITIONS FOR STAY OF PROCEEDINGS UNDER SECTION 8:

The 2015-amendment eliminated judicial discretion and mandated referral to arbitration upon fulfilment of the specified circumstances. The courts must now limit themselves to a *prima facie* assessment of the arbitration agreement's existence; they cannot examine the merits of the case. The phrase "shall refer the parties to arbitration" is significant as it constrains the court's discretion in exercising its authority according to the stipulated prerequisites.⁶⁴ The prerequisites are: (i) an

⁶³ 'The Arbitration and Conciliation Act, 1996, Section 08.'

⁶⁴ "Sindhu Soman-THESIS 16-03-2023.Pdf," n.d., accessed August 2, 2025, <https://dr.ddn.upes.ac.in/bitstream/123456789/4300/1/Sindhu%20Soman-THESIS%2016-03-2023.pdf>.

arbitration agreement; (ii) one party initiates a lawsuit against the other; (iii) the subject of the lawsuit and the agreement are identical; and (iv) one party requests referral to arbitration prior to submitting their first statement.⁶⁵ Section 8 mandates the referral of any dispute covered by an arbitration agreement to arbitration. In *'P. Anand Gajapathi Raju'*⁶⁶ and *'Hindustan Petroleum Corporation'*⁶⁷ cases, the Court determined that the wording of Section 8 is peremptory, therefore mandating the parties to enforce their agreement by referring them to arbitration. The *'Vidya Drolia'*⁶⁸ case similarly emphasized that courts do just a *prima facie* review to ascertain the existence of a valid arbitration agreement and discouraged further judicial examination at the Section 8 stage.

3.2.2 SECTION 45 AND 54 OF IACA:

Section 45 and Section 54 of IACA pertain to foreign-seated arbitrations and enforcement of foreign awards, respectively. These provisions fall under Part II of the Act, which is based on the NYC and the Geneva Convention. Section 45 stipulates that;

Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, [unless it *prima facie* finds] that the said agreement is null and void, inoperative or incapable of being performed.⁶⁹

⁶⁵ 'Magma Leasing and Finance Ltd Vs. Potluri Madhavilatha' (2009) 10 SCC 103 (Ind).'

⁶⁶ 'P. Anand Gajapathi Raju and others Vs. PVG Raju, Civil Appeal No. 5251 of 1993.'

⁶⁷ 'Hindustan Petroleum Corporation Vs. Pinkcity Midway Petroleums, Civil Appeal No. 5156 (2003).'

⁶⁸ 'Vidya Drolia Vs. Durga Trading Corporation, (2021) 2 SCC 1'

⁶⁹ 'The Arbitration and Conciliation Act, 1996, Section 45.'

Similarly, section 54 states that;

Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative.⁷⁰

3.2.2.1 CONDITIONS FOR STAY OF COURT PROCEEDINGS UNDER SECTION 45 AND 54:

Under sections 45 and 54 of IACA, courts possess considerable discretion in evaluating the enforceability, functionality, and practicality of an agreement. If the agreement is rendered “null and void, inoperative, or incapable of being performed” the court has the right to refuse to refer the subject to arbitration.⁷¹ When encountered with objections that an arbitration agreement is “null and void, inoperative, or incapable of being performed” under Section 45, the court is required to provide a definitive determination or ascertain if a *prima facie* review suffices to refer the parties to arbitration. A *prima facie* standard suffices for referring parties to arbitration, but a complete trial is needed only if the court intends to deny the referral.⁷²

⁷⁰ ‘The Arbitration and Conciliation Act, 1996, Section 54’

⁷¹ “Sindhu Soman-THESIS 16-03-2023.Pdf,” n.d., accessed August 2, 2025,

<https://dr.ddn.upes.ac.in/bitstream/123456789/4300/1/Sindhu%20Soman-THESIS%2016-03-2023.pdf>.

⁷² ‘Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd. And Another Supreme Court of India, 2005 INSC 360.’

3.3 LEGAL FRAMEWORK IN PAKISTAN:

The relevant laws regulating the stay of court proceedings in the presence of an arbitration agreement are included in section 34 of 1940 Act (for domestic arbitration) and section 4 of 2011 Act (for foreign-seated arbitration).

3.3.1 SECTION 34 OF 1940 ACT:

This is a key provision that pertains to the stay of court proceedings in domestic proceedings. The section stipulates that;

Power to stay legal proceedings where there is an arbitration agreement:

Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.⁷³

3.3.1.1 CONDITIONS FOR STAY OF PROCEEDINGS UNDER SECTION 34:

In *'INFOSPAN (Private) Limited'*⁷⁴ the court has laid down the following pre-requisites for stay of proceedings in a suit; (1) the plaintiff must be a party to a valid arbitration agreement that includes an arbitration clause; (2) the party requesting the stay must do so prior to submitting a

⁷³ 'The Arbitration Act, 1940, Section 34.'

⁷⁴ 'INFOSPAN (Private) Limited Vs. M/s Shaheen Foundation and another, 2019 CLC 750.'

written statement or taking any other step in the proceedings; (3) the court must be convinced, based on the applicant's conduct, that they were ready and willing to engage in arbitration at the onset of the proceedings or at the time of the application; and (4) there must be no adequate reason, inferred from the applicant's conduct, for the court to deny referral of the matter to arbitration as per the agreement.

The phrase 'may make an order' in this provision is significant since it gives the courts the authority to decide whether to stay proceedings. To enhance the country's pro-arbitration stance, the superior courts have consistently emphasized the need to restrict the discretionary powers of the courts in cases involving stay petitions. In the HUBCO case⁷⁵, the Supreme Court of Pakistan emphasized party sovereignty and determined that courts should refrain from unwarranted interference where parties have consented to arbitration.

3.3.2 SECTION 20 OF THE 1940 ACT:

Subsequent to the stay of court proceedings under section 34, the parties may either submit the dispute to arbitration independently of court involvement (under Chapter II of the '1940 Act') or with court involvement (under section 20 of the '1940 Act'). There are three conditions under section 20 for referring the dispute to arbitration.⁷⁶

- 1) The parties must have executed an arbitration agreement prior to initiating a suit over the subject matter of the arbitration. To ascertain the existence of an arbitration agreement, it is treated as a standard contract, and both are administered by the same principles of

⁷⁵ 'The Hub Power Company Ltd. v. WAPDA, PLD 2000 SC 841.'

⁷⁶ 'Ikram Ullah, Arbitration Law of Pakistan (Wolters Kluwer Law International, 2021).'

interpretation.⁷⁷ The arbitration agreement is examined in its totality, and a comprehensive and broad interpretation is used based on the concept of good faith.⁷⁸

- 2) A real dispute must exist within the parameters of the parties' arbitration agreement, for which the tribunal has not commenced proceedings, as it comprises the cause of action under section 20. The dispute indicates one party's claim to a right and the other party's repudiation of it.⁷⁹ For example, the determination of whether payment is owed, whether a party has overpaid,⁸⁰ or whether a party is entitled to claim the full amount of a guarantee⁸¹ has been adjudicated by the courts as constituting disputes.
- 3) The parties must refrain from commencing actions under Chapter II (sections 3-19) of the 1940 Act. If the parties to an arbitration agreement have invoked the provisions of Chapter II (sections 3-19), the remedies under Chapter III (section 20) of the 1940 Act will be inaccessible to them.⁸²

3.3.3 SECTION 4 OF THE 2011 ACT:

Section 4 deals with enforcement of arbitration agreements and foreign arbitral awards, respectively. This section states that;

Enforcement of arbitration agreements. — (1) A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter.

