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INTERNATIONAL ARBITRATION IN THE CONTEXT OF GLOBALIZATION: A PAKISTANI PERSECTIVE

Arbitration, i.e. the resolution of disputes by a forum settled upon by the mutual agreement of the parties to a dispute or otherwise agreeable to them, has an ancient lineage and a rich heritage in the sub-continent in the shape of the *panchayat* system. Even after the advent of British rule, the panchayat system continued to flourish and it was observed in 1927 by the Bombay High Court that to refer matters to a *panchayat* is one of the natural ways of deciding many a dispute in India"[1]. The casting of arbitration in a form more recognizable by modem eyes started in the sub-continent essentially with the Indian Arbitration Act, 1899. This was however, a statute of limited scope, being applicable only to the Presidency-towns of Madras, Bombay and Calcutta and such other towns in India as were notified for purposes of the Act. In 1908, a new Code of Civil Procedure, applicable to the whole of British India, was enacted, and in its Second Schedule, provision was made for arbitration, but only in respect of pending suits. Thus, there was initially a piece meal approach to making arbitration part of the corpus of laws. Recommendations and suggestions were made most prominently by the Civil Justice Committee in 1925, to provide for a new and comprehensive Arbitration Act. However, it was not until 1940 that the appropriate Act was passed by the Indian Legislative Assembly. The Arbitration Act, 1940 remains in force in Pakistan till today, and was in force in India till 1996.

Although Pakistan and India were, prior to Independence in 1947, Part of the British Empire, British India was nonetheless recognized as an distinct entity under international law for certain purposes, and in that capacity was a signatory to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927. In 1937, an Act known as the Arbitration (Protocol and Convention) Act, 1937 was passed by the Indian legislature to give effect to the aforesaid international agreements. Thus, three years before getting a statute that comprehensively dealt with domestic arbitrations, British India had in place an Act dealing directly with international commercial arbitration. The 1937 Act continued to be in force in Pakistan after 1947. Although Pakistan became a signatory to the New York Arbitration Convention of 1958 on December 30th of that year, it was not until July 2005 that the convention was made a part of the law of Pakistan by the promulgation of an Ordinance to give effect to the same. Thus, the law in respect of international arbitrations and foreign awards has developed in Pakistan almost exclusively with reference to the 1937 Act and to a certain extent the 1940 Act, and it is only very recently that the Courts have begun to deal with issues arising under the New York Convention.

Pakistani Courts have by and large supported the decision by parties to submit their disputes for resolution by a domestic forum of their own choice, especially those having an

[1] Chanbasappa Gurushantappa Hiremath v Baslingayya Gokurnay Hiremath AIR 1927 Bombay 565, 568-9

international dimension. This approach is reflected in their reluctance to interfere with the arbitral process or to overturn or upset arbitration awards. The Courts have sparingly exercised the statutory powers vested in them in this regard. The basic judicial approach has been to hold the parties to their bargain, and to enforce the arbitration agreement in letter and spirit to ensure the sanctity of the arbitral process. Thus, if a party to an arbitration agreement attempts to institute legal proceedings in a court of law, and the other side seeks stay of proceedings on the ground that recourse should be made to arbitration, the Courts have generally been quick to allow such an application. The desire to uphold the arbitration agreement, and force the parties to resolve their disputes before the domestic forum selected by them is all the more pronounced in the case of arbitration agreements having an international dimension, i.e., where one of the parties is a foreign national or entity. The judicial attitude of Pakistani Courts in this regard is aptly reflected in the concurring opinion of Mr. Justice Ajmal Mian (as he then was) in a 1993 decision of the Supreme Court, and his observations deserve to be quoted at length.[2]

