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Pakistan needs trained arbitrators

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Abstract

Arbitration is being relied on widely in every jurisdiction and these jurisdictions are reaping the benefits therefrom. Pakistani legal and cultural landscape also demonstrates the acceptability of arbitration as a method of dispute resolution. However, arbitration could not create its impact in Pakistan as it has done in other jurisdictions. The reason for this, among others, is that the arbitrator who decides the disputes between the parties is not trained. Arbitration by an untrained arbitrator does not make arbitration successful in that it gives birth to litigations in the court which is clear from the case Pakistani courts are dealing with arbitrator's misconduct, procedural issues emerging from arbitration which are also used to challenge the arbitral award. These litigations can be avoided if the arbitrators are trained and educated and could very skillfully avoid these issues while conducting the arbitration.

Key words: Arbitration, due process, award, arbitration proceedings, evidence, impartiality of arbitrator

Introduction

Arbitration is an effective mode of dispute resolution which disputants prefer due to, inter alia, its neutrality, privacy, enforcement of arbitral award and adjudication of dispute by arbitrators who are the experts in their field. The landscape in Pakistan on the cultural and legal fronts clearly demonstrates that arbitration is recognised here as a reliable dispute resolution mechanism. For instance, the Pakistani Constitution recognises it as a method of dispute settlement which is relied on specifically to

regulate the administrative relations between the Federation and the provinces. Ancient roots of Panhayat and Jerga in Pakistani culture to resolve the disputes evidence reflects its acceptability. Despite the judicial non-recognition of these Panchayat and Jerga and the decision emanating from them, people rarely avoid these decisions. Despite all this acceptability of arbitration, arbitration could not bear its fruits to the full extent and one of the main reasons is the untrained arbitrators. Untrained arbitrators are the most significant challenge Pakistan faces as they are not successful in using their discretion to regulate the arbitration procedure efficiently, are not well versed with the ethics and impartiality requirements and are unable to write enforceable arbitral awards. The way forward for these challenges is the training of arbitrators, standardisation of arbitration procedure and institutionalisation of arbitration.

Arbitration procedure

As a lawyer or non-lawyer, expertise in one field is insufficient to sit as an arbitrator. The arbitrator needs to understand the arbitral process, including dealing with the evidence and questions of law and fact, moderating the parties and the timetable, identifying matters of further investigations, scrutinising the increases in costs, and ensuring that the matters are decided fairly and efficiently, applying the rules against sharkish lawyers and having understating to avoid challenges against the award.

The litigation lawyers are trained in a specific way and think of court procedures while conducting arbitration which is not unnatural. However, the basic purpose of arbitration is not to make parties feel that they are in the court which is possible if the dispute in arbitration is resolved economically and expeditiously. However, the lawyers do not understand the techniques of conducting arbitration quickly and usually import the court procedure in the arbitration proceedings.

Similarly, in the arbitration of technical matters, the arbitrator should be an expert in the technical field relevant to the dispute. Along with the full knowledge of the technical field, such technical arbitrators should have practical and procedural skills to conduct the arbitration proceedings properly by affording parties equal opportunity to present their case and by appreciating oral and physical evidence in complete accordance with the due process requirement. If the arbitrators are trained, they can make arbitration more informal and fairer by reaching a decision that is more

commercially just as the sole purpose of the arbitration should not be a strict legal decision.

Pakistani judgments on the arbitrator's proceeding ex parte without proper notice, non-appraisal of evidence, fixation of costs without employing any reliable mechanism, etc., demonstrate his failure to benefit fully from the procedural autonomy and his discretion, as conferred by the Pakistani law, to determine the arbitration procedure.

