Enforcement of International Arbitral Awards in Pakistan

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Abstract

The twenty-first century is an era of globalization and trade, where arbitration is one of the basic tools to solve trade disputes between parties to international commercial agreements. However, an essential condition for the successful use of international arbitration is the enforcement of foreign arbitral awards (FAA). In Pakistan, enforcement of FAA is slow and sometimes reluctantly done, notwithstanding Pakistan being one of the original signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This article maintains that the New York Convention's 'pro-enforcement bias' demands a restrictive application of the public policy ground while refusing recognition and enforcement of an award. Moreover, it is argued that the jurisdiction of the High Courts in matters of recognition and enforcement of FAA does not grant them the power to reopen the merit of the dispute, but is limited to ascertaining that implementation of the award is not against the fundamental values of the state.

Introduction

The twenty-first century is an era of globalization of international trade, where citizens of one state are connected with those of other states and there is an increased chance of trade opportunities and business disputes arising between them. International arbitration is one of the basic tools to solve trade disputes between parties to international commercial agreements. However, an essential condition for the successful use of international arbitration in Pakistan is the enforcement of foreign arbitral awards (FAA). Slow enforcement of FAA, or even lack thereof. is one of the reasons that prevents international companies from confidently investing in Pakistan. The responsibility of the Pakistani judicial system in this is recognised by the judiciary itself. It was observed by the Sindh High Court in *A. Meredith Janes Co. Ltd. v Crescent Board Ltd.*[1] that 'if Pakistan is to attain some respectability in the commercial world, it is necessary that trans-national commercial agreements must be honored and judicial process must not be used to delay the implementation of such agreements or judicial or quasi-judicial decisions passed in disputes arising from such agreements.'[2]

Pakistan is one of the original signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA),[3] but almost fifty years had to pass before it ratified the Convention only on 14 July 2005.[4] The provisions of the CREFAA were introduced in Pakistani domestic law through the Recognition and Enforcement (Arbitration Agreements and Foreign

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[1] *A. Meredith Janes Co. Ltd. v Crescent Board Ltd.* CLC (1999) Karachi 437.

[2] ibid at 441.

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA) (10 Jun 1958) UNTS 330, 3.

[4] ibid Pakistan Ratification (14 July 2005) <https://treaties.un.org/Pages/showActionDetails.aspx?objid=080000028002a3ba&clang=_en>.

Arbitral Awards) Ordinance (REAO) in 2005.[5] However, the Ordinance did not receive Parliamentary approval, hence it was prorogated several times[6] until the Parliament approved and passed the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act ('the 2011 Act') in 2011.[7]

This article is divided into four sections. Section one will present the purpose, need and preamble of the 2011 Act, while section two will show how the Act has impacted the judicial attitude towards FAA, by raising awareness that a global economy requires a 'pro-enforcement bias' in favour of recognising arbitral awards of international commercial disputes. Section three will demonstrate that, notwithstanding this, hurdles still persist against recognition and speedy enforcement of FAA. Section four will deal with the discretionary nature of Article 5 and the grounds of refusal of the New York Convention 1958. The last section will show that the jurisdiction of the High Courts in matters of recognition and enforcement of FAA does not imply the power to reopen the merit of the dispute, that has been finally adjudicated upon by the arbitral tribunal.

[5] Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance (2005), Ordinance VIII of 2005.

[6] This law remained as an Ordinance till 3rd October 2007 when it became a law owing to the Emergency promulgation. The law was subject to re-enactment by the National Assembly by virtue of Supreme Court ruling of 31 July 2009 finally becoming a law passed by the National Assembly on 27th January 2011.

[7] Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (2011), Act XVII of 2011.

A. The 2011 Act and Its Main Provisions

According to Redfern and Hunter,[8] the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards is 'the most important treaty relating to International Commercial Arbitration. Indeed, it may be regarded as a major factor in the development of arbitration as a means of resolving international trade disputes.'[9]

The 2011 Act was promulgated to ensure proper enforcement of FAA. Proper laws are necessary for building both the confidence and the interest of international trading companies that enter into trade agreements with Pakistani companies: they must feel reassured that any dispute arising under the international trade agreement will be effectively and speedily solved.