> " I may observe that while dealing with…foreign arbitration clause like the one in issue, the Court's approach should be dynamic and it should bear in mind that unless there are some compelling reasons, such an arbitration clause should be honored as generally the other party to such an arbitration clause is a foreign party. With the development and growth of International Trade and Commerce and due to modernization of Communication/Transport system in the world, the contracts containing such an arbitration clause are very common nowadays. The rule that the Court should not lightly release the parties from their bargain, that follows from the sanctity which the Court attaches to contracts, must be applied with more vigor to a contract containing a foreign arbitration clause. We should not overlook the fact that any breach of a term of such a contract to which a foreign company or person is a party, will tarnish the image of Pakistan in the comity of nations…. [A] ground like that it would be difficult to carry the voluminous evidence or numerous witnesses to a foreign country for arbitration proceedings or that it would be too expensive or that the subject matter of the contract is in Pakistan or that the breach of the contract has taken place in Pakistan, in my view, cannot be a sound ground for refusal to stay a suit filed in Pakistan in breach of a foreign arbitration clause contained in contract of the nature referred to hereinabove. In order to deprive a foreign party to have arbitration in a foreign country in the manner provided for in the contract, the Court should come to the conclusion that the enforcement of such an arbitration clause would be unconscionable or would amount to forcing the Plaintiff to honour a different contract, which was not in contemplation of the parties and which could not have been in their contemplation as a prudent man of business."

As noted above, most foreign awards that have come for enforcement before Pakistani Courts have been filed under the 1937 Act. Such awards have almost always been upheld and the Courts have invariably rejected challenges and objections to their enforcement by Pakistani defendants. It is only in rare cases, where the objection is of such a nature that the defect is floating on the face of the award, that the Courts have upheld the objection and declined to enforce the award. It is interesting to note that a great many of the cases relate to awards made by the Livepool Cotton Association with regard to the export or import of cotton from or to Pakistan. This is of course not altogether surprising given the fact that cotton is one of Pakistan's main agricultural crops, and the textile industry is one of the leading manufacturing sectors in the economy. However, the Courts have also had occasion to deal with awards made under the Rules of Arbitration of the International Chamber of Commerce or ICC and other international bodies of a similar nature. Again, the Courts have shown a pronounced respect and sensitivity for the

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[2] Eckhardt & Co. GmbH V Muhammad Hanif PLD 1993 SC 42, 52

international dimension of such awards. Thus, in a 1999 decision, it was observed by a learned Judge of the High Court of Sindh that:[3]

> "…if Pakistan is to attain some respectability in the commercial world, it is necessary that trans national commercial agreements must be honoured and judicial process must not be used merely to delay the implementation of such agreements or judicial or quasi judicial decisions passed in disputes arising from such agreements."

The same learned Judge observed even more trenchantly in a subsequent case:[4]

> "Increasingly, it is seen that the parties who are involved in Transnational or International Agreements agree to an arbitration clause at the time of entering into [the] agreement but when as a result of that agreement an award is made against them they raise frivolous objections and deliberately refrain from seeking remedy of appeal available to them under the agreement or other rules and attempt to delay or avoid payment under the award by simply initiating proceedings in a Court in Pakistan…. I do believe this is tantamount to abuse of the process of the Court… [and] may lead Pakistan into becoming pariah in the commercial world. In order to curb such tendency Courts ought not to entertain objections to a foreign Award i.e. executable in Pakistan unless these strictly lie within the four corners of section 7 of Arbitration (Protocol and Convention) Act, 1937 and such assessment should be made from the Award itself. The Award should thus, be interfered with only if the error in it is apparent on the face of the award. Courts ought not to set themselves up as an Appellate Court or to go behind the award to reappraise the evidence. Additionally the Court should decline to entertain the objections to Foreign Awards unless all remedies available under the Arbitration Agreement or Rules, by which the parties are bound, are exhausted."