⁷⁷ 'Yasmeen Vs. Beach Developers through Manager Director and another, 2003 YLR 1109.'

⁷⁸ 'Ikram Ullah, Arbitration Law of Pakistan (Wolters Kluwer Law International, 2021).'

⁷⁹ 'Industrial Fabrication Company Vs. Managing Director, Pak American Fertilizer Limited, 2015 PLD 154 SC.'

⁸⁰ 'Arabteç Pakistan (Pvt) Ltd. Vs. Enshaanle Developments, 2011 CLC 323.'

⁸¹ 'Jamia Industries Ltd Vs. Pakistan Refinery Ltd., Karachi, PLD 1976 Karachi 644.'

⁸² 'Nasim Ahmad Vana Vs. State 2017 PLD 497 Karachi.'

(2) On an application under sub-section (1), the court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.⁸³

The prerequisite for denying a stay of proceedings is that the arbitration agreement was “null and void, inoperative or incapable of being performed”. These terms should be interpreted in accordance with the rule of *ejusdem generis*, which dictates that when a specific term related to a class, category, or genus is followed by general terms, the latter are understood to be restricted to things of the same nature as those explicitly mentioned.⁸⁴

3.3.4 SECTION 4 OF THE PROPOSED ARBITRATION BILL 2024:

To revolutionize the laws on arbitrations, an effort is being made by making a new and robust statute, the ‘*Arbitration Act, 2024*’ (‘Arbitration Bill, 2024’) which is tabled before the Parliamentary Committee for approval and shaping the arbitration laws into new legislation on domestic and international commercial arbitration. In an effort to delineate the subject, the proposed bill in section 9 shifts a mandatory duty on the courts to stay the proceedings before it and refer the matter to arbitration if arbitration agreement exists. This section states that;

Stay of legal proceedings. (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counter-claim) in respect of a matter which, under the arbitration agreement, is to be referred to arbitration may apply to the court or judicial authority in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application under this section may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

⁸³ ‘Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011.’

⁸⁴ ‘Cummins Sales and Service (Pakistan) Limited through Authorized Signatory Vs. Cummins Middle East FZE through Chief Executive and 3 others 2013, C L D 291.’

(3) An application under this section shall not be made if a party has already submitted their first statement on the substance of the dispute (other than a pleading asserting that the court or judicial authority does not have jurisdiction in the proceedings).

(4) On an application under this section the court or judicial authority in which the legal proceedings are pending shall grant a stay and refer the parties to arbitration if it finds that prima facie a valid arbitration agreement exists.

(5) If the court or judicial authority refuses to stay the legal proceedings, any provision (whether in the arbitration agreement or otherwise) that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

(6) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before a court or judicial authority, an arbitration may be commenced or continued and an arbitral award made.⁸⁵

3.4 COMPARATIVE ANALYSES OF THE LEGAL FRAMEWORK OF BOTH COUNTRIES:

The below discussion will compare the provisions related to the stay of legal proceedings in the arbitration instruments of both countries;

3.4.1 SCOPE AND APPLICABILITY:

India's arbitration framework distinctly differentiates between domestic and international arbitration via the IACA, which is categorized into Part I (domestic arbitration) and Part II (foreign arbitral decisions). Section 8 regulates domestic arbitrations, Section 45 pertains to foreign-seated arbitrations under the NYC, and Section 54 concerns antiquated Geneva Convention awards, which are hardly invoked. Conversely, Pakistan functions under a dual legal system. Domestic

⁸⁵ 'Arbitration Bill, 2024, Section 9.'

arbitration is regulated under Section 34 of the 1940 Act, whilst international arbitration under the NYC is administered by the 2011 Act. The proposed bill in Pakistan (Section 9) seeks to consolidate and modernize the legal framework, addressing both local and international arbitration with enhanced procedural protections and a pro-arbitration stance.

3.4.2 MANDATORY VS. DISCRETIONARY REFERRAL:

In India, reforms implemented in 2015 have made referral to arbitration mandatory in both domestic (Section 8) and foreign (Section 45) disputes, contingent upon the existence of a valid arbitration agreement and the dispute's alignment with its parameters. Courts possess little power to reject such referrals, save in cases where the agreement is "null, void, inoperative, or incapable of being performed." This transition strengthens India's commitment to a robust arbitration culture. Pakistan, nevertheless, has a hybrid approach. According to Section 34 of the 1940 Act, the referral is discretionary because of the word 'may', the courts may choose to stay proceedings if they identify enough justification, especially about the applicant's conduct. Conversely, Section 4 of the 2011 Act, pertaining to international arbitration, mandates that courts to stay proceedings where a valid arbitration agreement is present, much like Article II (3) of the NYC.

Encouragingly, section 9 of the proposed bill signifies a substantial transformation. It requires the automatic stay of legal proceedings upon the creation of a valid arbitration agreement, unless one of the standard exceptions ("null and void inoperative, incapable of performance") is applicable. This provision restricts court interference and aligns Pakistan with world best practices, akin to Article II (3) of NYC and Sections 8 and 45 of IACA.

3.4.3 JUDICIAL DISCRETION AND THE PRIMA FACIE TEST:

The courts in India are mandated by statute to conduct merely a *prima facie* evaluation of the existence of a valid arbitration agreement prior to bringing the subject to arbitration, specifically under Section 45. Courts are advised against doing a comprehensive examination of merits or arbitrability at the referral phase. However, the courts in Pakistan exercise substantial discretion under Section 34 of 1940 Act, frequently evaluating the practicality and appropriateness of arbitration in addition to its existence. This has resulted in judicial overreach and delays. Under the proposed Section 9 of the 2024 Bill, Pakistan implements the *prima facie* test, directing courts to conduct a restricted review and defer remaining matters to the arbitral tribunal in accordance with the competence-competence concept. This is a progressive shift and aligns with NYC as well as India's advanced stance under both Section 8 and Section 45.

3.4.4 WILLINGNESS TO ARBITRATE AND PROCEDURAL PROMPTNESS:

Section 8 of IACA mandates that the application for referral must be submitted prior to the filing of the first statement on the substance of the dispute, underscoring procedural discipline. Courts also evaluate whether the party seeking arbitration has waived its right by engaging in litigation. Section 34 of the 1940 Act mandates that the stay application must be made before filing a written statement or taking other steps in the proceeding. This criterion is often decisive in practice. The 2011 Act does not establish such procedural obstacles. Likewise, the 2024 Bill omits clear timeframes, concentrating instead on the existence and legality of the arbitration agreement, which may result in interpretation uncertainty until elucidated in future procedural regulations.

3.4.5 LEGISLATIVE MODERNITY AND REFORM:

India has implemented substantial legislative reforms to conform to the UML and NYC particularly via changes in 2015 and 2019 which priorities expediency, conclusiveness, and limited judicial intervention. The existing arbitration regime of Pakistan, established under the 1940 Act, is seen as antiquated and often criticized for its delays and judicial overreach. The 2011 Act was a pivotal moment in international arbitration, whereas the proposed 2024 Bill aims to modernize the arbitration framework, emphasizing autonomy, competence-competence, and enforcement.

3.5 ISSUES IN THE JUDICIAL INTERPRETATION OF THE PROVISIONS GOVERNING STAY OF COURT PROCEEDINGS:

The main objective behind the enactments of these legislations were to encourage the expeditious settlement of disputes, limit the court intervention and foster a pro-arbitration policy in disputes. But from the practical perspective, there are certain issues in the legal framework, particularly that of Pakistan, as the situation is totally different because of the wide judicial discretion given to the courts in section 34 of the 1940 Act. The next chapter will thoroughly explain the judicial interpretation of the provisions related to the stay of court proceedings and the principles adopted by the courts in disposing of the stay petitions.

