Online ISSN 3007-3197 Print ISSN 3007-3189

http://amresearchreview.com/index.php/Journal/about

Annual Methodological Archive Research Review
http://amresearchreview.com/index.php/Journal/about
Volume 3, Issue 7 (2025)

The Compliance of the International Arbitral Awards in Pakistan with Islamic Principles

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ABSTRACT

This research explored the refined challenges surrounding the enforcement and recognition of international arbitral awards in Pakistan in the context of contemporary arbitration and Sharia law. It was important to examine the legal framework of Pakistan incorporating the New York Convention (NYC) along with the Recognition and Enforcement Act of 2011 with Islamic concepts of riba, gharar, and public policy. Different and analytical approaches to the research problem were combined with doctrinal legal analysis of landmark judicial decisions invoking Islamic law, as well as some biographical case studies. In order to contextualize Pakistan's position with other Muslim countries, primary documents were supplemented with literature from Bangladesh, Turkey, Saudi Arabia, and Malaysia. The research showed that Pakistan's status as a party to the NYC and its willingness to engage in international arbitration is undermined by frequent vague Sharia-based public policy provisions on contract enforcement cited in cross border contracts under Article 227 of the Constitution. This has led to the denial of claims involving interest and speculative transactions which has eroded legal certainty and trust among investors. The examples of Saudi Arabia and Malaysia show that even modernized arbitration law may seek to observe Islam while incorporating international practices through avoidance of public policy restrictions and enhancement of clarity regarding procedural frameworks. Turkey and Bangladesh demonstrated secular or pragmatic enforcement tendencies, underscoring the challenges that dominate Pakistan. This research has led to the conclusion that reform Pakistan's arbitration framework is necessary in order to more effectively integrate Islamic legal principles with treaty obligations on the international level. By easing the Sharia-compliant limitations and setting clear boundaries, Pakistan would improve certainty, attract foreign investment, and strengthen its position as a competitive forum for resolution of cross-border arbitration dispute. This study is important for the policymakers, the judiciary and the investors as it enables them appreciate the implications of the Islamic law and the International Arbitration in Pakistan.

INTRODUCTION

In Pakistan, contemporary conflicts concerning international arbitration awards and their recognition and enforcement clash with Islamic principles for lack of legal mechanisms to resolve such conflicts. Pakistan is a signatory of the convention on the recognition and enforcement of foreign arbitral awards (Pakistan Joined the United Nations, 1958). Hence, foreign arbitral awards are to be enforced under the provisions of the Arbitration Act of 1940 as well as the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act of 2011 (R and E, 2011 Act). Nonetheless, Pakistan's legal system, particularly in heritage contracts, trade contracts, and dispute resolution, continues to be profoundly shaped by Islamic law (Sharia). This raises issues on international arbitration's applicability in Islam which is opposed to riba (interest), gharar (uncertainty), and demands dispute resolution in an Islamic sovereign and just manner.

Due to the presence of two legal systems in the country, the implementation of arbitral awards in Pakistan involves balancing international obligations and Islamic law. Although international arbitration is typically regarded as a global business dispute resolution mechanism, it possesses a Pakistani dimension that needs more scrutiny from Sharia law to ensure that no fundamental Shari'a principles are breached. This paper reviews the enforcement of international arbitral awards within Pakistan's legal paradigm in the context of Islamic law, taking into account several relevant statutes, judicial pronouncements, and Shari'a challenges.

ISSUES

There are unique challenges concerning the enforcement and recognition of international arbitration awards that stem from a conflict between modern legal systems and Islamic law in Pakistan. Pakistan signed the NYC and enacted the Recognition and Enforcement Act of 2011 which allows the enforcement of foreign arbitral awards. However, Pakistan is governed by Sharia law in many respects, including the Constitution of 1973 Article 227, which mandates that all laws are to be compliant with Sharia. This creates difficulties with the awarded arbitrations which contain elements of riba (interest) or gharar (uncertainty) or any other non-arbitration deemed under Islamic jurisprudence. The Pakistan case law such as Islamic Republic of Pakistan v. Societe Generale de Surveillance (2002) and Usmani v. Islamic Republic of Pakistan (1999) demonstrates Pakistan's refusal to honor awards that contradict Islamic principles. This raises concerns about the protection of foreign investors in Pakistan and the use of arbitration as a dispute resolution mechanism. The primary question is whether the arbitration regime of

Pakistan is compliant with international obligations of treaties while observing Islamic laws.