These observations are entirely consistent with, and reflective of, the general judicial approach to international arbitration agreements and awards. They amply demonstrate that Pakistani Courts are fully cognizant of, and sensitive to, the international dimension of contracts containing foreign arbitration clauses or in which the opposite party is a foreign entity. The Courts have chosen not simply to hold parties to their bargain (which may simply be regarded as an aspect of the law of contract) but have, in effect, taken a policy decision to uphold Pakistan's position in the comity of nations by insisting on the due enforcement of foreign awards. Pakistani courts have thus moved in stride with the growing international consensus and this is all the more pertinent given the fact that this has been done in the context of the 1937 and 1940 Acts and not the New York Convention, a point to which I will return later.

In the present context, an interesting case is the 2000 decision of the Supreme Court in the case of *Hub Power Company Ltd. v Wapda*.[5] The Hub Power company (or Hubco) was supplying electrical power to Wapda, the public sector utility, under a power purchase agreement. The agreement had an arbitration clause providing for ICC arbitration at London. Disputes arose between the parties, and Hubco wished to refer the matter to arbitration. WAPDA opposed this move on the ground that the issues raised by it, which were serious allegations of corruption, fraud and mala- fide, were not arbitrable. The matter was heard by a 5-member Bench of the Supreme Court, and by a bare majority, WAPDA's

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[3] A. Meredith Janes Co. Ltd v Crescent Board Ltd. 1999 CLC 437, 441
[4] Conticotton S.A. v Farooq Corporation and others 1999 CLC 1018, 1022-23
[5] PLD 2000 SC 841

contention was upheld. However, the majority was careful to note expressly that the disputes raised by WAPDA were not commercial in nature, but were such as raised very serious public policy issues which were essentially criminal in nature. Thus, although in this case the Supreme Court did interfere with the arbitral process, it did so reluctantly (as indicated by the strong dissenting judgment) and drew a clear line with regard to commercial matters in respect of which arbitration proceedings would not be stopped.

I may note here that the majority view has not been without its detractors. For example, in a paper read at the 17th LAWASIA Biennial Conference held at Christchurch, New Zealand in October, 2001, it was contended that the Judiciary (personified in the majority judgment of the Supreme Court) has apparently set its face against international commercial arbitration by invoking public policy and the development of the law has been diverted into barren lands where it can only wither away".[6] The Asian Development Bank took the view that "the Supreme Court essentially restricted the freedom of investors to choose how to resolve disputes".[7] I think that this criticism is unduly harsh and not warranted. The law as developed subsequent to the Hubco case has not shown any deviation by the Courts from the principles laid down earlier and the general trend of judicial authority as noted above and the Hubco case can be regarded as turning on its own special facts. The Courts have been diligent in holding Pakistani entities to their end of the bargain in terms of agreements having an international dimension and which contain arbitration clauses or agreements.

It must also be kept in mind that although it is somewhat rare, sometimes it is the foreign party which attempts to walk away from the arbitration agreement. The Courts have been equally firm in preventing such a breach of agreement. One such case is the 2002 decision of the Supreme Court in *Society General De Surveillance S.A. v Pakistan*[8]. The contract there provided for arbitration at Islamabad under the 1940 Act. SGS, which had a claim of several million dollars against Pakistan, attempted to litigate the claim in Swiss Courts, but the latter were equally firm in holding the company to its contract to arbitrate in Pakistan. An application was made by Pakistan in the civil courts under the 1940 Act seeking to take the dispute to arbitration. SGS however, proceeded to file its claim for arbitration under the ICSID convention[9] on the basis of a Bilateral Investment Treaty entered into between Pakistan and Switzerland. Pakistan objected to such an arbitration on the ground, *inter alia,* that the Washington Convention of 1965 under which the ICSID operated had not been incorporated into Pakistani municipal law. Interestingly, SGS, the foreign party, relied on the *Hubco* case, and contended that arbitration in Pakistan could not proceed as there were allegations of fraud, corruption and *mala fides* against it. The stand taken by SGS was obviously self-contradictory: it did want arbitration, but on its own

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[6] "hubco v. wapda: Allegations of Corruption Vitiate International Commercial Arbitration: The Pakistan Experience", paper read at the 17th Lawasia Biennial conference at Christchurch, New Zealand, 4-8 October, 2001. See also, "Control of jurisdiction by injunctions issued by national Court" by Dr. Jullian D.M. Lew, a report presented at ICCA Montreal 2006-International Arbitration 2006: Back to Basics?, June 2006."

