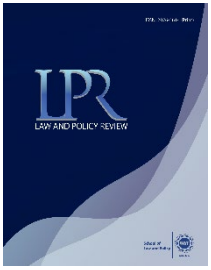
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Enforcement of Foreign Arbitral Awards: A Critical Study of Pakistan's Current Arbitration Regime

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Abstract

This study critically examines the enforcement of foreign arbitral awards in Pakistan. There are two primary enactments that deal with the procedures of arbitration. The first is the Arbitration Act, 1940. The second enactment that deals with the process of arbitration is Foreign Awards (Recognition and Enforcement) Act, 1961. Despite the existence of these laws, it is still arduous to completely execute the awards in the country. Several studies have highlighted the difficulties faced by the parties in enforcing foreign arbitral awards in Pakistan, including lack of awareness and understanding of the arbitration process, limited number of specialized arbitration courts, lengthy court procedures, and lack of effective enforcement mechanisms. This study aims to identify difficulties in the enforcement of arbitral award and suggest potential solutions for improving the process of execution. For this purpose, it relies upon a review of the relevant literature and statutes and also includes a case study analysis of several selected cases.

Keywords: arbitral awards, arbitration process, challenges, court procedures, execution, foreign arbitration, implementation

Introduction

Arbitration is an alternative method of resolving matters. It has achieved paramount importance and popularity in recent years. What differentiates this process is that at first, parties elect a person to make an adjudication of their matters. The adjudication remains obligatory upon them and they cannot run away from it (Khan, 2015). The findings of that person comprise an arbitral award. Indeed, a key benefit of arbitration is the enforceability of arbitral awards. So, the parties need to stay bound to the adjudication of the third person and then the matter is resorted to the court where the process of execution is carried on (Ahmed, 2018).

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However, the enforceability of foreign arbitral awards, particularly in developing countries, has been a subject of debate and concern and Pakistan is no exception in this regard. The enforcement of foreign arbitral awards in Pakistan has been a matter of concern for the international business community and the subject of several studies (Raza, 2019). For example, a study conducted by the Asian Development Bank (ADB) in 2007 found that the enforcement of foreign arbitral awards in Pakistan was hindered by a lack of awareness and understanding of the arbitration process among the general public and the legal community, as well as a lack of specialized arbitration courts and trained arbitrators (Asian Development Bank [ADB], 2007).

Another study conducted in 2010 by the International Centre for Settlement of Investment Disputes (ICSID) found that lengthy court procedures and limited scope for appeal in Pakistan were major obstacles to the enforcement of foreign arbitral awards (International Chamber of Commerce, ICC], 2016). A more recent study conducted by the International Chamber of Commerce (ICC) in 2016 found that limited enforcement mechanisms available in Pakistan remain a major obstacle to the enforcement of foreign arbitral awards (International Centre for Settlement of Investment Disputes [ICSID], 2010).

Background on Arbitration with Reference to Pakistan

The formal process of arbitration came into existence in the late twentieth century, whereby it was formally described in terms of which dispute would be decided by the third party and whose decision would be binding (Khan, 2020). The decision of arbitrators is known as an arbitral award. A key benefit of arbitration is the enforceability of arbitral awards (Qureshi, 2018)**.** Despite these acts, the fact remains that there has been a vacuum related to the modification of new arbitration laws in Pakistan and that there is a dire need to make the late arbitration laws in line with the global trends. Still, there has been no real efforts to make changes and modifications in the existing arbitration laws of Pakistan.

Challenges Faced in the Enforcement of Foreign Arbitral Awards in Pakistan

Lengthy Court Procedures

Despite the existence of the above mentioned laws, the arbitration process in Pakistan is often considered to be slow, costly, and inefficient

(Hussain, 2019). This is mainly due to a lack of awareness and understanding of the arbitration process among the general public and the legal community, as well as a lack of specialized arbitration courts and trained arbitrators. A major obstacle in implementing award in the country are the lengthy court procedures. It leads to delays in the arbitration process and increases the cost for the parties involved (Ali, 2017).

Limited Scope for Appeal

Another challenge is the limited scope for appeal, which makes it difficult for the parties to challenge the arbitral award (Shah, 2016). In comparison to arbitration with the enforcement of local judgments and decrees in Pakistan that provide exhaustive remedies for appeals and revisions, the scope for originating appeal in very limited. Although there are some awards in Pakistan that can be entitled to appeals and revisions, yet many foreign arbitral awards are not subject to appeals in Pakistan. The arbitration act has provided limited grounds where the appeal can be referred. The first instance where an appeal can be made against arbitration is where an issue of the jurisdiction of arbitrator exists. Jurisdiction is a very important matter and it has been dealt accordingly. Secondly, if the matter in question is the illegality of award, then an appeal can also be made against it.