OBJECTIVES OF THE STUDY

This study aims to scrutinize the law concerning the issuance and enforcement of international arbitral awards in Pakistan, focusing on the NYC and Recognition and Enforcement Act 2011 in the context of Islamic law. It evaluates the effects of Islamic teachings on arbitration with specific consideration to riba and gharar, as well as the public policy cut-off under Islamic jurisprudence. It examines the reception of Sharia objections to foreign arbitral awards in Pakistan in light of the judicial milestones in Pakistan's arbitration jurisprudence. Additionally, it examines the position taken by the other Muslim countries, Saudi Arabia, Malaysia, and the UAE, to understand how these countries deal with the demand of international arbitration and Islamic legal reasoning. Based on these observations, the study makes recommendations toward constructing international arbitral agreements from the perspective of Islamic law to improve legal clarity and increases foreign investments.

RATIONALE OF THIS STUDY

The international arbitration system is often regarded as one of the primary systems for dispute resolution considering the rapidly advancing globalization of trade and investment. In the context of Pakistan, enforcing arbitral awards is contentious, particularly due to the potential conflict with Islamic law. This research is significant in that it seeks to address the gap within legal scholarship on international arbitration in Pakistan in the context of Sharia law compliance. It also seeks to serve as a policy-oriented argument for legislative and judicial balance on Pakistan's arbitration norms and international concerns vis-a-vis Islamic legal traditions. Furthermore, it assists foreign direct investors and multinational corporations in understanding the legal and procedural intricacies surrounding the enforcement of arbitral awards in Pakistan. This study also makes an important contribution to the field of comparative legal studies by examining other Islamic countries and exploring their processes of international arbitration with Sharia law implications.

MATERIALS AND METHODS

This research adopts a comparative and analytical methodology through a combination of doctrinal legal analysis and case law analysis. It concentrated on the Arbitration the Recognition and Enforcement Act of 2011 as a primary source of Pakistani arbitration law, as well as key judicial precedents such as SGS v. Pakistan and Hubco v. WAPDA, which dealt with the application of Sharia law regarding the enforcement of arbitral awards. The research also took

into consideration relevant constitutional articles such as Article 227, which requires that legislation must comply with Islamic laws. Some of the secondary sources included scholarly works and commentaries on international arbitration and Islamic finance law. A comparative study approach was applied with respect to the interpretation and application of the public policy exception for the New York Convention by other Muslim-majority countries, including Saudi Arabia and the UAE. The study also looked into best practices from Malaysia and the UAE, which modernized their arbitration systems while maintaining Sharia-compliant standards.

LEGAL FRAMEWORK CONCERNING INTERNATIONAL ARBITRAL AWARDS IMPLEMENTATION IN PAKISTAN

The international framework for arbitration has been addressed in Pakistan by NYC which was adopted into national legislative policy via the Recognition and Enforcement Act of 2011. In this connection, courts in Pakistan have a mandatory duty to enforce international arbitral awards and disregard them only on one of the limited grounds prescribed by Article V of the NYC. In fact, the NYC also sets out the exhaustive grounds which can be used to refuse enforcement and recognition of an international arbitral award.

These fall under the exclusion based on law pertaining to the inapplicability of arbitration agreement (Article V(1)(a)), denial of due process such as lack of proper notice or a due process chance to present case (Article V(1) (b)), the award relating to matters which lie outside the scope of the arbitration agreement (Article V(1)(c)), insufficient or incomplete composition of the arbitral tribunal and procedural defects (Article V(1)(d}), and those instances where the award remains unrecognized as being legally binding or a competent authority in the place of its origin has annulled it (Article V(1)(e}). There are additional circumstances under which enforcement is barred, for example, where the matter in dispute is not capable of arbitration under the law of the state where enforcement is sought (Article V(2)(a}); or enforcement would violate the public policy of that state (Article V(2)(b}). The enforcement regime in Pakistan incorporates a variety of controversies. Most significant of these is the exception of public policy which has been derived from Islamic thought. Since the Islamization of laws under General Zia-ul-Haq in the 1980s, Pakistani judges have become increasingly willing to Sharia law in determining the existence of public policy violation pertaining to arbitral awards.