For instance, Arbitration Act 1930 does not make it mandatory for an arbitrator that he should not proceed ex parte in case of non-appearance of a party although, to move ex parte, the arbitrator should give notice to the other party asking him to attend the proceedings. If despite such notice, the party fails to attend the proceedings, the arbitrator should give another notice to the party with an intention to proceed ex parte in case of failure of such party to attend the proceedings.[1] However, arbitrators have sometimes failed to comply with these conditions. When a party sent a telegram to the arbitrator intimating that he would be unable to attend the arbitration proceedings by explaining the reasons, but the arbitrator moved ex parte to give the award, the court set aside such award on the basis that the arbitrator did not hear the party.[2] Similarly, where the arbitrator gave direction to a party to produce evidence by a specific date without expressing his intention to proceed ex parte in case he fails to do so and then moved ex parte when the party did not produce the evidence, the award was set aside by the court which termed such award illegal.[3]

The same kind of disposition may be observed cocerning the award of costs. The court refused to enforce an award because the arbitrator admitted in his award that no witness was brought to him to explain the method to calculate the costs and the formula to adopt for the ascertainment of the claim of the plaintiff. The arbitrator also admitted that no evidence was presented regarding the market value or the determination of the operational costs.[4]

Arbitrator's loss of control of arbitral proceedings

Pakistani law empowers arbitrators to control the arbitral procedure by recognising that

the object of getting the dispute settled through arbitration is to bypass the lengthy procedure involved in civil cases and technicalities embodied in procedural law.[5] Therefore, arbitrators are not strictly bound by the rules of

technicalities embodied in procedural laws and the Qanun-e-Shahadat Order.[6] Thus, the arbitrator has the authority to regulate its procedure and is not bound to follow any specific procedure. For instance, the arbitrator has the discretion to frame the issues with the consent of the parties and otherwise.[7] Similarly, the High Court of Sindh rejected the appellant's objection to the arbitration award that the Sole Arbitrator had framed issues to decide the controversy after recording evidence, and that such procedure was illegal. Rather the court accepted the authority of the arbitrator to regulate its procedure and held that the arbitrator is not bound to follow any particular procedure.[8] More broadly, the arbitrator is not mandated to prescribe rules of evidence nor is he required to frame issues and furnish his determinations on each issue so framed.[9]

Similarly, the Peshawar High Court acknowledged the discretion available to the arbitrator to conduct the arbitration proceedings when it said that no provision of the Arbitration Act 1940 compels an arbitrator to record 'oral evidence, or statements of the witnesses or admissions of the parties. There is no bar in the 1940 Act against relying on oral evidence. Failure of the arbitrator to reduce the evidence into writing is not an omission fatal to the award and does not constitute misconduct on the arbitrator's part'.[10]

Despite such empowerment, an untrained arbitrator is not confident enough to effectively control the arbitration proceedings. When the presentation is made before him, the possibility of misconduct makes him circumspect and compels him to accede to the counsels' suggestions on the arbitral procedure without examining or questioning the merits thereof. By contrast, such proposals from the counsels are examined and questioned by a trained arbitrator who constructs undoubtedly worthwhile and efficient procedures for the disposal of controversies. Therefore, an untrained arbitrator loses control of the arbitral proceedings at the beginning of the arbitration and leaves it to the parties' legal representatives which is one of the main reasons for adding undue costs and time to the arbitration. Due to this, the arbitrators may be seen making frequent requests from parties or courts for the extension of time beyond four months because they are trying to replicate the full trial into the arbitration proceedings and surrender the control of arbitral proceedings to the parties.

By contrast, the arbitration with control of arbitration proceedings is able to identify the issues as they arise, prescribe timelines for each phase of

arbitral proceedings, determine the evidentiary issues appropriately according to the nature of the case, issue orders for the discovery of document to the extent genuinely needed for the case and make decisions as to any other procedural issues needed for the efficient and just conduct of the arbitration. It is proposed that the arbitrator should have the final authority on the procedural matters even if his decision is opposite to that of the consensual decision of the parties so far as the such decision of the arbitrator is suitable for the arbitration. However, this does not mean conferring on him despotic powers because the majority of good arbitrators, who are trained, are always able to convince the parties and their counsels of the soundness of his view.