[7] "Judicial Independence Over view and Country-level Summaries", Asian Development Bank Judicial Independence Project RETA No. 5987, submitted by The Asia Foundation, October 2003

[8] 2002 SCMR 1694

[9] i.e. arbitration under the auspices of the International Centre for Settlement of Investment Disputes, which was established by and under the 1965 Washington Convention on the Settlement of Investment Disputes between States and National of other States.

terms, i.e. outside of Pakistan, and not in terms of the actual arbitration agreement entered into between the parties with called for arbitration at Islamabad. An attempt was therefore, made to transform the *Hubco* case from a shield into a sword. This attempt failed. The Supreme Court held that the dispute between the parties was wholly within the four corners of the contract, i.e., was commercial in nature (the Government having expressly stated that it would not press any claims in the nature of corruption and fraud) and hence the *Hubco* decision had no application to the facts and circumstances of the case. It was further held that since the Washington Convention was not part of the municipal laws of Pakistan, no reliance could be placed on the same to defeat the express agreement between the parties to arbitrate at Islamabad under the 1940 Act.

The 1937 Act, in terms of which much of the litigation has to date proceeded in Pakistan, contained two substantive provisions, one relating to the institution of legal proceedings in Pakistan notwithstanding an arbitration agreement, and the second as to how a foreign award was to be enforced in Pakistan. Before considering these provisions, it is necessary to note section 9 of the Act, which provided that the Act did not have any application to an award made on an arbitration agreement governed by the laws of Pakistan. A foreign award was defined in the Act as being an award made on differences relating to matters considered as commercial under the laws of Pakistan. Thus, the scope of the 1937 Act extended only to commercial disputes and differences, and the term "commercial" itself was left undefined to allow for flexibility and room for the law to develop organically in the face of changing circumstances. Likewise, the Act applied to those arbitration agreements to which the 1923 Geneva Protocol applied, and in effect (insofar as Pakistan was concerned), that Protocol applied only to arbitration agreements relating to commercial matters.

Section 3 of the Act provided that if any person which is a party to an arbitration agreement to which the Act applied commenced legal proceedings in any Court in Pakistan, then the other party had the right to apply for a stay of such proceedings which would have the effect of forcing the matter to be referred to arbitration. This provision found a parallel in section 34 of the 1940 Act when it was enacted some years later. There was however, a significant difference between the two. In terms of both sections, it was possible for the Court to allow the legal proceedings to continue. In the case of the 1937 Act, this was only if any one of three specified contingencies arose, namely that the arbitration agreement or the arbitration itself had become inoperative or could not proceed, or that there was in fact no dispute between the parties with regard to the matters agreed to be referred to arbitration. Under section 34 of the 1940 Act on the other hand, the Court could allow the legal proceedings to continue if satisfied that there existed any "sufficient reason" why the matter should not be referred to arbitration. The scope of section 3 was thus narrower than the discretion conferred by section 34. The High Court of Sindh did assert in some cases a residual discretion to let the legal proceedings continue even if none of the contingencies specified in section 3 were attracted[10]. In my view such an approach would be contrary to both the language of section itself and the clear intent behind the same, i.e. to ensure that persons party to international Arbitration agreements of

[10] See Transcomerz AG v Kohinoor Trading (Pvt) Ltd. 1988 CLC 1652 and Pakistan Insurance Corporation v P.T. Indones Oriental Lines and others PLD 1977 Karachi562

a commercial nature could not resile form their contractual commitment unless very clear and expressly specified grounds existed which would enable them to do so. The 1937 Act was after all, enacted to give effect to the Geneva Protocol and Convention and therefore, any deviation from the precepts of, and international obligations incurred hereunder, should be kept to the absolute minimum. As will be seen the situation has now in any case been rectified by the incorporation of the New York Convention into Pakistan's municipal law.