The 2011 Act was made for the purposes of honoring Pakistan's obligations under the New York Convention 1958. According to Section 7 of the 2011 Act the High Court will not refuse the enforcement of any Arbitration Award except on the grounds mentioned in Article 5 of the New York Convention 1958. Section 7 states that: 'the recognition and enforcement of Foreign Arbitral Award shall not be refused except in accordance with Article 5 of the Convention.' [emphasis added] The word used in this section is 'shall' which makes it mandatory for the Courts to enforce the Foreign Arbitral Award unless they fall under the circumstances provided in Article 5 of New York Convention. In addition to it, Section 10 of the 2011 Act repeals the Arbitration (Protocol and Convention) Act 1937. This is the old law and will continue to apply

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[8] Alan Redfern and Martin Hunter, *International Commercial Arbitration* (4th ed, Sweet & Maxwell 2004).
[9] ibid at paras 10-23.

only to FAA made before the date of 14 July 2005,[10] which is the day Pakistan ratified CREFAA. However, the 2011 Act does apply to all arbitration agreements made before, on or after the date of commencement of the Act.[11] As far as arbitration agreements are concerned, this Act has retrospective effect. The meaning of Section 10 and Section 1(3) was clarified by the Sindh High Court in in the case *Taisei Corporation v A.M Corporation Company (PVT.) Ltd*,[12] where it was stated that:

> The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 was primarily a procedural law, which had not repealed the Arbitration Act, 1940, but had only repealed the Arbitration (Protocol and Convention) Act, 1937; and thus domestic awards had to follow the path of the Arbitration Act, 1940 and after enactment of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011; all foreign awards had to sail through the waters of the said Act. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 merely changed procedures applicable to certain kind of arbitral awards and such procedural laws had retrospective effect. Notwithstanding the fact that an arbitration commenced before the enactment of Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011), if the award for the same was announced after said enactment, then provisions of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral

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[10] Recognition and enforcement of Arbitration Agreement and Foreign Arbitral Awards 2011, Section 1(4): 'It shall not apply to foreign arbitral awards made before the 14th day of July, 2005.'

[11] Section 1(3): 'It shall apply to arbitration agreements made before, on or after the date of commencement of this Act.'

[12] MLD (2018) Karachi 2058.

> Awards) Act, 2011 would be applicable to such an arbitral award'[13].

In adopting this view, the Court was reinforced by the opinion of the leading scholar F. Bennion: 'As procedural provisions are expected to be for the general benefits of litigants and others, it is therefore presumed that it applies to pending as well as future proceedings.'[14]

Section 8 is another unconventional provision in the 2011 Act, according to which in case of any inconsistency between the Act and the CREFAA, the convention will prevail. This is an unusual provision as it is a well settled principle of interpretation of Statutes that in the event of any conflict between an international treaty provisions and domestic law, the latter is to prevail. However, this Act reverses the principle in favor of CREFAA. It is not easy to find adequate justification for this legislative choice: one possible explanation may be found in Article 26 of the Vienna Convention on the Law of Treaties 1969, whose Article 26 states that: 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.' So states should follow the rule of *pacta sunt servanda* to take steps to make laws according to conventions and treaties that are in force for them. Any inconsistency between a domestic act and a convention or Treaty in force for that state, if resolved in favour of applying the convention or the treaty, would guarantee automatic compliance of the state with its international obligations. However, this is not the path usually chosen by the legislature and the courts in Pakistan. Another reason behind the unusual prevalence accorded to the Convention over domestic law provision may be found in the desire to make Pakistan a more favourable venue for international trade agreements.

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[13] ibid at 2065.

[14] Francis A. R. Bennion, *Statutory Interpretation* (5th ed, LexisNexis Butterworths 2005) at 320.

B. The Impact of the 2011 Act on Judicial Attitudes Towards FAA

One of the basic reasons for the enactment of the 2011 Act is to provide an appropriate platform for the enforcement of FAA in Pakistan. Before the 2011 Act, Pakistani courts refused to enforce the FAA just because either Pakistan or the other country did not recognize the International Arbitration Forum. In 1961, the Supreme Court of Pakistan, in its judgment of *Messrs Yangtze (London) Limited v Messrs Barlas Brothers (Karachi)*,[15] refused to enforce an Award made by the London Court of Arbitration on the basis that:

> In the absence of any notification by the Central Government of Pakistan declaring England to be a party of convention and her territories to be territories to which the said Convention applies, an award of the Court of Arbitration, London cannot be held to be a 'Foreign Award' within the meaning of Section 2 of the Arbitration (Protocol and Convention) Act, 1937 and cannot therefore, to be allowed to be filed in any Court in Pakistan and enforced like an award made in an arbitration proceeding in Pakistan or to which Arbitration Act, 1940 applied.[16]

However, after the 2011 Act the attitude of the courts in Pakistan seems to be more open to recognition of FAA made by the International Court of Arbitration. In *Louis Dreyfus SA Commodities v Acro Textile Limited*,[17] the Lahore High Court held that:

> There is no doubt that the purpose of the law is to give recognition and enforcement to a Foreign Arbitral Award expeditiously and with all deliberate speed. In short, the Act, 2011 has been enacted to give effect to the New York

[15] PLD (1961) Supreme Court 573.
[16] ibid at 583-584.
[17] PLD (2018) Lahore 597.

> Convention which is a binding agreement between the Contracting States and the underlying purpose being that any Awards issued by International Arbitral forums ought to be enforced and recognized so as to curtail the time of the contracting parties in the enforcement of their financial obligations.[18]

The same views were expressed by the Sindh High Court in *Dhanya Agro-Industrial (Pvt) Limited v Quetta Textile Mills Ltd*,[19] where it was held that 'the intention of the legislature while enacting this Act 2011 was to expedite the process by giving fast-track enforceability to Arbitral Awards granted between the members of New York Convention States.'[20]

The International Council for Commercial Arbitration (ICCA) has produced a guide to the interpretation of New York Convention 1958. A handbook for judges[21] was also published, which sets out questions to be answered and the steps to be followed by the Courts when applying the Convention. The handbook summarises the overall object and purpose of the Convention as follows: 'The Convention is based on pro-enforcement bias. It facilitates and safeguards the enforcement of Arbitration Agreements and Arbitral Awards and in doing so it serves International Trade and Commerce. It provides an additional measure of commercial security for parties entering into cross border transaction. [emphasis added]'[22]

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[18] ibid at 609.
[19] CLD (2019) Karachi 160.
[20] ibid.
[21] Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (May 2012 edition), UNCITRAL Working Group II. Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), December 14, 2005. Doc. A/CN.9/WG.II/WP.139.
[22] ibid at 25.

It appears that after the 2011 Act the 'pro-enforcement bias' is beginning to find its way into the judgments of the courts in Pakistan too. However, reluctance may still be found among the higher echelons of the judiciary as discussed next.

C. Persisting Hurdles Regarding Enforcement of FAA

Pakistani Courts are still somehow reluctant to enforce FAA and give them the same status as a domestic decree. It has already been shown in the previous parts of this paper that the main purpose of the 2011 Act is to provide for fast track recognition and enforcement of FAA through a summary procedure, and not by regular trail. Therefore, it is not the duty of domestic courts to check whether the Arbitration Court has acted legally or according to law; this would imply re-opening the merit of the dispute. The only task courts need to fulfil is to give a bird's eye view to the award to make sure that it is not against the public interest or public policy.[23] Once satisfied that this is the case, the municipal courts must issue a decree that declares the award recognised and enforceable in the country. However, the recent case *Jess Smith and Sons Cotton Llc v Ds Industries*,[24] shows the persisting lack of willingness of courts to enforce FAA. The facts were that a case was filed in 2014 for the enforcement of FAA but the domestic court after four years issued an order directing the parties to fix the case for framing of issues. The question that arises here is whether it is possible for a domestic court to record evidence or to summon all documents regarding a case when the arbitration was already completed in another country. The question of who will bear the expenses of all this is most pertinent to

[23] Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article 5. Public Interest or Public policy are the main grounds for refusal of recognition, discussed later in Section IV of this article.
[24] CLD (2019) Lahore High Court 23.

ask here, and how it would be possible to get all records from there. If this practice were to be followed, the award holder would have to wait for years and face another trial. All this jeopardizes the right of justice of the award holder because 'justice delayed is justice denied.'