3.6 CONCLUSION:

From the above discussion, it can be concluded that both India and Pakistan acknowledge the referral of disputes to arbitration, their legal frameworks exhibit differing degrees of legislative advancement and judicial autonomy. India has adopted a pro-arbitration framework characterized by a mandatory referral process and limited judicial interference, especially after the reforms made

in 2015. In contrast, Pakistan struggles with an outdated domestic framework established by the 1940 Act, although promising reforms are embedded in the 2024 Bill.

CHAPTER 04: JUDICIAL INTERPRETATION AND APPLICATION

4.1 INTRODUCTION:

The efficacy of the arbitral system as a dispute resolution mechanism is highly influenced by the stay of court proceedings in favor of arbitration. However, the approaches adopted by Indian and Pakistani courts, particularly the latter, in relation to the enforcement of arbitration agreements by staying the court proceedings have undermined the efficacy of arbitral system. This chapter examines the practices of Indian and Pakistani judgments to investigate the superior courts' approaches in both jurisdictions concerning the enforcement of arbitration agreements by staying the court proceedings, specifically focusing on the principles they employ to adjudicate stay petitions. This chapter analyses the judicial attitude of both jurisdictions towards the stay of court proceedings and the key issues in these approaches.

4.2 INTERPRETATION AND APPLICATION BY INDIAN COURTS:

As discussed in the previous chapter that '*The Arbitration and Conciliation Act, 1996*' ('IACA') is the primary legislation in the Indian arbitration regime which deals with the stay of court proceedings with regards to both domestic and foreign-seated arbitration. This discourse examines the interpretation and application employed by the Indian courts regarding the enforcement of arbitration agreements by staying the court proceedings, specifically the principles they applied to adjudicate stay petitions. In order to stay the court proceedings and referring the matter to arbitration under section 8 of IACA, the Indian courts will look into the following principles;

4.2.1 ARBITRABILITY OF THE MATTER:

The Indian Supreme Court in '*Vidya Drolia Vs. Durga Trading Corporation*'⁸⁶ held that the matter must be arbitrable. The contention in this matter pertained to a leasing contract. The landlord (Durga Trading Corporation) sought the eviction of tenants (Vidya Drolia and others) from a shop in accordance with the '*Transfer of Property Act, 1882.*' The tenants requested arbitration according to the arbitration provision in the lease agreement by submitting an application under Section 8 of IACA. The Supreme Court ruled that the issue was not subject to arbitration. It determined that landlord-tenant disputes, regulated by the '*Transfer of Property Act, 1882,*' particularly eviction litigation, are *actions in rem* and involve the adjudication of rights enforceable against the general public. Consequently, these disputes are classified as non-arbitrable issues.

Moreover, in disputes involving *actions in rem*, the Indian Supreme Court further determined that mortgage enforcement claims, as *actions in rem*, are not subject to arbitration and must be resolved by the courts. Disputes regarding specific performance are arbitrable, since they pertain to *rights in personam* and do not belong to the non-arbitrable category. Nonetheless, a suit concerning the enforcement of a mortgage via sale constitutes a *right in rem*, and such cases must be adjudicated by the court rather than an arbitral panel.⁸⁷

Furthermore, concerning the arbitrability of issues relating to winding-up of a company, the Indian Supreme Court held that Section 8 is applicable only to arbitrable disputes, and the authority to mandate a company's winding-up is exclusively conferred upon the court under the Companies Act. Section 8(1) requires arbitration where an arbitration agreement is present, contingent upon the case being within the legal competence of the arbitrator. A winding-up process is not a monetary claim but a statutory remedy that asserts a company's financial insolvency, raises public

⁸⁶ '*Vidya Drolia Vs. Durga Trading Corporation*, (2021) 2 SCC 1 2020.'

⁸⁷ '*Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd.* (2011) 5 SCC 532.'

interest issues, and includes non-arbitrable *rights in rem*, irrespective of any arbitration agreement between the parties and such cannot be ousted by a private arbitration provision.⁸⁸

By broadening the understanding of non-arbitrability in consumer disputes, the Indian Supreme Court deduced that an arbitration provision cannot supersede a customer's statutory right to seek redress in consumer forums under the Consumer Protection Act. Consumer law remedies are special remedies that cannot be waived by a previous arbitration agreement. The 2015 amendment to Section 8 aimed to reduce judicial intervention and require referral to arbitration when a valid arbitration agreement is present; however, this does not apply to non-arbitrable matters, such as consumer rights, which are based in public interest and pertain to *rights in rem*.⁸⁹ Similarly, labor disputes regulated by statute that pertain to *rights in rem* and are governed by public policy concerns are not subject to arbitration. Upon a referral under the '*Industrial Disputes Act*,' the tribunal is obligated to determine the matter and is prohibited from transferring it to arbitration.⁹⁰

4.2.2 PRIMA FACIE REVIEW:

Courts must prioritize the doctrine of '*prima facie review*' at the referral stage and direct the parties to arbitration unless it is clear that no valid arbitration agreement is present.⁹¹ The Bombay High Court in '*USP Studios (P) Ltd. Vs. Ganpati Enterprises*'⁹² held that the amendments enacted post-2015 make referral mandatory unless there is a *prima facie* absence of a valid arbitration agreement. Relying upon the *Vidya Drolia* decision, the court elucidated that matters such as admitted liability do not constitute valid reasons to deny arbitration, and that courts should refrain from extensive factual inquiries during the referral phase.

⁸⁸ 'Haryana Telecom Ltd Vs. Sterlite Industries (India) Ltd., SLP No. 3695 of 1999.'

⁸⁹ 'Emaar MGF Land Ltd. Vs. Aftab Singh, (2019) 12 SCC 751.'

⁹⁰ 'Rajesh Korat Vs. Innoviti Embedded Solutions Pvt. Ltd., 2017 SCC Online Kar 4975.'

⁹¹ 'Vidya Drolia Vs. Durga Trading Corporation, (2021) 2 SCC 1 2020 INSC 697.'

⁹² 'USP Studios (P) Ltd. Vs. Ganpati Enterprises, 2022 SCC Online Bom 1739.'

The Indian Supreme Court further elucidated the '*prima facie*' test in the case of '*Sanjiv Prakash Vs. Seema Kukreja*'⁹³ by emphasizing that, pursuant to Section 8 of IACA, the court's jurisdiction is extremely restricted, necessitating adherence to a *prima facie* test to determine the existence of a valid arbitration agreement and the applicability of the disputes within its parameters. The Court emphasized that it must '*screen and knock down*' only *ex facie* frivolous, meritless, or dishonest litigation, and that all other matters, including questions of non-arbitrability, should preferably be decided by the Arbitral Tribunal in line with the principle of competence-competence. This judgment significantly forbids courts from conducting mini-trials or exploring intricate factual or legal disputes, hence preserving the power of the Arbitral Tribunal which would otherwise usurp the Arbitral Tribunal's authority.

4.2.3 MANDATORY REFERRAL:

The amendments enacted in 2015 make the referral mandatory unless there is a *prima facie* absence of a valid arbitration agreement. In '*USP Studios (P) Ltd. v. Ganpati Enterprises*'⁹⁴ the contention stemmed from a loan arrangement that included a legitimate and enforceable arbitration provision. The plaintiff contended that no arbitrable issue existed since the liability was admitted. Nonetheless, the Court dismissed this, noting that even a mere appearance of contention—such as a difference over the interest component—was enough for referral. The Court highlighted that post-2015 amendments make referral mandatory unless there is *prima facie* no valid arbitration agreement, which was not the case here. Regarding the mandatory duty of the court to refer the matter to arbitration, the Delhi High Court, in the case of '*Krishan Radhu Vs. Emaar MGF Construction Pvt. Ltd*'⁹⁵ further held that Section 8 imposes a mandatory and peremptory

⁹³ '*Sanjiv Prakash Vs. Seema Kukreja*, (2021) 9 SCC 732.'

