International and Domestic Arbitration in Pakistan: Law and Practice: A Book Review

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Introduction

Rana Rizwan Hussain is a practicing lawyer who holds an LL.M in Comparative and International Dispute Resolution from Queen Mary, University of London. He is a guest lecturer at the Management and Professional Development Department (MPDD) of Government of Punjab and his major areas of teaching are International Arbitration and Commercial law. He is also a contributing author of the World Arbitration Reporter (JURIS publishing). His treatise, *International and Domestic Arbitration in Pakistan: Law and Practice*, comes forward as a remarkable effort in the context of the rapidly increasing importance of arbitration, both at international and domestic levels. In Pakistan, the field of arbitration has developed over the years and the recent legislative developments have cast their impact on the practice of arbitration. This has resulted in a major change in the arbitral system of Pakistan. While presenting an account of this development, the book delves into the details of domestic and international arbitration practice. This book review provides a brief description of each chapter, followed by an analysis, which highlights the features and shortcomings of the book, and a brief conclusion.

Overview of the Book

The book presents itself as a piece of expository literature. It is divided into thirteen substantive chapters. The last part of the book encloses the text of different laws and rules as appendices.[1]

The book opens with a discussion on the nature of arbitration and an engaging exploration of its development and its current position in Pakistan. It then progresses through different stages of arbitration, simultaneously discussing the relevant doctrines and theories. The distinction between domestic, foreign, and international arbitration is given at the very beginning of the book, which lays a structural foundation for the comprehension of the rest of its content.

Chapter 1 defines arbitration and discusses its nature. It starts by highlighting the features of arbitration, which make it comparable with the judicial proceedings.[2] For elaborating the concept of arbitration as a consensual mode of dispute settlement, the author initially relies on case law from domestic jurisdiction.[3] He then uses the definition provided under section 1 of the English Arbitration Act 1996, for a better understanding of the idea.[4] The author moves on to discuss the theories that explain the legal nature of arbitration.[5] These include the jurisdictional theory, the contractual theory, the mixed or hybrid theory, and lastly, the autonomous theory.

Chapter 2 explores the history and current position of arbitration in Pakistan. The author points out that the progression of international arbitration in Pakistan has been subject to

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[1] Rana Rizwan Hussain, *International and Domestic Arbitration in Pakistan: Law and Practice* (Al-Qanoon Publishers) 185-262.

[2] Ibid, 1.

[3] Ibid, *Daulan Bibi v Aisha Bibi* 2014 YLR 1628; *Ziauddin v Roze-Ud-Din* 1999 YLR 978.

[4] Ibid, 3.

[5] Ibid, 4.

conflicting decisions of the courts.[6] While the courts refused to stay the judicial proceedings in favour of the arbitration (differing on the grounds for refusal),[7] they also emphasised the need for Pakistan 'to attain some respect in international commercial world', and not 'to use the judicial process merely to delay the implementation' of arbitration agreements.[8] It is discussed that the ratification of the New York Convention[9] and the implementation of the ICSID Convention[10] marked a new era of development of international arbitration in Pakistan.[11] According to the author, this was the point where 'Pakistan entered the race to develop its arbitral practices in harmony with the international ones'.[12] The chapter further includes elaboration on the development of domestic arbitration in Pakistan, followed by a list of the relevant laws governing arbitration or involving it as a mode of dispute settlement.[13] The author then moves on to concisely acquaint readers with the distinction between domestic, foreign, and international arbitration.[14] While presenting a comparison between an institutional and an *ad hoc* arbitration, the author points out the scarcity of arbitration institutions in Pakistan.[15] Consequently, the author notes that the prevalent mode of arbitration in Pakistan is an *ad hoc* one and the parties enjoy an autonomy to choose the arbitration procedure.

Chapter 3 is a lengthy one, providing extensive details regarding the arbitration agreement, and including a thorough explanation regarding its validity, enforcement, etc. Each aspect has been separately discussed in the light of the Arbitration Act 1940 and the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act 2011 (Act XVII of 2011), also known as the New York Convention (NYC) Act 2011 ('NYC Act'). The author sufficiently elaborates upon the jurisprudence developed by the courts while discussing the relevant aspects of an arbitration agreement.