One of the basic reasons why companies and parties are not interested to refer their proceedings to arbitration is the slow procedure of enforcement and recognition of FAA. The 2011 Act gives the power to try the case for enforcement and recognition as summary procedure as compared to regular trial, but the Pakistani courts are reluctant to try cases summarily. One of the example of this is the case of *Louis Dreyfus SA Commodities v Acro Textile limited*[25] which was instituted in 2012 and decided in 2018 after forty hearings that caused serious and grievous loss to the award holder and also damaged the image of Pakistan regarding its seriousness in cases regarding FAA. In reality the 2011 Act only allows the domestic courts to refuse recognition of FAA on grounds of Public policy or Public Interest: the next part will discuss how this has been interpreted and applied by courts in Pakistan.

D. Grounds for Refusal of Enforcement under the New York Convention 1958

The 2011 Act discounts the discretion of the Courts by restricting the grounds for the refusal of enforcement of Foreign Arbitral Awards to only the grounds mentioned in Article 5 of the New York Convention. We might argue that Article 5 of the New York Convention envisages a power that is discretionary in nature as it uses the word 'may refuse' and not 'shall refuse' which allows the Court to exercise its personal judgment and assessment. Moreover,

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[25] *Louis Dreyfus SA Commodities v Acro Textile Limited* [2018] Lahore high court, PLD 597 (Lahore High Court).

this discretion is not unlimited because 'the best law leaves the least discretion to the judge'[26] The discretion awarded to the Courts by virtue of Article 5 of the New York Convention must be construed narrowly and applied restrictively as can be gathered from the case of *Jess Smith and Sons Cotton Llc v Ds Industries*[27] where it was observed that:

> The legislative intent regarding enforcement of a Foreign Award is writ large, in that, the conditions for refusing enforcement are to be narrowly construed, and, as far as possible the court may exercise its discretion in favor of enforcement of the Award as is clear from the use of the words 'recognition and enforcement of the Award may be refused, only if that party furnishes to the competent authority…prove that.[28]

Therefore, it stands accepted that courts may not refuse the enforcement of Awards on the basis of any mistake of law and fact committed by the Arbitral Tribunal in the course of the arbitral proceeding. This is because examining the way the Arbitral applied the law and the factual evidence that it used to support its decision would amount to a reopening of the case with the consequent shifting of the dispute before a different forum that the one chosen by the parties in the contract.

One of the most important grounds for refusal to implement the enforcement and recognition of a FAA is when enforcing it would go against public policy or public interest.[29] One of the most widely quoted definitions of public policy is the one provided in *Parsons &*

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[26] H.L. Menckom, *A New Dictionary of Quotations on Historical Principles from Ancient and Modern Sources* (19th ed, Knopf 2001) at 68(4).
[27] CLD (2019) Lahore 23
[28] ibid at 27.
[29] Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article 5(2)(b).

Whittemore Overseas Co. v Societe Generale De L'industrie DuPapier.[30] In this case the Court held that enforcement of an international award may be denied on the ground of public policy when enforcing it in the country would violate the state's 'most basic motions of morality and justice.'[31]

In line with this construction, the Lahore High Court in the case of *Orient Power Company (private) Limited v Sui Northern Pipelines Limited*,[32] held that:

> The application of public policy exception is restrictive and limited to exceptional circumstance that effected most fundamental values of the state. Public policy exception had been kept fluid and adaptive and could be invoked in the cases of patent illegality and allowed the contracting state to safeguard its core values and fundamental notions of morality and justice which may change over time. Public policy exception therefore should not become a backdoor to review the merits of foreign arbitral awards or to create that which was not available under Article V of the New York Convention.[33]

The most important Section of the 2011 Act is Section 7 which must be read with Article 5 of the CREFAA. Read together, these two provision give an exhaustive list of grounds for refusal of recognition and enforcement of FAA. Important remarks on this issue were given by his Lordship Justice Mr. Shahid Karim Khan in *Louis Dreyfus Sa Commodities v Acro Textile Limited*,[34] where he stated that:

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[30] 508 F.2d 969 (2nd Cir 1947).
[31] ibid at 166-167.
[32] PLD (2019) Lahore 607.
[33] ibid at 659.
[34] PLD (2018) Lahore High Court 597.

> The introductory sentence of Article V(1) provides that recognition and enforcement may only be refused at the request of the party against whom the Award is invoked, and if that party 'furnishes proof' of the grounds listed in that paragraph. In accordance with this wording, courts in the contracting states have consistently recognized that the party opposing recognition and enforcement has the burden of raising and proving the grounds for non-enforcement under Article V(1).[35]

This means that the burden is always on the Award debtor to give reasons why International Award is not maintainable but this is limited to the grounds under Article 5 of New York Convention 1958.