ISLAMIC GUIDELINES AND THEIR IMPACT ON ARBITRATION

1. PROHIBITION OF RIBA (INTEREST)

Importantly one of the problems in Pakistan relating to enforcement of foreign arbitral awards is

the prohibition of riba under Islamic laws. As discussed in the Usmani v. Islamic Republic of Pakistan (1999) case, both the Federal Shariat Court and the Supreme Court of Pakistan have developed a view that all transactions which involve 'interest' are un-Islamic and therefore void. This position is in direct contest with international commercial arbitration, which often awards interest on damages or payment delays. In Islamic Republic of Pakistan V. Société Générale de Surveillance (SGS) (2002) Supreme Court of Pakistan denied enforcement of arbitral award for non-payable interest citing violation of Islamic law and Pakistani public policy. This case illustrates the conflict between the enforcement of international arbitration award and sharia requirements.

2. GHARAR (UNCERTAINTY) AND ARBITRABILITY

Excessive ambiguity (gharar) poses constraints for arbitration contracts, which might be considered overly simplistic, thus limiting the scope of possible agreements. Moreover, several disputes such as those relating to family matters, criminal proceedings, or Hudood offenses are regarded as non-arbitrable under Sharia law, which further restricts the scope of arbitration in Pakistan.

3. PUBLIC POLICY AND COMPLIANCE WITH SHARIA LAW

In Pakistan, the public policy gap of the NYC has been considered to include objections based on Sharia law. In Hubco v WAPDA (2000), the Lahore High Court undertook what one might call an Islamic Law compliance audit on an arbitral award before permitting its enforcement. While the award was in fact enforced, the case illustrates how far Pakistani courts are willing to go and, in this instance, downright worryingly, suspend awards on account of Sharia rationale.

TRENDS AND ISSUES REGARDING THE JUDICIARY

In the context of international arbitral awards, Pakistani courts have been relatively jurisprudential. Nonetheless, there are certain exceptional cases which incorporate Islamic principles. In the Supreme Court decision Sindh High Court Bar Association v Federation of Pakistan (2009), it was held that 'New York Convention' along with other international treaties were to be interpreted in consonance with the Constitutional of Pakistan (1973) which mandates that all laws shall be dominated by Islamic laws (Article 227). This does however pose a problem where foreign investors and arbitral tribunals have to contemplate whether an award would be enforceable in Pakistan if it contains elements which are not compliant with Sharia law. There are some scholars who argue that more public policy exceptions on enforcement of award should be made to facilitate cross border trade. Other scholars argue that focus should be the compliance

with Sharia law.

INTERNATIONAL ARBITRAL AWARDS IN PAKISTAN IN THE CONTEXT OF ISLAMIC PRINCIPLES

In comparison to Saudi Arabia, Malaysia, Turkey, and even Bangladesh, the processes of awarding and enforcing international arbitration in Pakistan still exhibit significant deficiencies. This is not to say that Pakistan does not have international obligations. They are a signatory to NYC and also passed the Recognition and Enforcement, Act 2011. Their enforcement is, however, problematic because of Sharia contexts. Islamically grounded expectations would face conflicts with framework regulations on riba and ghara transactions, and the legal enforcement has been overly restricted as a result of Article 227 of the Constitution. Such unpredictable legal frameworks have strained investor confidence and damaged Pakistan's reputation as a host country for foreign direct investment arbitrated on international terms.

Unlike many countries, Saudi Arabia, which functions under Sharia law, has made significant advancements within the confines of Islamic law, particularly regarding modernizing its arbitration system. The Saudi Arbitration Law of 2012 and Enforcement Law of 2012 marked a critical shift in loosening the stagnated system by improving judicial productivity and defining the recognition and enforcement of international arbitral awards. These laws, which are based on UNCITRAL Model Law, support international arbitration and award recognition with only limited exceptions to enforcement. Furthermore, it is noteworthy that Sharia law dominated Saudi courts' flexibility while applying the public policy exception to a more limited Shariatic enforcement contradictory approach. For instance, enforcement cannot be granted if riba (interest) is involved, but there must be Shariatically non-compliant (non-ensured) Sharia non-compliance (Aljazy, 2016). This approach strengthens legal certainty in the legal regime for foreign investors and arbitration participants. In addition, newly established specialized courts for enforcement have improved procedures and reduced arbitrary refusals to enforce awarded judgments.