The next important provision of the 1937 Act related to the enforcement of foreign awards. A foreign award could be filed in any Court in Pakistan having jurisdiction over the subject matter of the award[11], and section 4 provided that a foreign award was enforceable in Pakistan as if it were an award made on a matter referred to arbitration in Pakistan. In other words, for purposes of enforcement, a foreign award was placed on the same footing as a domestic award, and if the award survived challenge to its enforcement (as foreign awards almost invariably did), then the Court was bound to pronounce judgment according to the award, and upon a judgment so pronounced, a decree was to follow in terms of the award[12].

This brings me to the all important section 7 of the 1937 Act, which specified the grounds on which the enforcement of the foreign award could be challenged. This section essentially incorporated the relevant articles of the Geneva Convention, and as I have already noted, very few challenges to foreign awards have between successful in terms of this provision. The section itself contained three sub-sections, the first two of which were cast in mandatory, and the third in permissive, form. Sub-section (1) required positively for the party seeking to enforce the foreign award to show that it fulfilled the conditions as specified therein, which were essentially of a procedural or formal nature. Sub-section (2) was in negative terms, and required the Court to refuse the enforcement of a foreign award if it was satisfied that a condition specified in any one of its three clauses was applicable. Finally, sub-section (3) gave the Court a residual discretion to refuse the enforcement of the award if satisfied that any ground, other than those specified in sub-sections (2) and (3), existed which entitled the defendant to contest the validity of the award. Section 7 thus contained an elaborate mechanism, and ostensibly, there were a fair number of different grounds on the basis of which a foreign award could be refused enforcement in Pakistan. However, despite the ingenuity of Pakistan lawyers, the Courts have taken a strong and robust view on the validity of foreign awards. Many grounds were dismissed as mere technicalities and others, which sought to attack the award on a more substantive basis were rejected as being matters which could or ought to, have been taken in the arbitration proceedings. A typical example of this trend is the 2004 decision of the High Court of Sindh in *Cogetx, S.A. v Mayfair Spinning Mills Ltd.*[13], where every conceivable objection, including those relating to violation of the Courts' rules of procedure, jurisdiction, limitation as well objections on the merits of the award were taken. Needless to say, the Court had little difficulty in disposing off all of the objections against the Pakistani defendant and in favour of the foreign party which was the beneficiary of the award. Judgment and decree followed accordingly.

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[11] Section 5 of the 1937 Act
[12] Section 6 of the 1937 Act
[13] 2004 CLD 1023

As this short review of the 1937 Act indicates, Pakistani Courts have not been lax in upholding and enforcing what have been regarded as Pakistan's international obligations in respect of arbitration agreements having an international flavour and foreign awards in terms of the principles enunciated by the Courts which have already been stated. However, the Geneva Convention and Protocol had long since been superseded by the 1958 New York Convention and that had, as it were, become the Convention of choice for the enforcement of foreign awards. Indeed, *Redfern & Hunter,* regarded by many as the leading treatise on international commercial arbitration[14] describes the Geneva Convention and Protocol as merely the "first step on the road towards international recognition and enforcement of international arbitration agreements and awards".[15] The New York Convention, on the other hand, is described by the same authority as

> "the most important international 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."[16]

The learned authors of *Redfern & Hunter* also state with regard to the Convention as follows:

> "It has been described as 'the most important pillar on which the edifice of international arbitration rests' and as a Convention which perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[17]