This was confirmed by the Karachi High Court in case of *Abdullah v CNAN Group Spa*,[36], where the award debtor filed a suit for declaration and injunctive relief, but the court rejected this suit on the basis that:

> [R]efusal must be accordance with Article 5 of New York Convention which indicated that any action in which the question of refusal to recognize or enforce a Convention Award was raised, must conform both substantially and procedurally with the requirements of Article 5. This means that recognition and enforcement could only be objected to on the grounds taken in paragraph one of Article 5 during an enforcement proceeding brought by the Award creditor and not otherwise: the public policy exception of Article 5 operates only as a shield and, not as a sword.[37]

[35] ibid at 625.
[36] PLD (2014) Karachi 349.
[37] ibid at 351.

E. Jurisdiction in FAA Recognition Cases

The 2011 Act gives the powers to enforce the Awards to the High Courts in its definition clause 2(d)[38] as compared to the Arbitration Act 1940 where Civil Courts have jurisdiction to proceed in arbitration proceedings[39]. However, the Lahore High Court in *Taisei Corporation v Am Construction Company (Pvt) Ltd.*[40] construed Section 2(d) of the 2011 Act as giving only limited powers to the High Court for the recognition and enforcement of FAA, whereas the general powers of jurisdiction conferred upon ordinary Civil Courts under provisions of the Arbitration Act, 1940 including Section 14 thereof remain available to a party affected by a FAA.[41] This interpretation may be criticized on the ground that that it is clear that the Arbitration Act, 1940 only applies to a domestic award and not to a foreign one. It is clearly stated in the CREFAA as well that 'it shall apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.'[42]

The Lahore High Court departed from its own precedent on this point in the case of *Orient Power Company (private) Limited v Sui Northern Pipelines limited*,[43] by clarifying that:

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[38] Recognition and Enforcement of Arbitration Agreement and Foreign Arbitral Awards Act 2011, Section 2(d): 'Court means a High Court and such other superior court in Pakistan as may be notified by the Federal Government in the Official Gazette.'

[39] Section 2(c) of Arbitration Act, 1940 of Pakistan: '"Court" means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court.'

[40] PLD (2012) Lahore 455.

[41] ibid at 476.

[42] Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article 1(1).

[43] PLD (2019) Lahore 607.

> Allowing a party to seek enforcement of foreign arbitral award before the High Court under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 and while at the same time to allow such parties remedy before civil court to enforce the same award under the Arbitration Act, 1940 is totally impracticable. There was no doubt that the High Court had exclusive jurisdiction to recognize and enforce Foreign Arbitral Awards'[44]

Conclusion

Pakistan is suffering from an economic crisis[45] and needs better policies for the progress of the economy. This may happen only if and when foreign investors believe in the state authorities' willingness to cooperate. The judiciary plays an important role to build the confidence and increase the interest of foreign companies considering investments in Pakistan. They need to be reassured that their rights will be protected if something happens in future so they can make investments without any fear. The 2011 Act was enacted precisely to facilitates foreign investors. However, as shown in this article, the courts of Pakistan initially showed a certain reluctance in applying the pro-enforcement bias that the 2011 Act carries. Moreover, the pace of awards recognition case is very slow. This is proven by the data shown in a recent New York Arbitration Convention report,[46] according to which only three cases are fully

[44] ibid at 618.

[45] Michael Kugelman, 'Another Tough Year for Pakistan's Economy' (*East Asia Forum*, 23 Dec 2019) <https://www.eastasiaforum.org/2019/12/23/another-tough-year-for-pakistans-economy/> (accessed on 3 Feb 2020).

[46] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Official Data Country Wise: Pakistan <http://www.newyorkconvention.org/court+decisions/decisions+per+country> (accessed on 3 Feb 2020).

decided by Pakistani courts. All other cases are still pending. This shows that is not easy for foreign investors to have international awards enforced or recognized in Pakistan. This attitude of the courts is bound to negatively affect foreign investment. It is suggested that special courts should be set up to deal with such kind of cases if Pakistan wants to progress in this economic era, where some urgent steps are needed to compete with other countries. In a nutshell, courts need to follow strictly the 2011 Act and decide cases as other signatory countries are doing.

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