Limited Enforcement Mechanisms Available

The limited enforcement mechanisms available in Pakistan also make it difficult for parties to enforce arbitral awards. The Arbitration Act, 1940 provides the methods for the enforcement of awards in Pakistan. There are several methods used to enforce laws but all of these end up having some technical or procedural defects. Moreover, the procedure for domestic enforcement is more or less the same as that of the enforcement of local judgments. However, when there is a matter of enforcement of foreign awards, then the enforcement mechanism must comply with the provisions of New York Convention. This is where the legal system of Pakistan gets exposed. Due to procedural hurdles and unnecessary delays, enforcement usually takes a lot of time. Indeed, it takes years to reach finality for an award.

Potential Solutions for Improving the Current Arbitration Regime in Pakistan

Increasing Awareness and Understanding of the Arbitration Process

A potential solution is to increase the awareness and understanding of the arbitration process among the general public and the legal community. This would help to build trust in the arbitration process and increase its use as an alternative dispute resolution method. The system and people of Pakistan are still not very familiar with the concept of arbitration. Yet, they resort to solve their disputes through alternate mediums for dispute resolution. It should be the duty of the government to make the people and the system attached to it familiar with the concept of arbitration and how it is much more effective and better than the other methods of dispute resolution. It is necessary because when the people have confidence in arbitration, then the overall system of arbitration would resort for improvement. When the overall system gets better, the enforcement of foreign arbitral award automatically improves (Yakoob, 2018).

Establishing Specialized Arbitration Courts and Training More Arbitrators

Another potential solution is to establish specialized arbitration courts and train more arbitrators. This would help to improve the efficiency of the arbitration process and ensure that arbitrators have the necessary expertise to handle disputes. As discussed above, familiarity with the concept of arbitration is very important. Indeed, not only familiarity but also the expertise in depth understanding of the concept and the whole system is imperative. Only then, the system would start developing but also start producing better judicial precedents. At the moment, there are no experts of the subjects available. The judges of the local system enforce the awards as well. However, they are not fully equipped with the concepts and procedures of arbitration (Ali, 2019).

Promoting Arbitration Instead of Other Techniques of Resolving Disputes

Lastly, instead of other techniques of resolving disputes, the use of arbitration clauses in contracts and providing incentives for parties to choose arbitration over litigation can also help to improve the overall arbitration regime in Pakistan. There is a dire need to encourage the concept and method of dispute resolution in Pakistan. The judicial system of

Pakistan has been ranked higher is at a lower rank in the global judicial ranks and the main reason behind this low ranking are procedural hurdles. To remove these obstacles, the only way forward is the promotion and effective adoption of the process of arbitration. Through this process, people would not only get speedy justice but it would also reduce the burden on the shoulders of local courts. The Government of Pakistan should take immediate effective steps for the adoption and promotion of this concept practice (Ahmed, 2015).

Amendments to the Existing Laws

Another potential solution is to amend the existing laws governing arbitration in Pakistan to make them more clear, consistent, and effective. This may include changes to the recognition and enforcement criteria outlined in the Foreign Awards (Recognition and Enforcement) Act of 1961, as well as changes to the procedural rules for arbitration proceedings (Chaudhry, 2010). Arguably, the current arbitration regime in Pakistan is often considered to be slow, costly, and inefficient, primarily owing to the lack of awareness or understanding of the arbitration process and also due to the lack of specialized arbitration courts and trained arbitrators. Potential solutions for improving the arbitration regime in Pakistan include the establishment of specialized arbitration courts, providing training and education for arbitrators and judges, and amending the existing laws governing arbitration in Pakistan.

Overview of the Laws Governing Arbitration in Pakistan

The arbitration regime in Pakistan is governed by the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. These laws provide the framework for the conduct of arbitration proceedings as well as the recognition and enforcement of arbitral awards in Pakistan.

Arbitration Act, 1940

The Arbitration Act, 1940 sets out the general principles and procedures for arbitration in Pakistan. It provides for the methods through which arbitrators would be employed, how they would initiate and pursue all proceedings, and how would they finalize the respective findings in the shape of the award as well as the rights and duties of the concerned parties. The act also provides whether the local court would have any say in the whole process in any circumstances, such as when there is a question of jurisdiction or when there is a possibility of any agreement being void. The

jurisdiction of this act has not been extended to the local court although it covers international arbitration (Khan, 2017). The act also provides for the appointment of arbitrators as well as the process of appointing them. It lays down the grounds on which an arbitrator's appointment can be challenged, such as the lack of independence, impartiality, and relevant qualification. Moreover, it also provides for how the process would be conducted upon, including the right of the parties to present their case, the right to cross-examine witnesses, and the right to produce evidence (The Arbitration Act, 1940).