The New York Convention has been ratified by around 137 countries in the world, and as already noted, Pakistan itself become a signatory to the Convention as early as 1958. India had also become a signatory to the Convention in 1958 and passed the relevant legislation in 1961. However, for various reasons, the Convention could not be incorporated into Pakistan's municipal law for a long time, and increasingly this deficiency was being felt acutely. It was not until 2005 that an Ordinance was finally promulgated to give effect to the Convention. Under our Constitution, an Ordinance has the same effect as an Act of Parliament, but lapses after four months. An Act has not yet been passed by Parliament to give permanency to the Convention, and it appears to have been kept alive as part of the municipal law by means of a successive Ordinances issued from time to time. The last such Ordinance as available to me was promulgated on 18th March, 2006[18], and it is to be hoped that Parliament will take appropriate legislative action in the matter as soon as possible since otherwise the constitutionality of the law may remain under a cloud.

The first point to note about the Ordinance enforcing the New York Convention is that, subject to certain savings, it repeals the 1937 Act. Given the fact that all countries which were signatory the Geneva Protocol and Convention enforced through the 1937 Act are also party to the New York Convention, the intent behind the repeal is clear.

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[14] Redfern & Humter, er. Al., Law and Practice of International Commercial Arbitration, 4th ed., 2004
[15] At para 1-146
[16] At para 1-147, See also, Russell on Arbitration, 24th ed., 2003, at para 1-1037
[17] At para 10-23
[18] Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance, 2006, Ordinance III of 2006, reported at PLJ 2006 Federal Statutes 305

The New York Convention, and hence the Ordinance, makes challenges to the enforcement of an award even more difficult than the position under the 1937 Act. The repeal of the 1937 Act therefore, removes the possibility of any overlap or duality; all foreign awards and international arbitration agreements are placed on the same footing, and made the subject matter of the New York Convention[19]. The second important feature of the Ordinance is that it confers exclusive jurisdiction with regard to its subject matter directly on the High Courts. In Pakistan, the High Courts, subject to a few exceptions, do not have any original civil jurisdiction. Legal proceedings are in general to be commenced in the civil, i.e. subordinate courts, and this was the position prevailing under the 1937 Act. By directly conferring jurisdiction on the High Courts, the Ordinance has eliminated altogether one level of legal proceedings and, given the unfortunate delays that can plague the legal system in this country, thus greatly speeded up the enforcement of foreign awards. Thirdly, the Ordinance also contains a highly unconventional provision in its section 8. The New York Convention has been incorporated into the municipal law as Schedule to the Ordinance, and section 8 expressly provides that in the event of any inconsistency between the Convention on the one hand and the Ordinance itself or any other law or any judgment of any Court on the other, the Convention shall prevail to the extent of the inconsistency. This is a most unusual provision. It is well established rule of the interpretation of statutes that in case of any conflict between the main part of a statue and any schedule thereto, it is the main provisions (i.e. the sections) which are to prevail. It is also well settled that any conflict between any treaty provision and municipal law is to be resolved in favour of the latter. Section 8 of the Ordinance thus reverses both these rules in favour of the New York Convention.

It will therefore be seen that an attempt has been made in promulgating the Ordinance to tilt the field in favour of the New York Convention and awards made there under. Original jurisdiction in civil matters is but sparingly conferred on the High Courts by the laws of Pakistan[20] and there does not appear to be any other treaty, convention or other international obligation in respect of which such a jurisdiction has been conferred. Furthermore, by reversing rules of interpretation which most Pakistani lawyers would regard as bedrock principles in favour of the Convention, the Ordinance has placed the Convention on a footing well above other international treaties and obligations. Indeed, there does not seem to be any other law on the statue books in which a schedule is placed on a pedestal higher than the parent Act itself. While these provisions have yet to be judicially interpreted and applied, the legislative intent clearly points towards giving the Convention an unprecedented primacy with regard to its enforcement.

Like the 1937 Act, the Ordinance concerns itself with legal proceedings brought in Pakistan notwithstanding the existence of an international arbitration agreement, and the enforcement of foreign awards in Pakistan. However, there are significant differences in the language of the relevant provisions. With regard to the stay of legal proceedings, section 3 of the 1937 Act, which has already been examined, contained

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[19] It may be noted that paragraph 2 of Article VII of the Convention also provides the Geneva Convention and Protocol "shall cease to have effect between Contracting States on their becoming bound and to the extent they become bound" by the Convention.