Section 3 of the Arbitration Act 1940 read with its First Schedule stipulates that unless agreed otherwise by the parties to the arbitration agreement, the arbitrator will give the award within 120 days after he enters upon the evidence.[11] This is to note that the phrase 'after entering on the reference' means when the arbitrator first applies mind to the dispute between the parties as presented before him and exercises any judicial function to conduct the task of arbitration. He performs such task, for example, when he arranges a preliminary meeting with the parties and issues directions to the parties with respect to the arbitration.[12] If the arbitrator is unable to give an award within this statutory period, parties (impliedly and expressly) as well as the court can extend this period under section 28 of the Arbitration Act 1940. There are several cases in which this time was extended beyond four months.[13]

Although the arbitrator is not bound by the rules of procedure or evidence, he cannot proceed in disregard of evidence otherwise he would be condemned with misconduct and the award will be set aside by the court on that ground. This would be the case, for instance, when the arbitrator moves to the arguments stage without calling parties for evidence.[14]

Ethics and impartiality of the arbitrator

The tribunal presides over the proceedings with the due process obligations of the Constitution of Pakistan and the 1940 Act uppermost in their minds, i.e. to act fairly, objectively and impartially as between the parties, giving each party a reasonable opportunity of putting its case, making disclosure of conflict of interest and avoiding any misconduct. Therefore, everything

done by the arbitrator while conducting the arbitration proceedings should be fundamentally fair. But, training is needed to make an arbitrator acquainted with the concepts of due process procedural fairness and to make him well aware of the standards of ethics, impartiality and independence for the conduct of arbitral proceedings and the resolution of disputes. In other words, training enables an arbitrator to differentiate between conduct that are inefficient and efficient and unfair and fair. This is so because arbitrators have to stick to the basic principles of natural justice as justice should not only be done but must be seen to have been done.

However, from Pakistani case law, this becomes clear that arbitrators commit breach these principles which may be due to the reason that they are not adequately trained and educated in the field of arbitration. For instance, they have moved ex parte without notifying the parties to this effect; hence the award was not enforced.[15] There are other instances of misconduct and failure to make the disclosure from the arbitrator that may be observed in the Pakistani judgments.[16]

Learning to work towards the ultimate goal: an enforceable award

Like efficient proceedings, the correct arbitral decision is of great importance for the parties. The arbitrator can make that kind of decision only if he is trained as to how to listen to the parties before making the decision because that not only enhances the accuracy of his decision but also the parties' satisfaction with the fairness of the overall arbitral process. Hence, the main duty of the arbitrator is to give an accurate arbitral award that in fact reflects his view as to the matter that happened and the stance of the law governing those matters. The arbitral award should narrate briefly the facts of the case, frame issues (optional), and a decision on the dispute with the costs supported by very brief reasons as mandated by section 26A of the Arbitration Act 1940. Since non-lawyer read the awards, they should not be written in legalese rather should be framed in a manner that is acceptable to them as well.

Arbitrators need the training to develop the content of an award and then commit it to black and white. This is patent from the challenges made against the award under section 26A even though Pakistani law does not oblige an arbitrator to give detailed reasons, frame issues or entertain each

issue in his award. Despite such flexibility and freedom, courts frequently remit awards to the arbitrator for reasons. More specifically, the court remits the award to the arbitrator that is without any reasons or with insufficient reasons.[17]

In this regard, the appellate court would also have the power to remit the award to the arbitrator for reconsideration, even if it was already merged into a decree by making it a rule of court.[18] This is so because the arbitrator is mandated to equip award with sufficient reasons so that the court may ascertain if the reasons are not in contradiction with the material on record[19] and also see if the arbitrator's decision is suffering from any infirmity or if he has committed any misconduct. The award would be vitiated by the court if the arbitrator did not participate in the process of its finalization.[20] For instance, the arbitration agreement read to appoint three arbitrators but only two arbitrators were appointed. But the decision from these two arbitrators was not enforced by the court which held that the tribunal was.[21] Similarly, where the award was made by two arbitrators, the submission thereto by one party was of no legal value.[22]