⁹⁴ '*USP Studios (P) Ltd. Vs. Ganpati Enterprises*, 2022 SCC Online Bom 1739.'

⁹⁵ '*Krishan Radhu Vs. Emaar MGF Construction Pvt. Ltd.*, 2016 SCC Online Del 6499.'

obligation on the court to refer matters to arbitration, except when the agreement is *prima facie* invalid. The court's responsibility is not to evaluate its own jurisdiction but to determine whether it has been excluded by a valid arbitration agreement. The court further held that the proceedings before the National Consumer Disputes Redressal Commission (NCDRC) were irrelevant to the Section 8 application, since the NCDRC's authority is discretionary under the Consumer Protection Act, and the refusal to initiate arbitration before the NCDRC did not preclude subsequent arbitration.

4.2.4 NON-PARTIES TO THE ARBITRATION AGREEMENT:

In '*Gujarat Composite Limited case*'⁹⁶ the dispute was arising from a license agreement with an arbitration provision, whereby the defendant contended that the plaintiff's requested reliefs were within the parameters of this clause. The Gujrat High Court determined that the whole of the suit's subject matter was beyond the scope of the arbitration agreement, especially when claims were asserted against defendants who were not signatories to the agreement. The court reiterated that, according to Section 8, the whole dispute—rather than a fragment—must be subject to arbitration, and that a suit involving parties not obligated by the arbitration clause cannot be divided or partly referred to arbitration. The court, citing precedents from the Bombay and Delhi High Courts, acknowledged that the mere involvement of third parties in a matter does not always warrant the dismissal of a Section 8 application. Nonetheless, it underscored that the claims against non-signatories were inextricably linked to the overarching issue, so precluding the advancement of arbitration.

⁹⁶ '*Gujarat Composite Limited Vs. A. Infrastructure Limited*, 2018 SCC Online Guj 4782.'

4.2.5 EXISTENCE OF VALID ARBITRATION AGREEMENT:

Upon the existence of a valid arbitration agreement and the timely submission of the plea, courts are obligated to refer the issue to arbitration unless the agreement is *prima facie* invalid.⁹⁷ In '*Bina Modi case*'⁹⁸ the central question was whether Clause 36 of the Restated Trust Deed, which stipulated the resolution of disputes by arbitration, constituted a valid and enforceable arbitration agreement according to Section 8 of the IACA. The court determined that Clause 36 constituted an invalid arbitration agreement, so refusing to refer the issue to arbitration according to Section 8. It underscored that for Section 8 to be applicable, a valid and enforceable arbitration agreement must exist between the parties, including the subject matter of the dispute. The Court determined that the trust deed's clause did not satisfy the legal criteria for an arbitration agreement under Indian law, necessitating that the matter must proceed in the civil court.

4.2.6 MULTIPLE CAUSES OF ACTION:

The consolidation of multiple causes of action cannot invalidate an arbitration agreement. In '*Taru Meghani & Ors. Vs. Shree Tirupati Greenfield Developers & Ors*'⁹⁹ the plaintiffs pursue the recovery of Rs. 1,24,08,764.54/- predicated on a memorandum of understanding and negotiable instruments. The plaintiffs advanced 3.5 million rupees in a MOU dated 22 July 2014, followed by an additional 1.9 million rupees through bills of exchange. The defendants requested the referral of the issue to arbitration according to Section 8 of IACA, citing the arbitration provision in the MOU. The plaintiffs contended that the later transaction of 1.9 million was not included by the MOU, hence the lawsuit could not be divided into arbitrable and non-arbitrable components. The

⁹⁷ 'Parasramka Holdings Pvt. Ltd. Vs. Ambience Private Ltd., 2018 SCC Online Del 6573.'

⁹⁸ 'Bina Modi Vs. Lalit Kumar Modi, 2020 SCC Online Del 1678.'

⁹⁹ 'Taru Meghani & Ors. Vs. Shree Tirupati Greenfield Developers & Ors, 2020 SCC Online Bom 110.'

court dismissed the plaintiffs' claim referencing the '*Sukanya Holdings case*'¹⁰⁰ differentiating it based on the broader legislative objective of Section 8, which requires limited judicial involvement and emphasizes party sovereignty. The Court determined that the consolidation of various causes of action cannot invalidate an arbitration agreement, and according to Order II Rule 6 CPC, courts possess the authority to mandate separate trials where justice necessitates.

In the matter of '*Lindsay International (P) Ltd. Vs. Laxmi Niwas Mittal*'¹⁰¹ the plaintiffs-initiated suits against several defendants, including Vesuvius (defendant no. 39), seeking specific performance of a pre-incorporation agreement and the enforcement of a non-competition agreement. Vesuvius requested arbitration according to a valid and uncontested arbitration provision in the purchase orders issued by the plaintiff. The plaintiffs contested the application, asserting that the claims were interconnected with other defendants and could not be separated. The Court held that the cause of action against Vesuvius was contractually independent and different from the claims against the other defendants, and ruled that the disputes fell squarely within the scope of the arbitration agreement. The Court rejected the argument on the indivisibility of causes of action, determined that bifurcation was acceptable, and stayed the proceedings of the case against Vesuvius.

4.2.7 “NOT LATER THAN THE DATE OF SUBMITTING” THE FIRST STATEMENT ON THE SUBSTANCE OF THE DISPUTE:

Section 8 of IACA stipulates that stay application must be made not later than the date of submitting the first statement on the substance of the dispute. The Delhi High Court in '*Parasramka Holdings Pvt. Ltd. Vs. Ambience Private Ltd*'¹⁰² referred the issue to arbitration

¹⁰⁰ '*Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya*, (2003) 5 SCC 531.'

¹⁰¹ '*Lindsay International (P) Ltd. Vs. Laxmi Niwas Mittal*, 2022 SCC Online Cal 170.'

¹⁰² '*Parasramka Holdings Pvt. Ltd. Vs. Ambience Private Ltd.*, 2018 SCC Online Del 6573.'

despite the defendant submission of written statement. The dispute included recovery lawsuits initiated by the plaintiff for financial compensation and a permanent injunction. The defendants cited an arbitration provision in the Apartment Buyer's Agreement and the Maintenance Agreement, requesting the referral of the issue to arbitration. The plaintiff contested the application on the basis that the defendants had previously submitted a written statement without explicitly requesting referral to arbitration, so acquiescing to the authority of the civil court. The plaintiff relied on precedent indicating that such conduct amounted to a surrender of the right to arbitrate. The court determined that the defendants' application under Section 8 is maintainable notwithstanding the submission of their written statement. The submission of an application under Order VII Rule 11 CPC before the written statement prolonged the deadline for filing an application under Section 8, consistent with the 2015 amendment to the IACA, which replaced the phrase "not later than when submitting" with "not later than the date of submitting" the initial statement regarding the substance of the dispute. The Court acknowledged that raising a particular arbitration objection in the written statement, even in the absence of a request for referral, may be interpreted as adherence to Section 8(1). The court, based on prior cases, underscored that once the arbitration provision was explicitly asserted in the written statement, the obligation to refer the subject to arbitration rested with the court.