[20] The ordinary jurisdiction exercised by the High Court of Sindh is limited to the Civil Division of Karachi (i.e. does not extent to the whole of the province of Sindh) and is essentially an historical anomaly stemming from the Court's origins as the Chief Court of Sindh in pre-Independence days.

certain procedural restrictions. In effect, the section required that an application seeking a stay of the proceedings had to be made before the filing of the written statement (i.e. defence) or the taking of any other steps in the legal proceedings, and if not so made, the application was not maintainable, i.e. the legal proceedings would continue. This was a fairly technical requirement and had an equivalent provision in the 1940 Act, around which a whole body of case law has developed and as sometimes happens in such circumstances, the resultant position is neither wholly consistent nor satisfactory. This procedural restriction or requirement has been eliminated from the Ordinance[21], and this is in line with paragraph 3 of Article II of the Convention. In principle therefore, an application can be made in a Convention case at any stage of the legal proceedings and while it is possible that the Courts may not permit an application to be made (e.g.) at the eleventh hour, it is clear that the filing of an application for stay of proceedings has been freed form procedural restrictions and given a much more extended time frame.

Section 4(2) of the Ordinance provides that if an application for stay of legal proceedings is made, then unless the arbitration agreement is null and void, inoperative or incapable of being performed, the Court shall refer the parties to arbitration, i.e., stay the legal proceedings. The provision was recently considered by the High Court of Sindh[22] and the Court held that under the Ordinance, the Court did not have any discretionary powers, but had to refer the matter to arbitration unless the limited exceptions just noted were applicable. In other words, the provision was held to be mandatory.

The enforcement of foreign awards has also been much simplified and the legal framework strengthened in favour of the award. The detailed provisions of section 7 of the 1937 Act have already been examined. The equivalent provision under the Ordinance[23] simply and succinctly states that the enforcement of foreign awards “shall not be refused except in accordance with Article V of the Convention”. Article V contains specific and expressly stated grounds on the basis of which enforcement of an award may be refused. Since the Ordinance does not, unlike section (3) of the 1937 Act, confer any residuary discretion on the Court to refuse enforcement, it follows that the grounds listed in Article V are exhaustive. Furthermore, Article V provides that the Court “may: refuse enforcement if any of the grounds do exist. In other words, the Court may nonetheless order enforcement of the award even if the party challenging the same is able to make out a case under Article V. Again, this is unlike the 1937 Act where sub-sections (1) and (2) of section 7 were mandatory and non-compliance with the provisions thereof meant that the award would not be enforced. The court now has a discretion pointing in the opposite direction. The Convention, and hence the Ordinance, can be said to have a “pro-enforcement” bias and a strong case can be made out that the grounds under Article V are to be applied restrictively and construed narrowly[24].

One ground listed in Article V which entitles (but, as already noted, does not require) the Court to refuse enforcement is if such enforcement would be contrary to the public policy of the country in which enforcement is sought. Some may, perhaps in view of

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[21] See section 4(1)
[22] Total Automation (Pvt) Ltd. V Abacus International (Pvt) Ltd and other 2006 CLD 497
[23] See section 7
[24] Redfern & Hunter, op. cit, paras 10-34 and 10-35

the majority judgment of the Supreme Court in the *Hubco* case, have certain apprehensions on this point with regard to the enforcement of foreign awards under the Ordinance. In my view, such concerns would be exaggerated. The attitude of Pakistani courts would in my view, be in the line with the approach taken by the Supreme Court in the 1993 *Eckhardt* case, from which the views expressed by Mr. Justice Ajmal Mian in his concurring opinion have already been cited earlier. Like the Courts of most common law countries, the Courts of Pakistan also take a skeptical view of the "public policy" defence, and although it does succeed from time to time both here and elsewhere[25], it cannot be regarded as a "back-door" through which the efficacy and application of the New York Convention could or would be undermined. I am confident that the Pakistani experience will be in line with the general international tends.