The subject of 'arbitration agreement' is further expanded in Chapter 4, which discusses the doctrine of separability. In Pakistan, this concept has only been recognised through case law. The case law establishes that an arbitration clause is independent from the main contract, and its invalidity does not affect the rights and obligations of the parties.[16] The chapter further specifies that in the cases of international arbitration, the applicability of the doctrine is to be determined by 'the law chosen by the parties' or 'the *lex arbitri*'.[17] The chapter closes with a study of

[6] Ibid, 10.
[7] Ibid, *Eckhardt & Co. GmbH v Muhammad Hanif* PLD 1993 SC 42.
[8] Ibid, 12; *A. Meredith Janes Co. Ltd. v Crescent Board Ltd* 1999 CLC 437.
[9] United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.
[10] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965.
[11] The former was ratified through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 and the latter was implemented by The Arbitration (International Investment Disputes) Ordinance 2006.
[12] (n 1) 12.
[13] Ibid, 14-16.
[14] Ibid, 17-18.
[15] Ibid, 21.
[16] Ibid, 54-55; *The Pan Islamic Steamship Co. Ltd v General Importers and Exporters Ltd* PLD 1959 Karachi 750; *Pakistan Burmah Shell Ltd v Tahir Ali* 1983 CLC 2745; *Surriya Rehman v Siemens Pakistan Engineering Co. Ltd* PLD 2011 Karachi 571.
[17] (n 1) 55.

LPGCL v Karadeniz Powership Kaya Bey.[18] In the light of this case, it is concluded that the doctrine is also applicable to contracts, which have been declared *void ab initio*.

Chapter 5 discusses the powers of a court and an arbitral tribunal, with respect to the determination of jurisdiction under the Arbitration Act 1940, the NYC Act 2011, and the Arbitration (International Investment Disputes) Act 2011 (ICSID Act 2011). The chapter opens up with a reference to section 31 of the Arbitration Act 1940, which confers the power to deal with the jurisdictional issue on the court rather than the tribunal.[19] It further explains the doctrine of competence-competence.[20] As opposed to section 31, this doctrine recognises the capacity of the arbitral tribunal to rule on its own jurisdiction. The author reveals that despite the inconsistent provisions of the Arbitration Act 1940, courts have applied the doctrine of competence-competence.[21] This sub-topic, however, closes with a decision of the Supreme Court of Pakistan, where it was ruled that the doctrine cannot be resorted to in contravention of the express provisions of the law.[22] Under the ICSID Act 2011, the power to determine the jurisdiction exclusively vests with the ICSID tribunal. Although, the NYC Act 2011 and the relevant convention are silent on the issue, the matter is to be decided in accordance with the law chosen by the parties or the *lex arbitri*.[23]

Chapter 6 distinguishes between the arbitrable and non-arbitrable disputes. Here the author refers back to the contractual and jurisdictional nature of international commercial arbitration that was discussed in the first chapter. These disputes are discussed with reference to subjective and objective arbitrability. Regarding the subjective arbitrability, the author mentions that every legal person, including the state and state-owned entities, can resort to arbitration.[24] Under the domain of objective arbitrability, the winding up proceedings, banking disputes, rent matters, the judicial review of administrative actions, and the issues of criminal law are considered by courts to be non-arbitrable.[25] The matter of non-arbitrability is further analysed in the light of domestic, international, and transnational public policy under Chapter 7.

In Chapter 8, the author delves into details pertaining to the constitution of arbitral tribunals and the arbitrators. This chapter thoroughly analyses the Arbitration Act 1940 and lists down the rights and duties of arbitrators, their remuneration, appointment, removal and termination, refusal to act as an arbitrator and its consequences, replacement, and liability, and immunity. For clarifying the difference between the appointment of sole arbitrator by the parties and the appointment of arbitrators by the parties, reliance is placed on *Karachi Dock Labour Board v Quality Builders Ltd*.[26] In this case, the court resolved that where the sole arbitrator is to be appointed by the parties and they fail, the appointment shall be made by the court under section 8 of the Act of 1940. One party cannot solely appoint an arbitrator. On the other hand,

[18] Ibid, 57; 2012 SCMR 773.
[19] Ibid, 59.
[20] Ibid, 60.
[21] Ibid, 61.
[22] Ibid, 62; *Karachi Dock Labour Board v Quality Builders Ltd* PLD 2016 SC 121.
[23] Ibid, 62-66.
[24] Ibid, 67.
[25] Ibid, 68.

where parties have to make the respective appointment of arbitrators and only one party appoints the arbitrator, the arbitrator so appointed can validly be declared as the sole arbitrator. The chapter ends with a brief reference to international arbitration under the NYC Act 2011 and ICSID Act 2011.