4.2.8 ALLEGATIONS OF FRAUD TYRANNY AND MISMANAGEMENT:

The charges of fraud and serious malpractices by the respondents may only be resolved in court by the presentation of comprehensive evidence by either side, such a situation cannot be properly gone into by the arbitrator. The civil court may decline to send a case to arbitration if it involves

complex questions of fact or law, or if there are allegations of fraud.¹⁰³ Nonetheless, this principle was subsequently dismissed by the Indian Supreme Court in the case of '*A. Ayyasamy Vs. A. Paramasivam*,¹⁰⁴ which held that mere allegations of fraud do not suffice to render a dispute non-arbitrable under Section 8 of IACA unless they possess such gravity that they invalidate the entire contract, including the arbitration clause; the mere existence of such claims does not preclude arbitration. The court reiterated that the concept of separability is applicable, indicating that the arbitration provision is regarded as an autonomous agreement and retains its validity even if the principal contract is contested, unless the arbitration clause itself is explicitly invalidated.¹⁰⁵ Only severe claims of fraud that need a public trial and significantly damage professional reputation or moral integrity may exclude arbitration. Simple discontent with account entries or doubts about inappropriate pricing—frequently seen in partnership disputes—do not constitute substantial fraud.¹⁰⁶

Regarding tyranny and mismanagement, the Bombay High Court, in '*Rakesh Malhotra case*'¹⁰⁷ held that matters of tyranny and mismanagement are not subject to arbitration and must be addressed by the judicial body directly. Sections 397 and 398 of the Companies Act of 1956 provide the filing of a petition about actions that lead to mismanagement of the company's affairs, oppression of minority shareholders, or both. Even if an arbitration agreement exists in such instances, not every action must be inherently pertinent to that arbitration agreement.

¹⁰³ 'N. Radhakrishnan Vs. Maestro Engineers and Others, 009 INSC 1195.'

¹⁰⁴ '*A. Ayyasamy Vs. A. Paramasivam*, (2016) 10 SCC 386.'

¹⁰⁵ *Supra*.

¹⁰⁶ '*Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak and Another*.'

¹⁰⁷ '*Rakesh Malhotra Vs. Rajinder Kumar Malhotra*, SCC Online Bom. (2014) (Ind.).'

4.2.9 NULL AND VOID, INOPERATIVE AND INCAPABLE OF BEING PERFORMED IN FOREIGN-SEATED ARBITRATION:

According to section 45 of IACA, a judicial authority is obligated to refer the issue to arbitration unless the agreement is deemed “null and void, inoperative, or incapable of being performed.” The Delhi High Court, in a recent ruling, examined the interpretation of these phrases and emphasized that they constitute the only grounds upon which an Indian court may decline to refer a matter to arbitration in cases involving foreign-seated arbitrations. Due to its importance, the court conducted an extensive analysis of each phrase, interpreting their applicability in accordance with the legislative objective to advance arbitration as a preferred method of dispute settlement. The court defined ‘*null and void*’ as pertaining to situations when an arbitration agreement is inherently invalid, such as agreements formed under duress, fraud, or coercion. An agreement is considered ‘*inoperative*’ if it was once valid but has now been ineffective, for instance, when one party repudiates the agreement or it is mutually abandoned. Ultimately, an agreement would be deemed ‘*incapable of being performed*’ if external circumstances rendered arbitration impossible, such as the unavailability of the appointed arbitrator and could not be replaced.¹⁰⁸ The Madras High Court held that the phrase ‘*incapable of being performed*’ effectively denotes frustration and subsequent dismissal. If, subsequent to the formation of the contract, the promise becomes impossible to execute owing to unanticipated circumstances, the contract is deemed frustrated.¹⁰⁹ Courts often evaluate the criterion of ‘inoperability’ within the larger framework of “null and void, inoperative, or incapable of being performed” without further differentiation. Nonetheless, the relevant case law indicates that the term ‘inoperative’ encompasses scenarios in which the

¹⁰⁸ *Delhi High Court’s Ruling on Section 45 of the Arbitration Act: Clarifying Grounds for Referral to Arbitration*, n.d., accessed August 2, 2025, <https://news.courtpractice.com/2024/11/delhi-high-courts-ruling-on-section-45.html>.

¹⁰⁹ *Ramasamy Athappan and Nandakumar Athappan Vs. Secretariat of Court, International Chamber of Commerce, High Court of Madras, India, 29 October 2008.*

arbitration agreement is no longer applicable to the parties or their dispute. In situations where the parties relinquished their right to arbitrate by commencing court proceedings, the Madras High Court held that the arbitration agreement was inoperative under Section 45 of the IACA, which mirrors to Article II (3) of the NYC. Consequently, it declined to refer the parties to arbitration, since they had filed many civil and criminal lawsuits in Indian courts.¹¹⁰

4.2.9.1 ALLEGATIONS OF FRAUD AND HARDSHIP UNDER SECTION 45:

The allegations of fraud or misrepresentation concerning the principal contract do not inherently nullify the arbitration clause unless the arbitration agreement itself is explicitly challenged. Courts cannot decline to refer parties to arbitration solely on the basis of alleged fraud in the underlying contract, provided the arbitration clause remains intact.¹¹¹ Similarly, simple claims of hardship do not provide sufficient justification under Section 45 to refuse referral to arbitration. A judicial authority is obligated to refer the issue to arbitration unless the agreement is deemed “null and invalid, inoperative, or incapable of being performed.”¹¹²

4.3 INTERPRETATION AND APPLICATION BY PAKISTANI COURTS:

In contrast to India, the stay of court proceedings under Pakistan's arbitration framework is regulated by the ‘*Arbitration Act, 1940*’ (‘1940 Act’) Act for domestic arbitration and ‘*Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011*’ (‘2011 Act’) for foreign-seated arbitration. Prior to the implementation of the 2011 Act, the principal statute governing foreign-seated arbitration was section 3 of the 1937 Act; however, in practice, section 34 of the 1940 Act was often used for foreign-seated arbitrations. This discussion examines the

¹¹⁰ Supra.

¹¹¹ ‘World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639.’

¹¹² ‘Vijay Karia Vs. Prysmian Cavi e Sistemi SRL (2020 SCC Online SC 177).’

interpretation and application employed by the Pakistani courts regarding the enforcement of arbitration agreements by staying the court proceedings, particularly the principles they applied in disposing of the stay petitions. The Pakistani courts adopted the following principles while disposing of the stay petitions in pre-2011 Act regime with regards to both domestic and foreign-seated arbitrations. It is pertinent to mention here that in this part, precedents rendered in post-2011 Act regime will also be discussed because after the promulgation of the 2011 Act, the court continue to adopt section 34 of the 1940 Act in domestic arbitration.

4.3.1 COURT’S DISCRETION TO STAY PROCEEDINGS:

The mere presence of an arbitration provision in the agreement does not exclude the jurisdiction of the civil court. Section 34 does not mandate a court to refer the issue to arbitration; it has the power to halt the proceedings unless it is convinced that there is no adequate justification for not adhering to the arbitration agreement.¹¹³ A party seeking relief under section 34 of the 1940 Act does not possess an unequivocal right to secure a stay of legal proceedings before the Court. The Court has discretionary authority to deny a stay of proceedings, even where an arbitration provision in the parties’ agreement stipulates referral of disputes to arbitration, under suitable circumstances.¹¹⁴

The Supreme Court of Pakistan rationalized this approach in ‘*Uzin Export Import Foreign Trade Co*’¹¹⁵ case by asserting that the mere execution of an agreement with an arbitration provision does not negate the jurisdiction of civil courts. Courts possess the jurisdiction to adjudicate cases concerning such agreements; nevertheless, the decision to stay proceedings in favor of arbitration

¹¹³ ‘Yusuf Muhammad Siddiq and 16 others Vs. Muhammad Rafique, PLD 2015 Sindh 319.’