No discussion of international commercial arbitration in the Pakistani context can be complete without a reference to the well-known decision of the Supreme Court in the *Rupali* case[26]. In that case, two Japanese firms entered into an agreement with a Pakistani company to set up a polyester plant in Pakistan. The main contract was governed by the laws of Pakistan and contained an arbitration clause which provided for ICC arbitration in London. The Court found that the arbitration agreement (as embodied in the arbitration clause) was also governed by Pakistani law. It will be recalled that section 9 of the 1937 Act excluded the applicability of the Act to arbitration agreements governed by the laws of Pakistan, and the said Act therefore, could have no application to the *Rupali* case. Disputes arose between the parties and Rupali invoked the arbitration clause. The arbitral tribunal, which sat at London, issued an interim award and Rupali sought to challenge the validity of the award in the Courts of Pakistan. It is important to keep in mind that the situation was not the typical case of the foreign party (i.e., the Japanese companies) bringing a foreign award for enforcement into Pakistan, and the Pakistani company resisting the enforcement proceedings. The question rather was whether the Pakistani courts had jurisdiction to rule on the validity of an award where the seat of the arbitration was outside the country. According to the "seat theory", it is only the Courts of that a country where the seat of the arbitration is located which have jurisdiction over challenges to the validity of the award and other aspects of the arbitration. The Indian Supreme Court had held[27] that in case where the arbitration agreement was governed by Indian Law, the courts of India had concurrent jurisdiction with the Courts of the seat of the arbitration. The Supreme Court however, rejected this approach. It held that insofar as the arbitration proceedings and matters relating thereto were concerned, the same would be governed by the law of the seat of the arbitration and it is those courts which would have jurisdiction. Pakistani court would not have jurisdiction simply because the arbitration agreement was governed by Pakistani law. However, insofar as the post-arbitration stage was concerned, the Supreme Court held that the interim award could be challenged before the Pakistani courts because the arbitration agreement and main contract were governed by the laws of Pakistan and the transaction had it closest connection with this country. The court has therefore, taken a view which is intermediary between the "seat" theory and the view taken

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[25] For an example from England in the specific context of Article V of the Convention, see Soleimany v Soleimany [1999] 3 All E.R. 847, CA

[26] Hitachi Ltd. And another v Rupali Plyester and others 1998 SCMR 1618. See generally "The Rupali case and the theory of concurrent jurisdiction" by Khalid Anwar, Official Proceedings of the ICC Regional Foreign Direct Investment Conference, Karachi, Pakistan, Februrary, 2002

[27] Natinal Termal Power Corporation v Singer Company and others (1992) 2 Comp LJ 256

by the Indian Supreme Court, and it remains to be seen whether this view will be affirmed if Court has occasion to re-visit the issues involved in some future case. It may also be that if a new and comprehensive Arbitration Act is enacted by Parliament to replace the 1940 Act, a different approach may be taken which is more in line with the “seat” theory, as has been done in other common law jurisdictions such as England and India.

Pakistan, and the Courts of this country, have come a long way since the days of the enactment of the 1937 and 1940 Acts. The Ordinance enforcing the New York Convention marks a major and welcome addition to the development of international commercial arbitration and enforcement of foreign awards in Pakistan. In one sense, however, it is not a fundamental shift in the law. The reason is that the judicial principles and attitudes in this country have already evolved to a great extent in line with international developments. In an important and meaningful sense therefore, the Courts had already, as it were, marched far in advance of the 1937 Act and it can be said that it is the legislature that is now, somewhat belatedly, catching up with the Courts. Pakistan is therefore, well placed to meet the modern day challenges and requirements of dispute resolution in the context of international commercial law.