Chapter 9 deals with procedural aspects of arbitration, covering domestic, international and institutional arbitration, and providing details regarding the relevant laws and rules. While discussing the procedure of international arbitration, the writer discusses the subject of anti-arbitration injunctions in the light of three judgments. The first case is *HUBCO v Wapda*.[27] In this case, the Supreme Court upheld the injunctions issued by Division Bench of the Sind High Court, restraining HUBCO from resorting to arbitration. The decision was based on the ground that the contract was tainted with fraud, corruption and bribery, which deprived the matter of its arbitral nature on the basis of public policy. In the end, the writer brings attention to the fact that the decision was criticised internationally. The second case is *SGS vs Pakistan*.[28] In this case, the Supreme Court restrained SGS from resorting to the ICSID tribunal for settlement of the dispute, notwithstanding the existence of an arbitration agreement between the parties. The fact that earlier the SGS resorted to the Swiss Court for settlement of the dispute, without any claim for ICSID proceeding, was construed by the court to mean that the ICSID proceeding was merely an afterthought to frustrate the arbitration clause.[29] Lastly, *Maulana Abdul Haq Bloch v Government of Baluchistan*[30] is discussed. The Supreme Court issued anti-arbitration injunctions against the ICSID proceedings because the agreement between the parties was executed in contravention of the laws of Pakistan.

Chapters 10 to 13 examine the different aspects of an arbitration award. Chapter 10 briefly touches upon all the relevant aspects of a domestic and a foreign award.[31] These aspects include the types of awards, its requirements, remedies, which an award may grant, and the *res judicata* effect of an award, etc. The foreign award is discussed in the light of the NYC Act 2011, the Arbitration (Protocol and Convention) Act 1937 (1937 Act), the ICSID Act 2011, and the relevant case law. Chapter 11 informs the reader about the procedure of recognition and enforcement of an award. According to the author, a domestic award does not need any recognition. However, the process of its enforcement is separately laid down under sections 14 to 17 of the 1940 Act.[32] As far as a foreign commercial award is concerned, it can be enforced either under NYC Act 2011 or the 1937 Act. An ICSID award, however, is enforced in accordance with the ICSID Act 2011. Under the NYC 2011 and the 1937 Act, there are several reasons due to which an award can be rendered unenforceable. An award is not enforceable under NYC Act 2011 in the case of incapacity of parties, invalidity of the agreement, non-service of notice of the appointment of arbitrator, suspension or setting aside of the award, or recognition or enforcement of the award being contrary to public policy, etc.[33] An award shall not be enforced under the 1937 Act if it has been annulled, or if the notice of proceedings was not

[27] Ibid, 116-7; PLD 2000 SC 841.
[28] Ibid, 117; 2002 SCMR 1694.
[29] Ibid, 118. Under the arbitration clause the parties conceived the arbitration to take place at Islamabad.
[30] Ibid, 120-22; PLD 2013 SC 641.
[31] Ibid, 123.
[32] Ibid, 137.
[33] Ibid, 144-145.

served upon the party against whom it is being enforced, or if the party was under some legal incapacity or if the award falls short of or goes beyond the subject matter of the dispute.[34] As far as the ICSID award is concerned, its recognition or enforcement cannot be refused by any court.[35] The refusal of enforcement of award under the New York Convention is further examined under Chapter 12.

The final chapter addresses the challenge and setting aside of the award. It provides that a domestic award cannot be challenged through appeal. However, the judgment given in terms of an award can be appealed against under section 17 of the 1940 Act. An award can be set aside on the grounds laid down under section 30 of the Act.[36] The chapter moves on and discusses other relevant provisions of the Act such as the requirement for contesting an agreement or award (s.33), bar to suits contesting an agreement or award (s.32), and power of the court to supersede arbitration where award is set aside (s.19). The discussion is supported by the relevant case law.[37] As far as the setting aside of a foreign award is concerned, the New York Convention does not lay down any such grounds. The author observes that this omission gives rise to practical difficulties and conflicting academic views. One view is that the competent authority seized with the annulment action can apply its domestic standards for determining the validity of the award. The other view is that the grounds for denying the enforcement of an award are also the grounds for setting it aside.[38] According to the author, both the interpretations raise several questions.[39] Moving towards the 1937 Act, the author notices that the Act does not allow any right to appeal against an award.[40] However, the judgment passed on such an award can be challenged through appeal on restricted grounds.[41] The setting aside of the award is dealt with under section 7 (2) (a) of the Act. According to this clause, an award can be set aside only by the competent authority at the seat of arbitration. Here, the author discusses an interesting aspect of the matter by referring to the judgment in *Hitachi v Rupali Polyester*.[42] In this case, the award rendered by the ICC tribunal in London was regarded as a domestic award because, in the case of absence of any choice of parties regarding the applicable law of arbitration agreement, the law of the main contract applied. As in this case, the law of the main contract was Pakistani law; therefore, the same applied to the arbitration agreement. Hence, the court determined the award to be a domestic one and applied section 30 of Arbitration Act 1940 for the purpose of setting it aside.