¹¹⁴ ‘Akbar Cotton Mills Ltd. Vs. VES/OJUANOJO OBJEDINENSIJE TECH/AMESH EXPORT, 1984 CLC 1605 KARACHI-HIGH-COURT-SINDH.’

¹¹⁵ ‘Uzin Export Import Foreign Trade Co. Vs. Macdonald Layton & Co. Ltd., Karachi and another, 1996 SCMR 690.’

is at the court's discretion. This discretion must be used judiciously, reasonably, and with careful consideration of the relevant facts and circumstances of the case. Although significant importance is often attributed to the sanctity of contracts and the presumption that parties who voluntarily consent to arbitration should adhere to that agreement, such contracts are not absolute and must function within the confines of the law. The enforceability of arbitration agreements is ultimately contingent upon the legal framework regulating contractual dealings and the overarching aim of justice.

The Court must apply its discretion judiciously; but this power cannot be limited or evaded via an agreement between the parties. When the court determines that a party in the dispute is unlikely to receive a fair, just, or impartial resolution in arbitration proceedings, it may decline to stay the legal proceedings in court, even if this decision contravenes the parties' explicit preference for foreign-seated arbitration, in order to avert a miscarriage of justice.¹¹⁶ Fraud was not cited under section 34 as a basis for denying the stay of proceedings. The Sindh High Court ruled that where fraud is asserted, the application of Section 34 of the 1940 Act, is rendered inapplicable, allowing the Court to decline referral of the issue to arbitration. The term "may" in Section 34 signifies that the authority to suspend judicial proceedings is discretionary rather than mandatory.¹¹⁷ Similarly, the Apex court held that the allegations of corruption would render the agreement as void, and according to the public policy such matters, are nor referable.¹¹⁸

¹¹⁶ 'Akbar Cotton Mills Ltd. Vs. VES/OJUANOJO OBJEDINENSIJE TECH/AMESH EXPORT, 1984 CLC 1605 KARACHI-HIGH-COURT-SINDH.'

¹¹⁷ 'Avari Hotels Ltd. Vs. Hilton International Company, PLD 1985 Karachi 445.'

¹¹⁸ 'The Hub Power Company Ltd. v. WAPDA, PLD 2000 SC 841.'

4.3.2 STEPS TAKEN INTO PROCEEDINGS:

Section 34 mandates that when one party to an arbitration agreement initiates legal proceedings against the other party, the latter must seek a judicial authority or court for a stay of the proceedings before taking any other step in the proceeding.¹¹⁹ The determination of whether the defendant has undertaken appropriate steps in the proceedings is contingent upon the facts of each case. If the defendant's actions ambiguously indicate acquiescence to the court proceedings and a desire to litigate the case on its merits, their plea for a stay under section 34 will be denied. If this is not the situation, the defendant must clarify his position promptly "before taking any steps in the proceedings," explicitly choosing arbitration, since any delay for whatever reason would exclude him from requesting a stay of court proceedings.¹²⁰ The phrase "before taking any steps" signifies 'at the earliest', 'at the first-opportunity', and 'before seeking adjournment(s) for filing of written statement' etc.¹²¹ The following actions are not regarded as forming 'steps' in judicial proceedings;

1. Submitting or contesting an application for injunction¹²² due to the fact that, under 1940 Act, an arbitrator lacks the authority to address injunctions.¹²³
2. Filing *vakalatnama* (from a lawyers).¹²⁴
3. Unilateral withdrawal of the suit and application for an extension to negotiate a settlement.¹²⁵

¹¹⁹ 'James Construction Co. (Pvt) Limited Vs. Province of the Punjab through Secretary Communication and Works, 2016 CLCN 136 LHC.'

¹²⁰ 'Island Textile Mills Ltd Karachi Vs. V/o Techno experts and others, 1979 CLC 307.'

¹²¹ 'Government of the Punjab Vs. Muhammad Asad & Co., 2021 CLC 2135 LHC.'

¹²² 'Island Textile Mills Ltd Karachi Vs. V/o Techno experts and others, 1979 CLC 307.'

¹²³ 'Serulean (Pvt.) Ltd. Karachi Vs. Bhoja Airlines (Pvt.) Ltd., 2001 YLR 3150.'

¹²⁴ 'MacDonald Layton & Company Vs. Uzin Export Import Enterprises, PLD 1989 Karachi 645.'

¹²⁵ 'Uzin Export & Import Enterprises Vs. M. Iftikhar & Company Limited., 1993 SCMR 866.'

In adjudicating the stay application, the court must ensure that the applicant has not waived its right to arbitrate.¹²⁶ This privilege is relinquished if a party undertakes any of the following actions before the court: i) submission of a written statement in reply to the plaint;¹²⁷ ii) request for an adjournment to file the written statement.¹²⁸

4.3.3 WILLINGNESS AND READINESS FOR ARBITRATION:

Another requirement under section 34 is that the party seeking a stay must be ready and willing to arbitrate at the time of filing the civil suit.¹²⁹ The Islamabad High Court held that the readiness and willingness of a party submitting an application under Section 34 of the 1940 Act is *sin qua non* for the implementation of that section. A defendant seeking a stay of the proceedings must demonstrate to the Court that he was, at the initiation of the proceedings, prepared and willing to undertake all essential actions for the appropriate conduct of the arbitration. Section 34 of the 1940 Act unequivocally stipulates that readiness and willingness must be present not only at the time of filing an application for a stay but also at the initiation of the judicial proceedings. The use of the phrases “was” and “still remains” clearly indicates that such readiness and willingness must be present at the initiation of the legal proceedings and must persist until the application under Section 34 of the 1940 Act is submitted.¹³⁰

¹²⁶ Supra.

¹²⁷ Supra.

¹²⁸ ‘Pakistan International Airlines Corporation Vs. Messrs Pak Saf Dry Cleaner, PLD 1981 SC 553; Mohammad Farooq Vs. Nazir Ahmed and others, PLD 2006 Supreme Court 196; Shin Satellite Public Company Limited through Attorney Vs. Messrs KASB Technology Services Limited., 2016 Y L R 2322.’

¹²⁹ ‘Gulf Iran Co. and another Vs. Pakistan Refinery Limited and other PLD 1976 Karachi 1060.’

¹³⁰ ‘Exceed Private Limited Vs. Pakistan Housing Authority Foundation 2019 YLR 427 Islamabad.’

4.3.4 EXISTENCE OF DISPUTE:

In the absence of an arbitration agreement, a stay under section 34 will not be granted.¹³¹ Additionally, the party seeking the stay must demonstrate the existence of a dispute that falls within the scope of the arbitration agreement.¹³² A claim for damages resulting from a hiring contract fell within the parameters of arbitration agreement stipulated in the hiring contract, hence the request for a stay was granted.¹³³ Nonetheless, the defendant issued a cheque to the plaintiff among a series of invoices and purchase orders. The defendant halted the payment for the cheque. The plaintiff initiated a suit for recovery, which was contested by the defendant, who then filed a section 34 application citing the arbitration provision in the purchase orders. The defendant said that the contention over the check originated from the purchase orders and, hence, should have been settled via arbitration. The court held that the dishonor of cheques constitutes a separate cause of action, so section 34 is inapplicable, and consequently denied the request for a stay.¹³⁴

4.3.5 NON-PARTIES TO THE ARBITRATION:

If a party to the suit is not involved in the arbitration proceedings, the court may deny the request to stay its proceedings.¹³⁵ In the case of '*A. Nawaz & Co. (Regd.) and others Vs. National Bank of Pakistan*,'¹³⁶ the National Bank of Pakistan initiated legal proceedings against the petitioners to recover PKR 2,08,795, owed on an overdraft account secured by a pledge of specific movable and immovable assets insured with an insurance company. These were later incinerated. The dispute against the Company was referred to arbitration according to the arbitration provision in the

¹³¹ 'Diamond Food Industries Limited Vs. Werner & Pfleiderer Gmbh Germany, 1992 MLD 926.'