Compared to Pakistan, where courts frequently refuse enforcement on the grounds of vague Sharia principles in Article 227 of the Constitution, Saudi Arabia's position is more structured and investor-friendly because it seeks to reconcile some religious rationale with the demand for foreign arbitration (Almutairi, 2020). That is why Saudi Arabia continues to be an archetype of how a country can observe Islamic guidelines and at the same time comply with the New York Convention.

In the case of Malaysia, there is an improvement and better balancing of international norms and Islamic considerations within the country's arbitration framework. The Implementation of the Arbitration Act in 2005 marked a significant advancement in Malaysia's legal infrastructure, optimizing the efficiency and modernity of the country's arbitration framework. This law incorporates fundamental features of the UNCITRAL Model Law. Furthermore, the Kuala Lumpur Regional Centre for Arbitration, which has been rebranded as the Asian International Arbitration Centre (AIAC), has done instrumental work in placing Malaysia on the map as an international arbitration hub by offering institutional Sharia-compliant arbitration services for Islamic finance disputes (Mustill & Boyd, 2009). Despite the Islamic leanings of the Malaysian legal system, the judiciary has drawn a boundary between civil arbitration and religion, especially in the context of foreign arbitration awards. The courts have consistently enforced arbitral awards, preserving legal certainty and economic globalization, barring situations where manifest public interest violations occur. Notably, in these cases, the vague Sharia reasoning commonly cited for non-enforcement has been intentionally refrained from use (Zulkepli & Alias, 2021). This upholds sound policies and signifies consistent legal investment in protection, stability, competitiveness, enhanced foreign direct investment, and cross-border commercial arbitration.

In Pakistan, Sharia is cited as a reason not to comply with arbitration; in contrast, Malaysia makes certain that Islamic considerations apply only in the context of an Islamic finance dispute, avoiding any Sharia Shule constraints on the international obligations of the New York Convention. This balancing act between the respect given to the Islamic legal tradition and adherence to international arbitration standards demonstrates how well Malaysia has developed a reliable infrastructure for international arbitration. Turkey is predominantly populated by Muslims, yet the country has a secular legal system which draws heavily from European civil law, particularly Switzerland and Germany. Through the adoption of International Arbitration Law No. 4686 of 2001 and relevant provisions of the Turkish Civil Procedure Code, Turkey has established a comprehensive legal framework for arbitration. These changes sought to elevate Turkish arbitration law to international standards, including the UNCITRAL Model Law and New York Convention, which Turkey was a signatory to in 1991 (Yüksel, 2017). It is known that Turkish courts habitually enforce foreign arbitral awards; in fact, the way they apply the public policy exception under Article V(2)(b) of the New York Convention is very narrow and objective in nature. Because of Turkey's principle of secularism, constitutional religious arguments do not tend justify refusals of enforcement of awards. The judiciary

prioritizes reliance on neutral legal frameworks devoid of religious considerations over procedural validity, soundness, and arbitral impartiality, which guarantees a stable arbitration climate for global actors (Akinci, 2015). This stands in stark contrast to Pakistan, which grapples with rampant barriers to the enforcement of arbitral awards due to expansive interpretations of Islamic law alongside Article 227 of the Constitution, which mandates all legislation must conform to Islamic doctrine.

Not invoking Sharia-based principles of public policy, which Pakistani courts sometimes use to decline enforcement, demonstrates Turkish courts' greater respect for international arbitration frameworks and investor protections. Similar to Pakistan, Bangladesh shares a colonial legal history rooted in the common law of Britain. They both ratified the NYC , in the case of Bangladesh through the Arbitration Act of 2001. Regardless, Bangladesh's courts have generally been more pragmatic and reasonable in dealing with foreign arbitral awards as compared to other jurisdictions. Unlike in Pakistan, where Islamic ideology intertwined with Article 227 of their Constitution is often used to rationalize enforcement disputes, Bangladesh does not argue from religious doctrine except in rare and odd cases (Rahman, 2018). While Islamic traditions influence Bangladeshi society, its courts appear more favorable to the norms of arbitration, foreign direct investment, and enforcement of awards in compliance with the NYC. This approach has provided greater legal certainty, stimulating investment and creating a more stable environment for arbitration compared to inconsistent enforcement practices in Pakistan (Islam & Hossain, 2020). Thus, with regard to laws and policy on adjudication pertaining to arbitration, Bangladesh maintained a hybrid stance leaning towards Islamic reverence and the pragmatic demands of diplomatic relations.