Proceeding further, the writer scrutinises the question of challenge to an ICSID award.[43] He divulges that once an ICSID award is registered, it is treated as a judgment of the high court. A judgment of the high court passed with the registration of the award is amenable to an intra-court appeal under section 3 of the Law Reforms Ordinance 1972. Consequently, he determines that an ICSID award may be challenged in appeal. Thereafter, the author refers to Article 52 of

[34] Ibid, 149; Section 7 of the 1937 Act.
[35] Ibid, 152.
[36] Ibid, 171.
[37] *Noor Alam v Muhammad Bashir* 2015 CLC 1675; *Khuda Bakhsh v Hamza* 2015 YLR 1624; *Trading Corporation of Pakistan Ltd v General Industrial Machines* 2016 MLD 897.
[38] Ibid, 177-8.
[39] Ibid, 178.
[40] Ibid, 179.
[41] Ibid, 180.
[42] Ibid.
[43] Ibid, 182.

the ICSID convention, which lays down the grounds for setting aside of the award.[44] It is also pointed out that 'the annulment of an ICSID award in not maintainable before any national court or tribunal'.[45]

Analysis

The book is an important contribution in the context of the increasing value of arbitration and the consequent development of the arbitration laws. It presents itself as an elucidating piece of legal literature. The orderliness of the book leads to a systematic understanding of the concepts discussed therein. The chapters dealing with different stages of arbitration are broken down into distinct sections: the Arbitration Act 1940; the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011; the Arbitration (International Investment Disputes) Act 2011; and the Arbitration (Protocol and Convention) Act 1937. Each chapter explicates its topic separately under these sections. This helps the reader clearly appreciate the discrete and sometimes similar positions adopted by these laws regarding different aspects of arbitration.

The methodology of the book is its biggest asset. Statutory provisions are discussed in the light of case law from Pakistan and other jurisdictions. This way, the author explores the practice relating to international and domestic arbitration. Unlike the majority of other commentaries available in Pakistan, on different subjects of law, the book does not merely describe the *ratio* of the court decisions. Rather, the cases are discussed in factual contexts, sufficiently describing the line of reasoning adopted by the court, which not only engrosses the reader but also makes the comprehension of the practical application of laws more effective. Such a detailed description of cases provides an added benefit of illustrating some other legal principles besides the subject of arbitration. The mention of contradictory views of courts *inter se* or of the courts and arbitral tribunals, where beneficial for legal practitioners on one hand, enhances the academic flavour of the book on the other.

Footnotes are another highlight of the book. Here, the author carefully attends to the need of law students' general understanding and that of any foreign reader, providing valuable details, which could not be adjusted in the main text. Brief details as to the basis of Pakistan's legal system,[46] the structure of superior judiciary,[47] practice as to the ascertainment of the meaning of any provision of international law,[48] and the general rule of interpretation of statutes are a few examples in this regard.[49] Footnotes thoroughly reflect the authorities used by the author and also provide sources for obtaining further information. An added feature of the book is that it bears the texts of all relevant laws and rules as appendices.

However, at some places, it seems that the author is carried away by the idea of enlightening the reader through the details of cases. Lengthy details of the factual contexts,

[44] Ibid, 183.
[45] Ibid, 184.
[46] Ibid, 9.
[47] Ibid.
[48] Ibid.
[49] Ibid, 16.

which could have been abridged or written more concisely, tends to be burdensome for the reader and trammels the smooth understanding of the subject.[50] The book also suffers from repetitions. For example, the facts of the case *Karachi Dock Labour Board v Quality Builders*, detailed on page 62, are repeated at the same form and length at page 83. Similarly, the text of Article V of the NYC Act 2011 has been reproduced in the book several times.[51] Though the text of a provision may be useful as a ready reference, its excessive reproduction tends to make the work less interesting. It is also observable that at some points the reproduction of the text of various provisions is simply consuming space. Since all the relevant statutes are annexed in the form of appendices, the author could have written a comment on most of the provisions, instead of producing them verbatim.[52] This would also have the effect of making the provisions more understandable for the reader in view of the inherent complexity of the statutory language. Conversely, at some points, the reproduction of the text of a provision merely appears to be a repetition of the point the author has already explained.[53]