Foreign Awards (Recognition and Enforcement) Act, 1961

The Foreign Awards (Recognition and Enforcement) Act, 1961 provides for the recognition and enforcement of foreign arbitral awards in Pakistan. It applies to awards made under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which Pakistan is a party to (Qureshi, 2017). It lays down the criteria for the recognition and enforcement of foreign awards, which includes the absence of any fraud or corruption in the making of the award and the absence of any violation of the Pakistani public policy. It also enumerates how the awards would be executed in the country. It sets out that there would be petition to be presented in the court having jurisdiction to hear the matter, which should then determine whether the condition for the award are fulfilled or not. It also sets out the principles that testify that whether the award is in line with the polices of Pakistan or not and whether it would deny implementation or not.

Comparative Analysis of Arbitration Law between Pakistan and India

Similarities Between the Laws Governing Arbitration in Pakistan and India

This section highlights the similarities between the laws governing arbitration in Pakistan and India. Both Pakistan and India are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the enactments in both countries are such that they follow all international conventions related to it. The laws of both countries also lay down rules about the criteria for arbitrators, as well as the rights and duties of parties. These laws also provide for the power of the courts to intervene in the arbitration process in certain circumstances (Sharma, 2017).

Differences Between the Laws Governing Arbitration in Pakistan and India

This section highlights the differences between the laws governing arbitration in Pakistan and India. The Indian law, the Arbitration and Conciliation Act of 1996, is relatively more recent and has been amended several times. Whereas, the Pakistani law, the Arbitration Act of 1940, has not undergone any major amendments. The Indian law provides for a more detailed and comprehensive framework, smoothing the running of the procedure or appointment of arbitrators, whereas the Pakistani law is relatively more basic in this regard (Ahmad, 2018). The Indian law also provides an esteemed set of rules for effective implementation, whereas the Pakistani law requires a petition that needs to be filed in a court to start the process (Gupta, 2019). Additionally, the Indian law provides for the concept of "fast-track arbitration" for certain types of disputes, such as disputes involving smaller amounts or disputes that are urgent in nature. This allows for quicker resolution of disputes, whereas the Pakistani law does not have any such provision. Furthermore, the Indian law has provisions for interim measures, such as injunctions and appointment of arbitrators in case of emergent situations. The Indian law also has a provision for the consolidation of multiple arbitrations, whereas the Pakistani law does not (Ahmed, 2019). In conclusion, while both Pakistan and India have laws in place for the conduct and recognition of arbitration, the Indian law is more recent, detailed, and comprehensive. Its provisions for fast-track arbitration, streamlining of the process for the recognition and enforcement of foreign awards, the provisions for interim measures, and the consolidation of arbitrations are notable advantages over the Pakistani law. However, both the nations have almost the same sets of rules of arbitration on almost every point.

Legal Framework and Procedure for the Execution of Foreign Arbitration Awards in Pakistan

Foreign arbitration awards refer to arbitral awards made in a foreign country. In order for these awards to be enforced in Pakistan, they must be recognized and executed in accordance with the Foreign Awards (Recognition and Enforcement) Act, 1961. The execution of foreign arbitration awards in Pakistan can be a complex process and it is essential for the concerned parties to understand the legal framework and procedures involved. There are two primary enactments that deal with the procedures

of arbitration. The first is the Arbitration Act, 1940. The second enactment that deals with the process of arbitration is Foreign Awards (Recognition and Enforcement) Act, 1961. These acts have been enacted so as to make local legislation in line with international measures. They lay down the criteria and the procedures for the recognition and execution of foreign awards in Pakistan.

The first step in their execution and implementation in Pakistan is the recognition of the award by the competent court. The party seeking to execute the award must apply to the court for recognition and the court examines the award to ensure that it meets the criteria laid down in the Foreign Awards (Recognition and Enforcement) Act, 1961. The court must be satisfied that the award is a valid and binding award, that it has been made by a competent tribunal, and that the parties have a valid arbitration agreement. Once the foreign arbitration award has been recognized by the court, it can be executed in Pakistan. The party seeking to execute the award will have needs to put a petition in the local court and then a decision is made regarding its implementation. However, the question of executing regarding assets within or outside Pakistan is also dealt there, accordingly.