With these compulsions, Pakistani law has also eased the task of the arbitrator on several points which arbitrator should know to make arbitration proceedings informal and delivery of award quicker. For instance, reasons given in the award are not required to be in as much detail as mandated in a civil court's judgment. [23] Also, to make an award, the arbitrator need not frame issues nor is he bound to give his findings on each issue so framed.[24] Similarly, he is not bound to record evidence on oath in the absence of an agreement to that effect meaning thereby he can arrive at his decision by relying solely on the documents that parties present before him. [25] In other words, if the arbitrator makes an award without recording the evidence in detail and after merely hearing the parties, the award would be enforced by the courts.[26]

Standardisation of process or methodologies

There are no standardised methodologies, nor are there any standardised arbitration rules being followed in Pakistan. In Pakistan, the absence of arbitral institutions has compelled parties to agree on ad hoc domestic arbitration, although parties do not incorporate UNCITRAL Arbitration Rules to govern the arbitration procedure. The standardisation of rules

through the institutionalisation of arbitration is the remedy for the maladies plaguing this sector. This will bring certainty and predictability to the arbitral procedure and autonomise the arbitration system. In an arbitration under the auspices of such a prospective arbitral institution, parties' request for the appointment, removal and substitution of the arbitrator will be dealt with internally by the arbitral institution taking into consideration the peculiar nature of the arbitration. Similarly, institutional arbitral rules empower arbitrators to issue interim measures and even provide for the appointment of an emergency arbitrator to decide interim measures application in case the arbitral tribunal has not yet been constituted, which applications are otherwise decided by courts with an apprehension of judicial intervention into the merits of the case at the interim stage.

Concluding remarks

To disdain the need for arbitrator's training, a view is held that an arbitrator should know to remain fair in arbitration proceedings. However, the fact is that there is no shortcut to the education and training of an arbitrator. Issues pertaining to the substance and procedure of arbitration arise on regular basis before the arbitrator. He should be well versed to deal with these issues in order to comply with the obligations of his office. The importance of his knowledge of such issues and the methods for their resolution increases in the face of Pakistani disinclination to interfere and put each indiscretion right.

Despite the recent arbitration-friendly judgments from Pakistani courts, there is still very little arbitration expertise available in either the Bar or the Bench compared to other developed partners. The subject of arbitration could not get a place in the mandatory subjects in Pakistani legal education and there are also no serious attempts to make the arrangement for arbitrator's training aiming to create a viable environment for arbitration which will cause problems. To make Pakistan a great seat of arbitration and develop investors' trust in the Pakistani legal system, the modernisation of arbitration laws is not sufficient, rather along with that, there is a need for an infrastructure of arbitration comprising trained and experienced arbitration professionals and judges and arbitration centres which not conduct the arbitration but also impart training on regular basis. After legal fraternity and other stakeholder of arbitration are well trained

and an atmosphere of arbitration is created, arbitration statutory and precedential laws can be reformed effectively. There is no doubt that an enhanced legal system with a strong judiciary can trigger the economic progression but such legal change will bear fruit in long run if conditions for the receptivity of legal change are well in place. In this regard, educational activities and training programmes for arbitration for lawyers, judges and dispute settlement professionals are needed in Pakistan for the positive result of globalisation.

The highest number of arbitration cases filed in Pakistani courts are on the points of arbitrability, separabiltiy and competence-competence that are usually discussed in an application for the stay of court proceedings in favour of arbitration under section 34 of the Arbitration Act 1940. One of the reasons for the court's refusal to stay its proceedings in favour of arbitration is its dearth of trust in the arbitrator's capability to determine the arbitrability or the (non)arbitrable matters. The training of arbitrators on the issues above will generate an atmosphere of arbitration, ameliorating this trust deficit and will increase the referral of the matters to the arbitrator even on these issues.

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