Furthermore, at a few spots, it seems that the discussion stands in need of further analysis by the author. For example, while discussing the authority of the tribunal to determine its own jurisdiction (doctrine of competence-competence), under the Arbitration Act 1940, the author notes that the courts in Pakistan have recognized the said doctrine, despite a contrary provision in the statute. He then cites two cases. In the first case, the court recognized the authority of the arbitrator to deal with all questions arising out of the dispute.[54] In the second case, the court refused to recognize the authority of the arbitrator to determine his jurisdiction, stating that the doctrine of competence-competence could be availed in contravention to the express provisions of the law.[55] For a better comprehension of this sub-topic, it is essential to know the difference in the reasoning employed by the court in these decisions. The author neither explains the underlying reason behind these apparently (if not actually) contradictory decisions nor does he indicate that which view is to prevail over the other. He further fails to demonstrate how the second case substantiates his point of recognition regarding the doctrine by the Pakistan's judiciary. Lawyers and experts might be able to appreciate this content better, but the law students will find it complex and explained inadequately.

In Chapter 9, while discussing the judicial practice regarding the anti-arbitration injunctions, the author discusses the case of *Maulana Abdul Haq Bloch v Government of Baluchistan*.[56] The case is discussed at a great length but the complexity in the description hampers the reader from understanding details regarding the grounds on which the court applied the anti-arbitration injunction. This is contrastable to the discussion on *HUBCO v WAPDA*[57] and

[50] Ibid 120; while narrating the facts of the *Maulana Abdul Haq Baloch* case, the writer provides such factual details which does not seem necessary for the explanation and understanding of the point under discussion.
[51] Ibid, 31, 63, 89, 107, 144.
[52] Ibid, 154, ICSID Act 2011, s. 4 & 183; ICSID Convention, art 54; to cite few examples in this regard.
[53] Ibid, 153; ICSID Act 2011, s. 3 (3). This is contrastable to the reproduction of the text of s. 5 of the same Act which is seems necessary in view of the commentary in the preceding paragraph. Ibid, 68; reproduction of s. 7 does not seem necessary at all.
[54] Ibid, 61-2; *LSE v Fredrick J. Whyte Group (Pakistan) Ltd* PLD 1990 SC 48.
[55] Ibid, 62; *Karachi dock Labour Board v Quality Builders Ltd* PLD 2016 SC 121.
[56] PLD 2013 SC 641.
[57] 1999 CLC 1320.

SGS v Pakistan,[58] which clearly connects to the point of the anti-arbitration injunctions and categorically indicates the reasoning forwarded by the court. The same clarity could have been achieved in the discussion on the *Maulana Abdul Haq Bloch* case if the author could point out that the court declared the main agreement (Chagai Hill Exploration Joint Venture) along with the arbitration clause null and void. Therefore, it held that the parties could not resort to arbitration and the proper forum for dealing with the case was the judiciary. The following paragraph from the judgment could have been used in this regard in addition to the one reproduced in the book.

> As all the key provisions of CHEJVA were made subject to a reliance on relaxations that were illegal and *void ab initio*, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law.[59]

In this case, the Supreme Court of Pakistan laid practical limits of the doctrine of separability. The author could have relied on this case for elaborating the discussion under chapter 4 (doctrine of separability). The determination of the scope of the doctrine of separability in the light of this case and the role played by the Supreme Court in the development of the jurisprudence in the area would definitely have been useful for the reader.[60] The fact that the case has attracted the attention of international writers *viz-a-viz* the doctrine of separability reinforces this observation.[61]

Conclusion

Despite some shortcomings, *International and Domestic Arbitration in Pakistan: Law and Practice* is a praiseworthy resource for law students, academics, and legal practitioners. The foibles, identified above, do not outweigh the beneficial features of the book, and the same can be fixed in the future editions (if the author so desires). The work is surely a source of inspiration for young lawyers to involve themselves in legal research as it discovers many areas, which can be taken up for further exploration. I expect that the author will continue his research in further developing the current edition and will also produce more work on the subject.

[58] 2002 SCMR 1694.
[59] *Maulana Abdul Haq Bloch v Government of Baluchistan* PLD 2013 SC 641, 24.
[60] The case has attracted the attention of the international writers and an article is published in this regard in the Arbitration Law Review. Sara E. Myirski, 'Copper, Gold, Corruption, and No Arbitral Relief: A Recent Pakistan Supreme Court Calls into Question the Doctrine of Separability' (2014) 6 (1) *Arbitration Law Review* 305.
[61] Sara E. Myirski, 'Copper, Gold, Corruption, and No Arbitral Relief: A Recent Pakistan Supreme Court Calls into Question the Doctrine of Separability' (2014) 6 (1) *Arbitration Law Review* 305.