Once the foreign arbitration award has been recognized by the court, the party seeking to execute the award must apply to the court for execution. The application must be accompanied by the original or certified copy of the award, the original or certified copy of the arbitration agreement, and any other documents that the court may require to establish the validity and binding nature of the award. Upon the receipt of the application for execution, the court examines the documents and if satisfied that the award is a valid and binding award, it issues an order for the execution of the award. The order for execution is binding on the party against whom the award is made. The award can be executed against assets located in Pakistan or against the assets of the party located outside Pakistan, subject to the laws of that jurisdiction. The party seeking to execute the award must identify the assets of the other party and apply to the court for the attachment and sale of these assets. The court then orders the attachment and sale of these assets in accordance with the law. However, it is important to note that the execution of foreign arbitration awards in Pakistan is a complex process and the party seeking execution should consider hiring a local attorney to assist them in the execution process.

Loopholes in the Implementation of Arbitral Awards in Pakistan

Lack of awareness, lack of understanding, and slow process

A main loophole in execution in Pakistan is the lack of awareness and understanding of the arbitration process among the legal fraternity as well as the general public. This can lead to delays and difficulties in getting the finality on the award as most people are not aware of the operations of law (Hussain et al., 2019). A study found that the lack of understanding of arbitration among legal practitioners in Pakistan remains a major barrier to the effective implementation of foreign arbitral awards. It recommended that more education and training regarding arbitration should be provided to legal practitioners in order to improve its implementation (Hussain et al., 2019). Another loophole in execution in Pakistan is the slow and cumbersome court process. The legal process can be time-consuming and may result in delays in the recognition and execution of awards, which can be detrimental to the parties involved. Tariq (2018) found that the court process in Pakistan is slow and inefficient, leading to delays in the recognition and execution of foreign arbitral awards. The study recommended that measures should be taken to streamline the court process, such as the introduction of specialized courts for strict implementation.

Limited Scope of Appeal

The Foreign Awards (Recognition and Enforcement) Act, 1961 allows for an appeal only on limited grounds, such as invalid arbitration agreement, lack of jurisdiction of the tribunal, and invalid award. This can make it difficult for the parties to challenge an award if they disagree with the outcome. Hassan (2018) found that the limited scope of appeal under the above mentioned act is a major loophole in the implementation of foreign arbitral awards in Pakistan. They recommended that the scope of appeal should be expanded to include a wider range of grounds, such as the merits of the award. The arbitration act provides limited grounds where appeal can be preferred. The first instance where an appeal can be made in arbitration is where there is an issue of the jurisdiction of the arbitrator. Jurisdiction is a very important matter and it has been dealt with accordingly. Secondly, if the matter in question is the illegality of the award, then an appeal can also be made against it.

Lack of Specialized Institutions

A lack of specialized institutions, such as specialized execution courts or execution officers can also be a loophole in the implementation of foreign arbitral awards in Pakistan. This can lead to delays and difficulties in the execution of awards, as parties may not have access to specialized resources to assist them in the execution process. A study found that a lack of specialized institutions for the execution of foreign arbitral awards is a major challenge in Pakistan. It recommended that specialized institutions should be established to improve the implementation of foreign arbitral awards in Pakistan (Raza, 2017).

Limited Access to Foreign Assets and Limited Scope of Enforcement

The execution of foreign arbitral awards may be limited by the laws of the jurisdiction where the assets are located, making it difficult for the parties to execute an award against assets located outside Pakistan. Khan (2016) found that limited access to foreign assets is a major challenge in the execution of foreign arbitral awards in Pakistan. They recommended that international agreements should be entered into to facilitate the execution of foreign arbitral awards against assets located outside Pakistan. The Foreign Awards (Recognition and Enforcement) Act, 1961 does not provide for the enforcement of foreign awards in relation to certain types of disputes, such as disputes related to immovable property, criminal matters, family law, and disputes that are not considered commercial in nature.

Conclusion

The current study concludes that the execution of foreign arbitral awards in Pakistan is faced with several challenges and loopholes. The main challenges include a lack of awareness and understanding of the arbitration process, a slow and cumbersome court process, limited scope of appeal, lack of specialized institutions, limited access to foreign assets, and limited scope of enforcement. These challenges can lead to delays and difficulties in the recognition and execution of foreign awards, which can be detrimental to the parties involved. To improve the implementation of foreign arbitral awards in Pakistan, it is essential to address these challenges and loopholes through measures such as providing education and training regarding arbitration, streamlining the court process, expanding the scope of appeal, establishing specialized institutions, entering into international agreements, and amending the Foreign Awards (Recognition and

Enforcement) Act, 1961 to include a wider range of disputes. This study found that the current arbitration regime in Pakistan is often considered to be slow, costly, and inefficient. This is primarily due to a lack of awareness and understanding of the arbitration process, as well as due to a lack of specialized arbitration courts and trained arbitrators.

Recommendations for Future Research

Future research should focus to explore the potential solutions suggested in this study in more detail and evaluate their effectiveness in improving the arbitration regime in Pakistan. Additionally, research could also be conducted to explore the impact of arbitration on the economy and the business environment in the country.

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