¹³² 'Zohra Begum Vs. Abdul Razzak & Co. and others, 1984 CLC 1643 Karachi.'

¹³³ 'Pakistan Telecommunication Corporation Ltd. Vs. Dr Waqar Hussain Chaudhary, PLD 2007 Lahore 678.'

¹³⁴ 'Nasir Ahmad v. Pakland Cement Limited, 2001 CLC 1156.'

¹³⁵ 'Haji Muhammad Zafar Vs. Muhammad Sikandar and others, 2000 YLR 2503.'

¹³⁶ 'A. Nawaz & Co. (Regd.) and others Vs. National Bank of Pakistan, 1970 SCMR 234.'

insurance policy. In a recovery matter initiated by the Bank, the petitioners submitted a Section 34 application based on the arbitration provision included in the insurance policy. The application was denied on the basis that the Bank was not responsible for the damage incurred by the petitioner as a result of the fire. Consequently, the Bank was not concerned to the petitioner's claims in the arbitration proceedings against the insurance company.

4.3.6 NULL AND VOID, INOPERATIVE AND INCAPABLE OF BEING PERFORMED UNDER FOREIGN-SEATED ARBITRATION:

The prerequisite for denying a stay of proceedings was that the arbitration agreement was “null and void, inoperative or incapable of being performed”. These terms should be interpreted in accordance with the rule of *ejusdem generis*, which dictates that when a specific term related to a class, category, or genus is followed by general terms, the latter are understood to be restricted to things of the same nature as those explicitly mentioned.¹³⁷ In *‘Abid Associated Agencies International (Pvt.) Ltd. and others Vs. Areva and others,’*¹³⁸ it was ruled that the meanings of “null and void, inoperative or incapable of being performed” are to be assessed in relation to the arbitration agreement, which is distinct from the principal contract. The court emphasized that these phrases are not delineated in the 2011 Act. The arbitration agreement, as a contract, would invoke the ordinary standards of contractual interpretation. The court further asserted that arbitration agreement may be rendered null and void owing to several grounds acknowledged by the applicable law such as lack of consent, ability, or fraud. The invalidity of being null and void originates from the very beginning. The arbitration agreement shall be deemed ‘inoperative’ if it ceases to be effective for whatever reason. Consequently, it will be rendered inoperative if, for

¹³⁷ ‘Cummins Sales and Service (Pakistan) Limited through Authorized Signatory Vs. Cummins Middle East FZE through Chief Executive and 3 others 2013, C L D 291.’

¹³⁸ ‘Abid Associated Agencies International (Pvt.) Ltd. and others Vs. Areva and others, 2015 MLD 1646.’

instance, disputes have been resolved, or a judicial order has been issued by a competent court prohibiting the parties from enforcing the arbitration agreement. Similarly, ‘incapable of being performed’ pertains to situations where the enforcement or performance of the ‘arbitration agreement’ becomes unfeasible, such as when the designated forum for arbitration no longer exists, or when the stipulations of the arbitration agreement are inherently unenforceable.

4.4 AREAS OF CONVERGENCE BETWEEN INDIAN AND PAKISTANI APPROACHES:

There are certain fundamental principles that are common in both countries; like both jurisdictions require a valid and enforceable arbitration agreement to consider petitions for a stay of proceedings. This stipulation is fundamental under Section 8 and 45 of the IACA in India and Sections 34 and 4 of the 1940 and 2011 Act in Pakistan. Moreover, both courts acknowledge that the inclusion of non-signatory parties in a civil suit may obstruct referral to arbitration, particularly where disputes are interdependent.¹³⁹ Furthermore, in foreign-seated arbitration, both countries have embraced a contractual interpretation of ‘null and void, inoperable and incapable of being performed’ treating them as definitive grounds for denying reference.¹⁴⁰

4.5 KEY DISTINCTIONS IN THE JUDICIAL APPROACHES:

Beside the similarities, there are key distinctions in judicial approaches of both jurisdictions which are discussed below;

¹³⁹ ‘Gujarat Composite Limited Vs. A. Infrastructure Limited, 2018 SCC Online Guj 4782; Haji Muhammad Zafar Vs. Muhammad Sikandar and others, 2000 YLR 2503.’

¹⁴⁰ ‘World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639; Cummins Sales and Service (Pakistan) Limited through Authorized Signatory Vs. Cummins Middle East FZE through Chief Executive and 3 others 2013, C L D 291.’

- 1) The post-2015 framework in India requires referral where the agreement is *prima facie* valid and the issue is arbitrable, so constraining judicial discretion which aligns the Indian practice with arbitration-friendly jurisdictions. In contrast, Pakistani courts possess considerable discretion under Section 34 of the 1940 Act, even in the presence of valid agreements.
- 2) Indian courts adopt a more lenient interpretation of “first statement on the substance of the dispute” permitting parties to present arbitration objections even subsequent to submitting limited replies.¹⁴¹ Pakistani courts interpret “before taking any steps” stringently; for instance, submitting a written statement or requesting an adjournment may result in the forfeiture of the right to request a stay.¹⁴²
- 3) India like world-best practices has narrowed the fraud exception (e.g., ‘*A. Ayyasamy v. A. Paramasivam*’)¹⁴³ by the application of the notion of separability. Only significant fraud impacting the arbitration clause may obstruct arbitration. Pakistan, meanwhile, persists in treating any significant accusation of fraud as a valid basis to deny a stay, demonstrating a more conservative stance on private dispute settlement among public justice considerations.¹⁴⁴
- 4) Pakistan mandates a continuous and bona fide willingness to arbitrate from the commencement of judicial proceedings until the application for a stay is submitted. Indian law like international best practices has largely emphasizes on the existence of the arbitration provision and the timeliness of its invocation.

¹⁴¹ ‘Parasramka Holdings Pvt. Ltd. Vs. Ambience Private Ltd., 2018 SCC Online Del 6573.’

¹⁴² ‘MacDonald Layton & Company Vs. Uzin Export Import Enterprises, PLD 1989 Karachi 645; Uzin Export & Import Enterprises Vs. M. Iftikhar & Company Limited., 1993 SCMR 866.’

¹⁴³ ‘A. Ayyasamy Vs. A. Paramasivam, (2016) 10 SCC 386.’

¹⁴⁴ ‘Avari Hotels Ltd. Vs. Hilton International Company, PLD 1985 Karachi 445.’

4.6 ISSUES IN THE JUDICIAL INTERPRETATION OF PAKISTAN:

Unlike India, Pakistan’s arbitration jurisprudence exhibits a preservation of judicial power within an outdated legal framework. The continued dependence on the 1940 Act for domestic arbitration and the restricted implementation of the 2011 Act for foreign-seated arbitration provide distinct challenges. Below are some of the key issues in the judicial interpretation of Pakistan;

- 1) In contrast to India’s mandatory referral scheme, Pakistani courts often use discretion to deny a stay—even in the presence of a valid arbitration agreement—citing reasons such as fraud,¹⁴⁵ public policy,¹⁴⁶ or the risk for a miscarriage of justice.¹⁴⁷ This has ungended uncertainty and undermines the enforcement of arbitration provisions.
- 2) There is much ambiguity around what defines “taking steps in the proceedings.” Courts have established that submitting a written statement relinquishes the right to arbitration; nevertheless, other procedural actions—such as requesting an adjournment¹⁴⁸ or submitting an injunction application¹⁴⁹—remain ambiguous, leading to inconsistent enforcement of Section 34. This ambiguity often punishes parties for procedural measures undertaken in good faith.
- 3) Section 34 mandates that the applicant demonstrate their ‘readiness and willingness’ to arbitrate not only at the time of application but also from the initiation of the dispute. Courts have erratically construed this criterion, at times requiring onerous evidence of continuous

¹⁴⁵ ‘Avari Hotels Ltd. Vs. Hilton International Company, PLD 1985 Karachi 445.’

¹⁴⁶ ‘The Hub Power Company Ltd. v. WAPDA, PLD 2000 SC 841.’

¹⁴⁷ ‘Akbar Cotton Mills Ltd. Vs. VES/OJUANOJO OBJEDINENSIJE TECH/AMESH EXPORT, 1984 CLC 1605 KARACHI-HIGH-COURT-SINDH.’

¹⁴⁸ ‘Pakistan International Airlines Corporation Vs. Messrs Pak Saf Dry Cleaner, PLD 1981 SC 553; Mohammad Farooq Vs. Nazir Ahmed and others, PLD 2006 Supreme Court 196; Shin Satellite Public Company Limited through Attorney Vs. Messrs KASB Technology Services Limited., 2016 Y L R 2322.’

¹⁴⁹ ‘Island Textile Mills Ltd Karachi Vs. V/o Techno experts and others, 1979 CLC 307.’

readiness. This criterion, while intended to thwart delay tactics, often establishes an unreasonable threshold and engenders a litigation trap for otherwise diligent parties.

- 4) Despite the 2011 Act aligning its international arbitration framework with the NYC, the implementation of Section 4 remains insufficiently used and underdeveloped. Courts have construed phrases such as “null and void” or inoperative” in accordance with international standards (e.g., *Abid Agencies v. Areva*); nonetheless, institutional hesitance and insufficient familiarity with international arbitration doctrine have impeded uniform enforcement. The discretionary aspect of judicial referral remains dominant, notwithstanding the Convention's presumed pro-enforcement criterion.

4.7 CONCLUSION:

The judicial approach to staying court proceedings under arbitration agreements illustrates divergent trajectories in both jurisdictions. India’s legal system has evolved into a referral-centric, arbitration-friendly structure that prioritizes little judicial involvement. Pakistan continues to implement stringent judicial oversight, particularly in domestic arbitration, often favoring procedural fairness above adherence to commercial arbitration agreements. The enduring broad judicial discretion in Pakistan, alongside an outdated statutory framework and inconsistent enforcement of international obligations, fosters an adverse atmosphere for effective arbitration. Confronting these problems requires legal clarity, judicial education, doctrinal uniformity, together with a comprehensive institutional commitment to arbitration as a viable substitute for litigation.

CHAPTER 05: CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION:

This thesis concludes that stay of court proceedings is central to effectiveness of the arbitration and the judicial treatment of this doctrine determines the arbitration-friendliness of a regime. The contrasting judicial responses to the stay of court proceedings in arbitration cases, underscore a significant absence of harmonization between the arbitration frameworks of India and Pakistan. Despite their common colonial legal heritage, the two jurisdictions have pursued divergent trajectories—India via progressive legislative reforms and a shift towards limited judicial intervention, while Pakistan has maintained discretionary judicial control under an obsolete statutory framework. Moreover, after the enactment of '*New York Convention, 1958*' ('NYC') and '*UNCITRAL Model Law*' ('UML') and the development of pro-arbitration jurisprudence in arbitration-friendly jurisdictions provides a proven framework particularly for Pakistan to modernize their arbitration systems. India has made notable progress in constraining judicial discretion; however, Pakistan requires statutory reforms and judicial precision to incorporate mandatory stay provisions, notions of separability and competence-competence, as well as organized conditional stay frameworks. Restricting fraud and public policy exceptions and establishing specialized commercial courts are crucial for ensuring uniformity and promptness.

5.2 RECOMMENDATIONS:

Several legislative and judicial reforms are required to align stay provisions with arbitration-friendly jurisdictions.

- 1) In order to become an arbitration-friendly jurisdiction, Pakistan needs to repeal the outdated 1940 Act and shape the newly drafted Arbitration Bill into a law.

- 2) It is imperative to implement mandatory stay provisions that eliminate judicial discretion upon the establishment of a valid arbitration agreement and an arbitrable dispute; a stay must be granted where a ‘matter’ falls within an arbitration agreement, barring any statutory exclusions.
- 3) Doctrinal clarity regarding ‘matter’ and the ‘scope of arbitration’ should be integrated into the statutes, following two-stage analytical framework: (i) identifying substantive legal issues, and (ii) assessing their inclusion within the arbitration clause through a commercially rational interpretation.
- 4) Both countries must codify the principles of separability and competence-competence, guaranteeing that arbitral tribunals ascertain their own jurisdiction. This would reduce premature court intervention in arbitrability assessments.
- 5) Courts need to implement systematic constraints on the imposition of conditions for stays. The courts should categorize the condition into administrative and substantive conditions—administrative conditions promote arbitration, whereas substantive conditions that influence rights, such as the waiver of limitation defences, necessitate rigorous examination and extraordinary justification.
- 6) Fraud and public policy exceptions to stay orders must be interpreted restrictively, in accordance with principles of NYC, permitting rejection where it erodes the entire contract or where its execution would unequivocally violate the fundamental rights enshrined in the Constitution or legislative requirements.
- 7) There is urgent need to create specialized commercial benches with arbitration competence to properly manage stay petitions and ancillary processes, thus minimizing delays and inconsistencies in court interpretation.

Harmonizing the stay-of-proceedings framework with global best practices would provide several strategic and structural advantages;

- 1) First, it would bolster party liberty by uniformly upholding contractual selections pertaining to dispute settlement, so augmenting confidence in the arbitral procedure.
- 2) Second, procedural efficiency would enhance by abolishing superfluous litigation over the need of staying proceedings, so diminishing expenses and alleviating court backlog.
- 3) Third, investor trust would be enhanced, promoting foreign direct investment and establishing Pakistan as credible venue for arbitration.
- 4) Fourth, these changes would alleviate the possibility of ‘anti-arbitration’ impressions among international courts and tribunals, promoting an image of judicial endorsement for arbitration similar to that in established arbitration hubs.
- 5) Finally, the reforms will safeguard public policy concerns without compromising the efficiency and conclusiveness of arbitration, establishing a balanced system that safeguards legitimate state interests while upholding international obligations.

By implementing these reforms, Pakistan may evolve into arbitration-friendly jurisdiction, meeting their commitments under NYC and UML and increasing their appeal as venue for both domestic and international arbitration.

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4	British Telecommunications Plc Vs. SAE Group Inc, 18 February 2009, HT-08-336, [2009] EWHC 252 (TCC)	High Court of Justice, England and Wales	14
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4	UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law or UML')	International	1985
5	Protocol on Arbitration Clauses	International	1923
6	The Arbitration Protocol and Convention Act	Pakistan	1937
7	The Arbitration Act ('1940 Act')	Pakistan	1940
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